

*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## **Considerations for Nonprofits with Paycheck Protection Program (“PPP”) Loans That Are Looking To Merge or Dissolve**

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As the pandemic continues, some nonprofits are evaluating their options for continuing their work. Two common options are (1) a merger and (2) a sale of assets and dissolution. However, if a nonprofit obtained a PPP loan, there are more factors to consider when evaluating these options. On October 2, 2020, the Small Business Administration (“SBA”) issued a procedural notice to its employees and PPP Lenders about [PPP Loans and Changes of Ownership](#). This notice provides guidance about how to handle such mergers and/or sale of assets and dissolution. It also addresses the issue that under The Cares Act, a nonprofit may not apply for or obtain two PPP loans, so if both nonprofits involved in the deal have PPP loans, careful consideration, additional steps and documentation is necessary.

- A. Definition of Change of Ownership. The SBA notice defines what is a change of ownership. For a nonprofit organization, it will include transfer of at least 50% of the organization’s assets or when a nonprofit PPP borrower is merged with or into another nonprofit.
- B. Responsibility for PPP Loan. No matter what, any nonprofit with a PPP loan remains responsible for (a) performance of all obligations under the PPP loan, (b) the certifications made in connection with the PPP loan application, including the certification of economic necessity, and (c) compliance with all other applicable PPP requirements. Additionally, the PPP borrower remains responsible for obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing those forms and supporting documentation to its PPP lender or to SBA.
- C. Written Documentation of Eligibility and Necessity. It is important for both nonprofits involved in a merger or sale of assets to independently create detailed written documentation of its eligibility to receive its PPP loan. Each nonprofit should detail that it met the eligibility requirements and was not contemplating a merger or sale of assets at the time of its PPP loan application. Each nonprofit should detail that it needed its PPP loan, met the necessity requirements, and again was not contemplating a merger or sale of assets at the time of its PPP loan application. This documentation will be critical if the remaining nonprofit (the “buyer”) is audited.

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- D. Obtaining Consent from Lender and SBA for the Deal. The nonprofit that is merging into or selling its assets (the “seller”) must notify its PPP Lender in writing about the planned transaction and provide the PPP Lender with copies of any proposed agreements. The promissory note that the seller signed for its loan, especially if it is the standard SBA 7A loan documents, likely says that seller will be in default of its PPP loan if it “reorganizes, mergers, consolidates or otherwise changes ownership or business structure without lender’s prior consent.” So, seller must obtain consent from its PPP lender if the PPP loan is still outstanding (even if forgiveness has been applied for). If seller doesn’t obtain such consent, the loan can be accelerated and become due without forgiveness. Further, if the seller is changing its ownership within 12 months of obtaining the PPP loan, the PPP lender must obtain the SBA’s approval to waive the default provision in the loan document. Based on the nature of PPP loans, it is likely that seller will be in the 12-month window. Further, many PPP loan documents require SBA approval of a change in ownership (waiving default resulting from a change in ownership) regardless of when the change occurs so long as the loan is outstanding.
- E. Option to Eliminate Required SBA Approval. If a nonprofit is merging into another nonprofit or selling 50% or more of its assets, it can avoid the need to obtain SBA approval for the change in ownership by completing the following steps.
1. Step 1: Seller must submit its PPP forgiveness application along with all required supporting documentation to its PPP lender AND create an interest-bearing escrow account controlled by the PPP lender for the full amount of the outstanding balance of the PPP loan plus any potential interest.
    - i. This step assumes that seller has used all its PPP funds and is ready to apply for forgiveness and has the amount of the PPP loan in cash with which to establish the escrow account.
    - ii. A seller who is using the 24-week covered period may apply for loan forgiveness early if it has used all its PPP funding. Some sellers that received PPP loans early may have been under the 8-week covered period which should be completed.
    - iii. If seller has not used all its PPP loan and desires to use the full amount, it cannot move forward with the sale or merger without SBA approval (see below).
    - iv. Some PPP lenders have not opened their forgiveness applications to date which will delay any potential change of ownership done without SBA approval (see below).
    - v. It is also essential that seller not let go of employees or furlough them before it submits its forgiveness application. If seller does, it might affect the amount of forgiveness seller receives. These employees will not be counted

towards forgiveness even if they are hired by the buyer if the forgiveness application has not been submitted.

2. Step 2: The PPP loan forgiveness process can take up to 150 days from forgiveness application submission. Once the forgiveness process is completed, including any appeal of the SBA's decision, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest. The rest of the escrow can go to the buyer in completing the change of ownership.
- F. SBA Approval Necessary. If a buyer cannot complete Steps 1 and 2 above and eliminate the need for approval of the SBA, then the seller's PPP lender must submit the request for approval to the SBA Loan Servicing Center. The request must include: (1) why the seller cannot meet Steps 1 and 2 above; (2) the details of the requested transaction; (3) a copy of the executed PPP loan note; (4) any letter of intent and purchase or sale agreement setting forth the seller's responsibilities under the agreement; and (5) disclosure of whether buyer has an existing PPP loan and, if so, the SBA loan number. If the SBA approves the change of ownership, it will be conditioned upon the buyer assuming all of the seller's PPP loan obligations including responsibility for complying with the PPP loan terms. The SBA should provide its determination within 60 calendar days of receipt of a request.
1. Under this approach, the buyer must be willing to take on the liability for the seller's PPP loan.
  2. This avoids the seller's need to have enough cash for an escrow account.
  3. This approach may be faster than avoiding SBA approval.
- G. Additional Documentation, Responsibilities and Notice to SBA. Regardless of which approach is taken, there are several additional steps and considerations for the buyer and seller.
1. In the case of a merger, the buyer remains subject to all the obligations under the seller's PPP loan.
  2. If the buyer also has a PPP loan, buyer must segregate and delineate PPP funds and expenses and provide documentation to demonstrate compliance with PPP requirements by each PPP borrower (buyer and seller) for each loan.
  3. The seller must notify its PPP lender immediately when the transaction is complete as the PPP lender must notify the SBA Loan Servicing Center with five business days of such completion.

4. Detailed Use of PPP Loan. The SBA has said that all loans over \$2 Million dollars will be audited. The SBA also has the right for 6 years to audit any PPP loan. As a result, seller should provide buyer with an extremely detailed explanation of its use of its PPP loan with clear evidence that it met the loan forgiveness requirements. Seller should also provide the detailed FTE and employee information that is required for forgiveness. The buyer should require this as part of the deal.

If you are a client of Pro Bono Partnership of Atlanta and are considering a merger or sales of assets and dissolution, please reach out to your PBPA attorney for further assistance.