

**PPP Loan Certification of Need:
NADA Analysis of Clarifying Guidance from SBA and Treasury**

Disclaimer

NADA believes that the analysis that follows is correct based on guidance to date from the Small Business Administration (SBA) and the Department of Treasury (Treasury). Additional guidance from the government may be forthcoming. Accordingly, this analysis may change over time with new information and developments. Dealers are advised to keep these realities in mind when drawing definitive conclusions.

Furthermore, this analysis does not provide, and is not intended to constitute, legal advice. All content is for general informational purposes only. As necessary and appropriate, 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.

On May 13, 2020, the SBA and Treasury issued a new [FAQ \(#46\)](#) which (1) significantly clarifies the issues regarding PPP borrower certifications that had been created by certain earlier FAQs (#31 and #37) and (2) for the reasons explained below, renders the previously announced “loan payoff” safe harbor deadline (now extended until May 18, 2020 by FAQ #47) largely irrelevant for most dealers. (An NADA analysis of FAQs #31 and #37 is available [here](#).) The clarifications issued on May 13 are largely straightforward and consistent with the original purposes of the PPP. As a result, they should be helpful for dealerships that applied for PPP loans in reliance on those original understandings.

The new SBA/Treasury FAQ contains two important provisions:

1. First, FAQ 46 establishes a clear safe harbor for certifications made in connection with PPP loans with original principal amounts less than \$2 million. In particular, FAQ 46 states as follows:

“Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”

This means that for a borrower within the safe harbor there should be no government inquiry into whether it had other sources of liquidity that prevented it from making the required certification. This conclusion is underscored by FAQ 46’s explanation of why the safe harbor is being created, where SBA and Treasury state that “borrowers with loans below [the \$2 million] threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans.”

To be sure (and as noted above), the safe harbor requires that, in determining whether its PPP loan satisfies the “less than \$2 million” threshold, a borrower must consider not only its loan but also those of its affiliates. However, footnote 20 to FAQ 46 explains which affiliates must be considered in this analysis. Footnote 20 reads in its entirety as follows:

“For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).”

NADA has previously provided [an analysis on the SBA affiliation rules](#) and their application to franchised dealerships applying for PPP loans. That analysis explains why the SBA’s regular affiliation rules largely do not apply to dealers applying for PPP loans and why those dealers are deemed to have no affiliates for purposes of the PPP loan process. The [Interim Final Rule \(IFR\)](#) referenced in footnote 20 to FAQ 46 contains language that echoes these points and specifically addresses the question of whether business concerns like dealers are required to be affiliated with other concerns that are under common ownership or control or otherwise related. This language is contained in footnote 1 to the IFR which provides, in relevant part, as follows:

*“[The CARES Act] waives the affiliation rules contained in § 121.103 for . . . any business concern operating as a franchise that is assigned a franchise identifier code by the [SBA]. . . **This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.**”* (Emphasis added.)

Thus, dealerships operating as franchises that have been issued [franchise identifier codes](#) by the SBA are not required under the relevant IFR to affiliate with related companies.¹ Accordingly, in determining whether they come within the new “less than \$2 million” loan amount safe harbor, it appears that those borrowers should each only need to consider its own PPP loan.

2. FAQ 46 also addresses certifications made with respect to loans that do not meet the requirements of the foregoing safe harbor (i.e., the amount originally borrowed is \$2 million or higher). In a positive development, the FAQ expressly recognizes that PPP borrowers with such loans may still have had an adequate basis for making the required good-faith certification, based on their individual circumstances. FAQ 46 also reiterates, however, that most – if not all – of those loans will be subject to review by the SBA for compliance with PPP requirements.

Thus, those dealer PPP borrowers who are not in the new safe harbor described above will likely have to defend the good faith certification of need that they made in their PPP loan applications. In that connection, dealer-borrowers are encouraged to consult with their legal, business/accounting, and banking advisors to consider carefully how they may demonstrate that they had a sufficient basis to make that certification at the time their PPP loan applications were filed. NADA has provided [guidance](#) on some of the considerations that could go into that analysis. As noted in NADA’s guidance, factors that may be relevant to demonstrating “need” at the time of certification include the following:

- a. Whether the loan would enable the applicant to keep employees on the payroll that it would otherwise furlough or terminate;

¹ This conclusion is further supported by the SBA’s use of the concept of affiliation in some of its other interpretations of the PPP. For example, this can be seen in the [interim final rule on corporate groups](#). 85 CFR 26324, 26325 (May 4, 2020). However, the SBA has not so used the concept here. As explained in the text, the relevant IFR affirmatively states that the affiliation rules do not apply.

- b. Whether accessing arguably available sources of credit/liquidity would be significantly detrimental to business operations; and
- c. Whether the borrower would remain economically viable without the loan.

Dealer-borrowers should also consult with their professional and other advisors to determine what business records should be maintained and retained to support their need demonstrations.²

Importantly, FAQ 46 clearly spells out for the first time the consequences that will flow if the SBA determines during a review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request. Significantly, FAQ 46's description of those consequences is less severe than many had previously speculated. Specifically, the FAQ states that, in the event of a finding that a certification was unfounded, SBA will simply "seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness." Moreover, FAQ 46 expressly affirms that, if the borrower repays the loan after receiving notification from SBA, "**SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request.**" (Emphasis added.)

In effect, this provides a borrower which is outside the "less than \$2 million" loan amount safe harbor a path to resolve any questions about the appropriateness of its original need certification. And this path is not time-limited as it was prior to the issuance of FAQ 46.³

May 15, 2020

² Possible areas of documentation include:

1. Market conditions and anticipated sales and service declines during the pandemic as compared with earlier periods;
2. Employment decisions and related records; and
3. The nature of available credit and other forms of liquidity (including any cross-collateralization and/or cross-default provisions).

The analysis available [here](#) may also offer valuable insights on what documentation to maintain and collect.

³ The "loan payoff" safe harbor, under which borrowers that repay their PPP loans in full by May 18, 2020 are deemed to have made the required "need" certification in good faith, still exists. However, for the reasons discussed above, for many PPP borrowers with loans of \$2 million and above, it may no longer be the most attractive option. In contrast, the [availability and potential use of the employee retention tax credit](#) is one factor that might weigh in favor of taking advantage of the May 18, 2020 loan repayment safe harbor. Dealers are encouraged to discuss with their professional and other advisors which path is most appropriate for them.