

Consent Requirements for M&A Deals Involving PPP Loans

June 12, 2020



Although times are uncertain, we're still seeing movement in the M&A deal world. Third party consents to transactions are typically on both Buyer and Seller's radars but Sellers with PPP loans likely have additional consent requirements they agreed to when accepting their loan funds.

Lender Consent:

While the SBA did not provide a required promissory note for Paycheck Protection Program (PPP) lenders to use, they did provide a form promissory note that we suspect most lenders have mirrored closely. Under the terms in the form note, if a borrower "**reorganizes, merges, consolidates, or otherwise changes ownership or business structure without Lender's prior written consent**", this constitutes a default under the note. In the form, defaults give Lenders several rights, including requiring immediate payment of all amount due under the note or taking possession of any collateral under the note.

SBA Consent:

As you may know, the PPP was created as an addendum to an existing SBA rule (7(a)) and relaxed many of the requirements thereunder to address the immediate needs of borrowers due to the pandemic. One of the 7(a) loan requirements that we haven't yet heard from the SBA whether it applies for PPP as well is the need for getting the SBA's approval to a change in ownership that happens within 12 months of the 7(a) loan being disbursed. This process is outlined by the SBA here and pasted further below for reference.

Consistent with our advice to date, where the SBA has not issued specific guidance on an aspect of the PPP, we recommend that borrowers take a conservative approach unless and until that guidance comes out.

Recommended Action Steps:

Where a Seller in the deal has taken a PPP loan, we recommend the following steps:

1. Review the Seller's promissory note with the PPP lender ASAP to confirm whether their prior written consent is required due to the transaction. If yes, go to Step 2.

no, go to Step 3

2. Seller should get in contact with their representative at the lender to confirm the process for obtaining consent to the transaction and whether the lender requires any documentation related to the transaction. Keep in close contact with your lender representative so that their consent can be obtained ASAP in order to avoid any delays to closing.
3. Seller should confirm the process and timing for the lender to submit a request to the appropriate Commercial Loan Servicing Center of the SBA in order to get the SBA's approval of the change. As noted in the below text from the SBA, the lender must also give the SBA their recommendation on whether the change should be approved. Once the process is confirmed, keep in close contact with the lender representative to ensure that all required documents and information have been timely submitted by the lender.

While the above is intended to provide a high level overview of this issue, we know that each transaction will present unique challenges or circumstances. Please reach out to our team if you have any further questions on M&A considerations for PPP.

From SBA Procedural Notice, effective April

1, 2019:

In order to obtain SBA's prior approval of such changes, SBA Lenders must submit a request to the appropriate Commercial Loan Servicing Center (CLSC), as identified in SOP 50 55, Chapter 2 and SOP 50 57 2, Chapter 2. The request must include the reason for the change(s), the details of the requested action, along with the recommendation of the SBA Lender. The appropriate CLSC will make its determination after:

- a. Verification that the proposed changes to the ownership of the Borrower comply with limitations on the aggregate amount of SBA portions of all loans to a Borrower, including affiliates; and*
- b. Verification that there has been no prior loss to the Government caused by the new owner(s) or any business owned, operated or controlled by the new owner(s).*