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Just 9 (Not 10) Tips to Assist You in Obtaining PPP Loan Forgiveness

September 22, 2020

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Now that the day of reckoning has come – SBA has opened the portal and some banks are beginning to process and submit completed PPP forgiveness applications – what can you do to try to make the process easier for your lender and therefore easier for you to achieve forgiveness?

Anyone deciphering the previous sentence already knows that these tips relate to the Paycheck Protection Program (PPP) established by the U.S. Small Business Administration (SBA) under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), P.L. 116-136, as amended by the PPP Flexibility Act of 2020, enacted on June 5, 2020. The suggestions below are based on the numerous interim final rules promulgated by SBA, as well as published guidance in the form of frequently asked questions and answers (FAQs) posted by SBA in consultation with the U.S. Department of the Treasury (Treasury) on the SBA website.

With the usual warnings that Treasury and SBA guidance has been known to change (and is overdue to do so, right now), and even though SBA says that borrowers and lenders may rely on guidance in the FAQs as SBA's interpretation of the CARES Act and the PPP's interim final rules, who knows what will happen next. SBA and Treasury have publicly stated that borrowers and lenders can expect additional guidance. Many lenders are not accepting applications, knowing that the possibility still exists that PPP loans under \$150,000 may be forgiven, even without the submission of PPP Loan Forgiveness Application Form 3508EZ. One constancy in the PPP is that anything published about the PPP is generally obsolete immediately.

But you should still consider the following practical suggestions, which may be helpful to you in preparing your PPP loan for forgiveness.

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1. Submit your forgiveness application based entirely on payroll during the covered period, preferably payroll provided by a recognized third-party processor.

Lenders are advised by SBA in the Interim Final Rules whether lenders can rely on borrower documentation for loan forgiveness: “The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs.” Interim Final Rule 3.C., effective April 15, 2020, 85 FR 20811, 20816.

The Interim Final Rules effective May 22, 2020 go one step further: “Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application. Lenders are expected to perform a good-faith review, in a reasonable time, of the borrower’s calculations and supporting documents concerning amounts eligible for loan forgiveness. For example, **minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources, more extensive review of calculations and data would be appropriate.**”

The example tells the borrower how to make filling out Form 3508EZ even easier. What could be simpler and make approval quicker for your busy lender? SBA has provided an example that protects lenders with some clarity and encourages borrowers to submit outsourced payroll data.

This is good news for borrowers on multiple fronts. First, if your payroll has been prepared by a recognized third-party service, you can submit that third-party payroll confirmation with some level of confidence that it will be accepted by your lender. Note also that banks are aware of the ease with which they should be able to review and obtain approval of a forgiveness application based entirely on payroll. For example, Fifth Third Bank provides the following in the forgiveness instructions on its website: “If your payroll expenses for the covered period are greater than your loan forgiveness amount, it isn’t necessary to provide documentation for mortgage, rent or utility expenses.” Why would a bank want to wade through the extra paperwork associated with confirming more document intensive expenses?

Note also that the Interim Final Rule mentions a “good faith” review, “in a reasonable time.” If you feel that your lender is not meeting these requirements, you should document your dissatisfaction and make sure that the lender knows that you are watching. The Rule also contains a warning: “By contrast, if payroll costs are **not** documented with such recognized sources, more extensive review of calculations and data will be appropriate. The borrower shall not seek forgiveness without submitting all required documentation to the lender.” [emphasis added] This example means that you had better be submitting to your lender the monthly bank account statements showing payment of payroll, as well as unemployment tax filings, if you do not use a recognized third-party payroll processor.

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2. Have a buddy check your math.

The borrower is responsible for calculation errors; not the lender. [PPP FAQ number 1.] Although this very first FAQ was issued in the context of filing your PPP application, you should assume that it applies to all your submissions regarding your PPP loan.

Make sure that someone else in your organization reviews the completed loan forgiveness application and all accompanying documents you plan to submit to the lender, as well as the work papers you are required to prepare and retain backing it up. If you are not the CFO, make sure that one of the sets of eyes reviewing your completed forgiveness application is from your bookkeeping and/or accounting department and is a particularly detail-oriented nitpicker who would be well-suited to the task (but maybe do not reveal to him/her why they were selected, if they do not see that as a flattering description). PPP lenders are using third-party services to scour the forgiveness applications for discrepancies. Remember that the PPP emanated as much from Treasury as it did from SBA; therefore, we suggest you treat the documentation you submit much as you would a tax return that you are filing. In fact, the SBA-required document retention period for your backup files and papers – six years after the date of submission – should follow the normal 7-year retention period that we recommend you use for your tax returns and tax backup information.

3. Confirm that all document dates are consistent with your covered period.

The purpose of a forgiveness application is to show that the PPP allowable expenses were all paid or incurred during the “covered period,” which means the 8- or 24-week period after the initial disbursement date of your PPP loan (or, if you have elected, for an Alternative Payroll Covered Period with regard to wages). **All the documentation you submit should be tied to the 8-week or 24-week covered period (or, if you are a borrower with bi-weekly or more frequent payroll and have so elected, the Alternative Payroll Covered Period) that your application says is the period you are using.**

4. Remind your lender that it is supposed to help you.

The rules promulgated under PPP have stated from the beginning that, if the lender identifies errors in the borrower’s calculation or material lack of substantiation in the borrower’s supporting documents, the lender should work with the borrower to remedy the issue. Interim Final Rule 1, 85 FR 20811, 20815-20816 (April 15, 2020). The Interim Final Rules promulgated on May 22, 2020 reiterated this requirement in its response to question 2.a. “What should a lender review?”

The lender has an obligation to work with you, perhaps by identifying what is missing and what could be submitted to supplement or correct confusion in an application that otherwise might be denied. The lender is required to issue a decision to SBA on the loan forgiveness application “not later than 60 days after receipt of a *complete* loan forgiveness application from the borrower.” [emphasis added].

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It seems likely that lenders, once they are besieged with forgiveness applications from the 5.2 million PPP loan recipients, will be using third-party resources to review the applications and quickly reject any application that has any missing documentation or poorly explained payroll, and will not feel that the lender's 60-day review period has started running, on the basis that any forgiveness application that does not contain all required backup material must not be "complete."

5. Send your lender backup documentation.

Do not limit the documentation you submit to your lender to the documents listed in the instructions on the forms. Remember that you are submitting these documents to a lender who is relying on a 100% guaranty of repayment from SBA that will potentially be denied by SBA, if the lender makes mistakes in what the lender submits to SBA with your forgiveness application. **Make sure that the materials you submit to your lender sufficiently document what you are trying to prove in a gap-free, consistent package that gives the lender confidence that the loan will be forgiven.** Consider submitting any additional documentation that would clarify any complexities that your particular loan forgiveness application may present. Your lender will come back to you (before submitting the application to SBA for forgiveness) to the extent that your lender finds any discrepancies that will risk its guaranty. Err on the side of being overinclusive.

6. Maintain a file of everything submitted and all back-up documents.

You should already be maintaining in a paper or computer file every piece of documentation that constitutes backup or work papers for what you are stating in your forgiveness application. **Although you are only required to submit certain information to your lender, make sure that you have and retain all documents that are necessary to make sense of your file.**

- *For example*, if you are requesting forgiveness for business rent payments for leased facilities during your covered period, and your current lease is an extension of the term of a pre-existing 5-year lease that expired after February 15, 2020 (as lease agreements in force *before* February 15, 2020 are listed in the forgiveness application as lease payments eligible to be made), maintain in your files a copy of the original lease that was entered into before February 15, 2020, as well as the term extension documentation.

7. Consider filing now.

Consider the business reasons why it might be to your advantage to prepare the forgiveness application now, despite rumors to the contrary. At the risk of having stealth FAQs and Interim Regulations issued immediately after publishing these suggestions, we are recommending that borrowers consider applying as early as possible for their forgiveness for a variety of business reasons. One is that Congress is probably not done debating the value of providing some level of automatic forgiveness (assuming even the Form 3508EZ is too daunting) to forgive loans under \$150,000. Perhaps talk will become action, in reducing the documentation requirements for loans between \$150,000 and \$2,000,000. If you are a business that has been meticulously

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preparing to submit its forgiveness forms, you can clean up your balance sheet by submitting it now and start the clock on the review process. You will likely need to retain the same documents in case of an audit, whether forgiveness becomes easier or not.

Because we are attorneys and understand the tendency of busy people to put things off, we can only advise you that **if your covered period recently ended, you are in the best position right now to gather, submit and retain copies of the documents that prove your loan satisfied the forgiveness requirements.** It will not be easier one or two years from now, should your loan ever be audited, to create a file retrospectively. You may not have the same documents easily available to you, proving that your payroll was at least 60% of the amount you spent for which you are requesting forgiveness during the covered period, as well as permissible utility, mortgage, lease and similar permitted expenses. **While this documentation is generally re-creatable at a later date, it is inconvenient and potentially more expensive to collect it later.** In addition, if you use a third-party payroll provider, these entities are focused on PPP forgiveness right now and can provide documentation that is tailored to satisfying the current forgiveness forms under the PPP.

Also, many businesses are already grappling with the tax issues raised by the fact that the extension in the covered period from 8 to 24 weeks under the PPP Flexibility Act, when added to the 60-day review period the lender is permitted, followed by the 90-day review period that SBA is allowed, means that forgiveness may not occur for most borrowers before the end of 2020. Borrowers with outstanding loans at the end of 2020 that are likely to be forgiven, but have not been forgiven, are now awaiting tax advice regarding their 2020 taxes, as to whether an unforgiven—so far—PPP loan should be treated for all tax purposes as if it will not be forgiven. Imagine a similar process extending throughout 2021. We therefore are suggesting (nudging, as lawyers are wont) our clients to put together the forgiveness application now and submit it.

8. If you feel that you have satisfied any of the safe harbors under the Flexibility Act for a reduction in full-time equivalent employee head count (FTEs), collect and preserve that information in real time, as it can be daunting.

Don't forget to provide and preserve the detailed documentation that you need as back-up for any reductions in FTEs or hours during the covered period.

The first Forgiveness Rule, Interim Final Rule III.5.A (85 FR 33004, 33007), provides for an exemption from reduction in forgiveness. The Rule currently provides that in calculating the loan forgiveness amount, a borrower may exclude any reduction in FTEs that is attributable to an individual employee if: (i) the borrower made a good faith, written offer to restore the reduced hours of such employee; (ii) the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the reduction in hours; (iii) the offer was rejected by such employee; and (iv) the borrower has maintained records documenting the offer and its rejection. The borrower is also required to inform the applicable state unemployment insurance office of any employee's rejection of a rehire offer within 30 days of that employee's rejection of the offer. Interim Final Rule III.5.A (85 FR 33004, 33007). You should preserve proof that you

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sent the notice as required.

You should therefore document that you made an offer to each individual who was an employee and that you advertised or similarly sought to hire similarly qualified employees before December 31, 2020. Satisfying this standard requires that you do all of this in writing and save evidence that shows not only what you did, but when you did it. You should plan on obtaining and preserving this proof in real-time.

Another avenue for avoiding reduction in forgiveness, in spite of your having fewer FTEs, is because you were complying with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020 and ending December 31, 2020, relating to the maintenance of standards for sanitation, social distancing and other worker or customer safety requirements related to COVID-19. You should collect the evidence and prove what those standards were.

A borrower's right to be exempted from the loan forgiveness reduction based on federal laws was also extended to state and local laws by an Interim Final Rule published by SBA and Treasury on June 26, 2020, amending the First Loan Forgiveness Rule. Under the amended Rule, the statutory exemption was broadened to include "both direct and indirect compliance with COVID Requirements or Guidance, because a significant amount of the reduction in business activity stemming from COVID Requirements or Guidance is the result of state and local government shutdown orders that are based in part on guidance from the three federal agencies." Interim Final Rule (85 FR 38304, 38309).

This reference to state and local laws should be extremely helpful to businesses that were required by state and local laws to shut down since March. However, **you should prepare the documentation showing what specific state and local government orders, issued on what dates, caused your business to reduce your FTEs.** The Rule expressly states that "the borrower satisfies the Flexibility Act's exemption and will not have its forgiveness amount reduced because of a reduction in FTEs during the covered period, if the borrower in good faith maintains records regarding the reduction in business activity and the local government's shutdown orders that reference a COVID Requirement or Guidance as described above." Interim Final Rule (85 FR 38304, 38309).

If the documentation you are submitting to your lender with the forgiveness application does not clearly show that all your decreases in FTEs were for permissible reasons, you should provide this information to the lender, whether the lender clearly asks for it or not.

9. Don't miss the application deadline, even if you have paperwork issues.

If for some unforeseen reason--perhaps some aspect of your loan, your business, your ability to recover from COVID-19--has made it difficult for you to put together your forgiveness application, do not miss the 10-month filing deadline. **The 10-month deadline is in the statute, which currently offers no forgiveness for**

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those missing the deadline. If you are having difficulty with finding proof for a portion of the forgiveness, don't miss the date because you are waiting for one piece of information that would allow full forgiveness. Filing a timely application for partial forgiveness beats no forgiveness.

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