

# **Making Sense Out of The New SBA Paycheck Protection Program: Practical Considerations for Dealers**



# COVID Phase 3: Major Dealer-Related Provisions

## Presenters

- Andy Koblenz  
EVP, Legal & Regulatory Affairs
- Dave Regan  
EVP, Legislative Affairs

# Complexity of Issues and Disclaimer

- NADA believes that the analysis that follows will be correct, but implementing guidance has yet been issued by the Small Business Administration (SBA). Accordingly, this analysis may change over time with new information and developments. Until guidance confirming this analysis is forthcoming from the SBA, no definitive conclusions may be drawn.
- Furthermore, this analysis does not provide, and is not intended to constitute, legal advice. All content and materials are for general informational purposes only.
- Important: as necessary, dealers should consult an attorney familiar with the federal, state and/or local laws at issue and with dealership operations to obtain specific advice with respect to any specific legal matters.

# Prior COVID Legislation

- COVID Phase One – initial funding for testing vaccine research and development
- COVID Phase Two – paid sick and FMLA leave

# COVID Phase Three (CARES ACT) Paycheck Protection Program

- The Big Picture: \$2.2 Trillion Package, Massive by Historical Standards
  - Individual Relief IRS payments and Expanded UI Payments
  - Business Tax Relief
  - Emergency Small Business Loans
  - Assistance to the Health Care System
  - Assistance to Distressed Industries

# Legislative Process

- Highly compressed
  - From Draft Senate Bill to the President's desk in 7 days
  - Very opaque process
- NADA's focus throughout: dealership liquidity
  - New Small Business Loan Program
  - Business Tax Provisions

# Very Important Preliminary Observations: Paycheck Protection Program

- Completely NEW \$350 billion SBA loan program
- Streamlined application
- Dramatically favorable terms for the loans
- Demand will be enormous
- Application process is imminent

# Key Questions for Today

- **Am I eligible?**
- Where can I get a loan?
- What terms can I expect?/What documentation will be required?
- How much can I borrow?
- How can I use the funds?
- How much of the loan will be forgiven?

# Am I Eligible?

- First Test:
  - Borrower in operation on February 15, 2020; AND
  - Paid salaries and payroll taxes for employees; OR
  - Paid independent contractors on Form 1099-MISC

# Am I Eligible?

- Second Test
  - General Rule: Borrower has 500 or fewer employees
  - What is the date for determining the number of employees?
    - Must be addressed by regulation or guidance
    - But, likely that measuring date will be on or after February 15, 2020.

## How will SBA apply the 500-employee limit?

- Unless waived, general SBA affiliation rules will apply
- Under these rules, business concerns that are commonly owned or commonly controlled are often treated as one – even if they are separately organized
- An SBA publication describes these complex affiliation rules ([here](#))

# Normal Application of SBA's Affiliation Rules

- Without a waiver, the affiliation test would generally be applied as follows:
  - Does the group of business concerns (stores) that you control employ, in total, more than 500 people?
    - If no, you should be eligible for a loan
    - If yes, you will NOT be eligible for a loan

# PPP Affiliation Rule Waiver

- Fortunately, the PPP contains an affiliation rule waiver provision that can work well for dealers
- SBA issues Franchise Identifier Codes (FICs) to OEMs for name brands
  - For example, the FIC for Ford dealers is S4155 and Lincoln is S4156
- Under the PPP, the standard SBA affiliation rules will be **WAIVED**, if (1) the dealer operates as a franchise and (2) that franchise has been assigned an FIC by the SBA

# PPP Affiliation Rule Waiver

- Franchises that have FICs
- Franchises that have FICs applications pending because of NADA's efforts
- Status of the pending applications
- How can I find out if a particular franchise has an FIC?
  - SBA maintains a directory that lists all FICs (found [here](#))

# PPP Affiliation Rule Waiver

- How will the waiver work for dealerships?
- First, determine how many separately organized business concerns (stores) you have?
  - Does any one of those stores employ MORE than 500 people?
    - If yes, you will NOT be eligible for a loan FOR THESE STORES.
    - This is true even if your store has an FIC

# PPP Affiliation Rule Waiver

- For the stores in your group with 500 or fewer employees
  - Determine which stores have an FIC
    - Each of those stores should be eligible but will need to file a separate loan application
  - What about stores that do NOT have an FIC?
    - If they together combine to exceed 500 employees, they will likely not be eligible

# Key Questions for Today

- Am I eligible?
- **Where can I get a loan?**
- What terms can I expect?/What documentation will be required?
- How much can I borrow?
- How can I use the funds?
- How much of the loan will be forgiven?

# Where Can I Get a Loan?

- Lenders must be “SBA-approved”
- Treasury and SBA approved all for insured depository institutions and credit unions
- CARES Act contains explicit authority to approve additional lenders
  - Qualified to process, close, disburse and service loans
  - Nothing in the law excludes non-depository, captive finance companies

# Where Can I Get a Loan?

- SBA Lender Match – online tool connects small businesses with participating SBA-approved lenders. (Information available [here](#).)
- SBA-approved credit unions in CUDL. (List available [here](#).)
- What is NADA doing to help?
  - Outreach to lenders already active in auto finance, including captives
  - Outreach to CUDL and national trade associations (banks and credit unions)
- Message: Participate in this program!

# Where Can I Get a Loan?

- Should I contact a lender now?
  - Yes, to determine your lender's interest in participating
  - Discuss loan application process
- Seek advice from the local lender on:
  - Timing of the application process; and
  - Lender's capacity to process loans and disburse funds
- Can you pre-file or reserve capacity with a lender?

# REALITY CHECK

- Completely new, \$350 Billion program
- Demand will be enormous
- Although initial SBA guidance is out, administrative challenges and frustrations are certain to arise
- NADA will advocate for a streamlined process in every phase of the program

# Key Questions for Today

- Am I eligible?
- Where can I get a loan?
- **What terms can I expect?/What documentation will be required?**
- How much can I borrow?
- How can I use the funds?
- How much of the loan will be forgiven?

# What Terms Can I Expect?

- Program meets unprecedented social and economic challenges
- Terms not previously found in any business loans

# What Will Be Required at Closing?

- Borrower's good faith certification that:
  - Current economic conditions necessitate the loan to support ongoing operations,
  - Funds will be used to retain workers and maintain payroll, and make mortgage, lease, and utility payments, and
  - No duplicative SBA loans have been received or applied for
- Other documentation: TBD (potentially from lenders)

# What are the Key Terms?

- Certain portion may be forgiven
- No cost, automatic 6-month deferral
- Borrower pays no principal and interest for first 6 months
- No closing costs
- No collateral
- No personal guarantees
- No prepayment penalties
- No creditworthiness assessment (Loans are 100% government-guaranteed)
- No SBA requirement for borrower to seek credit elsewhere
- Interest rate of 0.5% (per Treasury; statutory cap = 4%)
- 2-year term for balance not forgiven (per Treasury; statutory cap = 10 years)

# Key Questions for Today

- Am I eligible?
- Where can I get a loan?
- What terms can I expect?/What documentation will be required?
- **How much can I borrow?**
- How can I use the funds?
- How much of the loan will be forgiven?

# How Much Can I Borrow?

## How Much Do I Have To Pay Back?

- The statute has different formulas to determine:
  - The maximum loan amount
  - The maximum amount of loan forgiveness

# How Much Can I Borrow?

## How Much Do I Have To Pay Back?

- KEEP THIS IN MIND – General Congressional Intent:
  - Provide liquidity to small businesses
  - Keep people on the payroll
  - Restore people to the payroll
  - Focus benefits on employees making less than \$100,000

# How Do I Compute the Maximum Loan Amount?

- In general, the lesser of:
  - 2.5 times the borrower's average monthly Payroll Costs; or
  - \$10,000,000

# How Much Can I Borrow?

- VERY IMPORTANT: The following factors are NOT relevant to the maximum amount of the initial loan:
  - The number of employees currently on the payroll
  - The total revenue of the dealerships, either currently or historically
- The ONLY relevant factors for the initial loan are:
  - What is time period for computing the monthly average of the Payroll Costs?
  - How do I compute the monthly average?
  - Which Payroll Costs can be included?

# How Much Can I Borrow?

- What is the time relevant time period?
  - The 12 months PRIOR to the date on which loan is made
- How do I compute the monthly average?
  - Add up total Payroll Costs from the year preceding the date on which the loan is made
  - Divide that number by 12

# How Do I Determine Which of My Payroll Costs to Add Up?

- INCLUDE these Payroll Costs:
  - Wages, salaries, commissions, or similar compensation
    - NOTE: Inclusion of performance pay is very important
  - Cash or tip equivalent
  - Paid leave (vacation, sick, parental, family, medical or sick)
  - Separation or dismissal allowances
  - Group health benefits and insurance premiums
  - Retirement benefits
  - State or local employment taxes

# How Do I Determine Which of My Payroll Costs to Add Up?

- DO NOT INCLUDE these Payroll Costs:
  - Payroll and income tax withholdings
  - Cost of Sick and FMLA eligible for tax credits under FFRCA (government funded).
  - Compensation for individual employees in excess of an annual rate of \$100,000 (public policy inherent in the bill)
  - Compensation for non-residents of USA (public policy inherent in the bill)

# How Much Can I Borrow?

- The final calculations to determine the maximum loan amount:
  - Annual Payroll Costs  $\div$  12 = Average monthly Payroll Cost
  - Average monthly Payroll Costs  $\times$  2.5
  - BUT no more than \$10,000,000

# Key Questions for Today

- Am I eligible?
- Where can I get a loan?
- What terms can I expect?/What documentation will be required?
- How much can I borrow?
- **How can I use the funds?**
- How much of the loan will be forgiven?

# How Can I Use the Funds?

- Payroll Costs drive the initial loan amount
- BUT, permissible use of funds BROADER than Payroll Costs

# How Can I Use the Funds?

- Permissible uses of funds:
  - Payroll Costs
  - Rent (including rent under a lease agreement)
  - Utilities
  - Interest on any mortgage obligation (only interest)
  - Interest (but only interest) on any other debt obligations that were incurred before February 15, 2020
    - Should include floor plan interest (but not curtailment) for inventory acquired before February 15, 2020

# Key Questions for Today

- Am I eligible?
- Where can I get a loan?
- What terms can I expect?/What documentation will be required?
- How much can I borrow?
- How can I use the funds?
- **How much of the loan will be forgiven?**

# How Much of the Loan Will Be Forgiven?

- As noted, the policy goal of these loans is to maintain and/or restore payroll
- Formula for loan forgiveness directly linked to maintaining and/or restoring payroll

# What is the General Rule for Loan Forgiveness?

- Up to 100% of principal may be forgiven, subject to:
  - The type of expenses funded with the loan proceeds
  - Reductions based on headcount and/or level of pay
    - Reductions may be waived if headcount or level of pay restored
  - The 8-week period following the loan is important

# Which Expenses Can Be Forgiven?

- First, a limited timeframe:
  - Only expenses incurred during the 8-weeks following the loan

# Which Expenses Can Be Forgiven?

- Second, the following expenses may be included in the forgiveness:
  - Payroll Costs
  - The same categories of Payroll Costs used to determine the size of the initial loan
- With two major differences:
  - These are ACTUAL Payroll Costs
  - For the period 8 weeks after the date of the loan origination.

# Which Expenses Can Be Forgiven?

- Other expenses listed under permitted use, with more specific definitions
- Interest on an indebtedness or debt instrument that:
  - Is a liability of the borrower,
  - Is a mortgage on real or personal property, AND
  - Was incurred before February 15, 2020
  - Guidance is needed on whether this includes floor plan interest; answer depends on what the term “mortgage” means as used in the statute
- Rent paid on a lease in force before February 15, 2020
- Utilities paid for services which began before February 15, 2020

# General Limitations Applicable to Loan Forgiveness

- Reductions in headcount
- Reductions in level of pay

# Reductions Based on Headcount

- If the number of employees is reduced during the 8-week period, the forgiveness amount will be reduced proportionally

# Reductions Based on Headcount

- Formula to determine the percentage reduction in headcount:
  - Average number of full-time employees (AFTEs) per month employed during the 8 weeks following the loan date
  - DIVIDED BY, at the election of the borrower
    - AFTEs employed by the borrower from February 15, 2019 to June 30, 2019, or
    - AFTEs per month employed by the borrower from January 1, 2020 to February 29, 2020.
- AFTEs is determined by calculating the average number of FTEs for each pay period falling within a month.

# Reductions Based on Level of Pay

- In addition, loan forgiveness will be REDUCED by:
  - The amount of any employee's reduction in total salary or wages in excess of 25 percent of that employee's total salary or wages from the most recent full quarter prior to the date of the loan.
  - NOT applicable to employees with annual rate of salary or wages greater than \$100,000 for any single pay period during 2019.

# Restoration of Loan Forgiveness

- Loan forgiveness reductions may be restored by rehires
- The effect of reduced pay rate will NOT apply if:
  - Headcount: Between February 15, 2020 and 30 days after the effective date of the Act, there is a reduction of FTEs compared to February 15, 2020, and the reduction in FTEs is eliminated by June 30, 2020; **[Restoration of the overall number]**
  - Level of pay: Between February 15, 2020 and 30 days after the effective date of the Act, there is a reduction in salary and wages of one or more employees, and the employer eliminates the reduction in salary or wages of such employees by June 30, 2020; **[Restoration of specific pay cuts]** OR
  - A combination of both circumstances occurs.

# What Documentation Will I Have to Provide for Loan Forgiveness?

- More documentation than required to obtain the loan
- Without documentation, no loan amount will be forgiven

# What Documentation Will I Have to Provide for Loan Forgiveness?

- Proof of payroll payments:
  - Verification of number of full-time equivalents and pay rates for the relevant period, such as
  - Payroll tax filings reported to the IRS, and
  - State income tax, payroll and unemployment insurance filings
  - Verification of other expenses
    - cancelled checks, payment receipts, etc.
- Certification from the borrower that:
  - The documentation is true and correct, and
  - The amount of the forgiveness was used for the intended purposes
- Any other documentation the SBA/lender requires.

## Other Key Issues for Loan Forgiveness

- As a practical matter, cannot file until after the 8-week period (and possibly before 6/30 because of the effect of rehires)
- The lender will issue a decision within 60 days of borrower's application for forgiveness.
- The amount of the forgiveness will NOT trigger Federal income tax.

# Recap

- Am I eligible?
  - Does my dealership or group of my dealership exceed 500 employees?
  - Can I rely on an SBA Franchise Identifier Code to waive the affiliation rules?
- Where can I get a loan?
  - Existing SBA approved lenders and other depository institutions
  - Newly enrolled SBA approved lenders (potentially captives)
- Talk to a lender now
  - To find a lender that wants to participate
  - To discuss the application process
  - To discuss other SBA loan products that may work for you

# Recap

- What terms can I expect?
  - Very favorable
  - Not found in any previous commercial or government loans
- What documentation will be required to obtain a loan?
  - Relatively low documentation loan
  - Certification of need and use of loan proceeds

# Recap

- How much can I borrow?
  - The LESSER OF
    - 2.5 times average monthly Payroll Costs (one year prior to loan), or
    - \$10,000,000

# Recap

- How can I use the funds?
  - Payroll Costs
  - Rent
  - Mortgage Interest
  - Floor plan interest for inventory acquired before February 15, 2020
  - Utilities

# Recap

- How much of the loan will be forgiven?
  - Up to 100%,
  - BUT, forgiveness limited by percentage reduction of head count and level of pay
  - UNLESS, headcount and pay levels are restored
- Documentation of payments must be provided for forgiveness
- For amounts not forgiven
  - Term: 2 years per Treasury; statute caps at 10 years
  - Interest rate: 0.5% per Treasury; statute caps at 4%

# Paycheck Protection Program Application Form



## Paycheck Protection Program Application Form

OMB Control No.: 3245-0407  
Expiration Date: 09/30/2020

Non-Profit <input type="checkbox"/> Vet Org <input type="checkbox"/> Tribal <input type="checkbox"/> Ind. Cont. <input type="checkbox"/> Self Employed <input type="checkbox"/>		DBA or Tradename if applicable	
Business Legal Name			
Business Primary Address		Business TIN (EIN,SSN)	Business Phone
			( ) -
		Primary Contact	Email Address

Average Monthly Payroll:	\$	X 2.5 equals Loan Amount:	\$	Number of Jobs:	
Purpose of the loan (select more than one):					
<input type="checkbox"/> Payroll <input type="checkbox"/> Rent / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):					

### Applicant Ownership

List all owners of Applicant with greater than 20% ownership stakes. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN,SSN)	Address

*If questions (1) or (2) below are answered "Yes," the loan will not be approved.*

Question	Yes	No
1. Is the Business or any owner presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has the Business, any of its owners, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the Business or any owner an owner of any other business or have common management with any other business? If yes, attach a listing of all Affiliates and describe the relationship as addendum A.	<input type="checkbox"/>	<input type="checkbox"/>
4. Has the Business received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input type="checkbox"/>

*Applicants who are individuals and all 20% or greater owners of the business must answer the following questions. If questions (5) or (6) are answered "Yes" or question (7) is answered "No", the loan will not be approved.*

Question	Yes	No
5. Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, on probation or parole?	<input type="checkbox"/>	<input type="checkbox"/>
Initial here to confirm your response to question 5 → _____		
6. Within the last 7 years, for any felony or misdemeanor for a crime against a minor, have you: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?	<input type="checkbox"/>	<input type="checkbox"/>
Initial here to confirm your response to question 6 → _____		
7. <input type="checkbox"/> I am a U.S. Citizen <u>OR</u> <input type="checkbox"/> I have Lawful Permanent Resident status <input type="checkbox"/> No		
Initial here to confirm your response to question 7 → _____		



Paycheck Protection Program Application Form

OMB Control No.: 3245-0407 Expiration Date: 09/30/2020

Paycheck Protection Program Application Form

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

REPRESENTATIONS AND AUTHORIZATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order included in this form, and I understand them.
I will comply, whenever applicable, with the civil rights and other limitations in this form.
All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
To the extent feasible, I will purchase only American-made equipment and products.
The Applicant is not engaged in any activity that is illegal under federal, state or local law.

For Applicants who are individuals and all Associates: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The Business and each 20% or greater owner must certify in good faith to all of the below by initialing next to each one:

- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
The funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; I understand that if the funds are used for unauthorized purposes, the federal government may pursue criminal fraud charges.
Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.
Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than twenty-five percent (25%) of the forgiven amount may be for non-payroll costs.
During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under this program.
I further certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
I acknowledge that the lender will calculate the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those I submitted to the IRS. I also understand, acknowledge and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Business

Date

Print Name

Title

Signature of Owner of Applicant Business

Date

Print Name

Title

# Complexity of Issues and Disclaimer

- NADA believes that the preceding analysis will be correct, but implementing guidance has yet been issued by the Small Business Administration (SBA). Accordingly, this analysis may change over time with new information and developments. Until guidance confirming this analysis is forthcoming from the SBA, no definitive conclusions may be drawn.
- Furthermore, this analysis does not provide, and is not intended to constitute, legal advice. All content and materials are for general informational purposes only.
- Important: as necessary, dealers should consult an attorney familiar with the federal, state and/or local laws at issue and with dealership operations to obtain specific advice with respect to any specific legal matters.

# Suggestions/Comments

<https://www.nada.org/stimulushelpform/>



**Questions?**



**NADA**

