**PPP Loans: Use of Proceeds and Forgiveness**
**NADA Updated Preliminary Guidance**

The Paycheck Protection Program (PPP) established by the Coronavirus Aid, Relief, and Economic Security (CARES) Act details what PPP loan proceeds can be used for, how to apply for loan forgiveness, and whether and to what extent, if used properly, loan proceeds can be forgiven. The following analysis seeks to provide direction on some of the central questions raised in this context.

This analysis reflects both the forgiveness application documents (Forgiveness Application) and all other guidance published by the Small Business Administration (SBA) and the Department of the Treasury (Treasury) on May 16, 2020 and the Paycheck Protection Program Flexibility Act of 2020 (PPP Flexibility Act) that was signed into law on June 5, 2020. Nonetheless, unanswered questions and open issues remain. As additional guidance is issued by SBA/Treasury, this analysis will be updated further.

***Disclaimer***

*NADA believes that the analysis that follows will be correct. However, as noted, additional implementing guidance is expected from SBA and Treasury on many of the questions raised. Accordingly, this analysis will change over time with new information and developments. Until guidance confirming this analysis is forthcoming from the SBA and Treasury, no definitive conclusions may be drawn.*

*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 advice with respect to any specific legal matters.*

- *What changes did the PPP Flexibility Act make to the PPP?*
  - The PPP Flexibility Act amended the PPP loan program by:
    - establishing that covered loans that have a remaining balance after applying any forgiveness shall have a minimum maturity of 5 years and a maximum maturity of 10 years from the date on which the borrower applies for PPP loan forgiveness.
      - This applies to any PPP loans originated on or after June 5, 2020 and to existing PPP loans that are so by modified by consent of the parties;
    - redefining the "covered period" during which PPP loan proceeds may be used to be the period beginning on 2/15/20 and ending on 12/31/20.
      - Previously, this period ended on 6/30/20;
    - extending the similarly-named but different "covered period" for forgiveness calculations from 8 weeks to 24 weeks from the origination date of a PPP loan.

        - The PPP Flexibility Act also allows a borrower who so elects, to have its covered period remain at the original 8 weeks.

            - **<u>Practical tip</u>: In deciding whether to retain its current 8-week covered period or switch to a 24-week covered period, among the factors a PPP borrower should consider are (1) the degree to which it is satisfied that it has already maximized its forgiveness entitlement and (2) whether it expects to at least maintain, if not increase, both the number of workers it employs and the pay rates for those workers during the 24-week period**;

    - extending from 6/30/20 to 12/31/20 the period in which a borrower must eliminate any reduction in either (1) the number of full-time equivalent employees or (2) the salary or wages of such employees for purposes of the forgiveness reduction avoidance paths (described below);

    - providing for alternative partial forgiveness reduction relief in the event a borrower can document that it is unable, by December 31, 2020, either (1) to rehire or replace individuals who left its employ during the pandemic or (2) to return to its pre-COVID level of business activity;

    - reducing from 75% to 60% the percentage of forgivable expenses that must be allocated to Payroll Costs;

    - allowing the deferral of PPP loan payments otherwise due until forgiveness remittances are made to lenders.

        - However, if a borrower fails to apply for forgiveness within 10 months after its forgiveness covered period ends, that borrower must begin making loan payments immediately thereafter.

        - **<u>Practical tip</u>: This deferral should provide a PPP borrower sufficient time to decide whether to opt for a 24-week forgiveness covered period or to retain its current 8-week forgiveness covered period; and**

    - repealing the provision of the CARES Act that barred PPP forgiveness recipients from deferring employer payroll taxes.

- Where applicable and relevant, the guidance that follows integrates these changes to the CARES Act and the PPP.

- *Use of Loan Proceeds: For what expenses may the proceeds of PPP loans be used?*
    - *Expenses that are allowable uses*. The CARES Act states that PPP loan proceeds may be used to pay for the following expenses:[1]
        - Payroll Costs (salaries, wages and commissions below $100,000; leave benefits; health care benefits; retirement benefits; and state and local payroll taxes).
            - Health care benefits are payments by a borrower for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but excluding any pre-tax or after-tax contributions by the employee.
                - Unresolved issue: Do health care benefits include payments for dental plans, health savings accounts, etc.?
        - Salaries and commissions that are excluded from Payroll Costs (e.g., compensation in excess of $100,000).
        - Rent (including rent under a lease agreement).
            - "Rent" includes amounts due on equipment leases and other leases of personal property.
        - Utilities.
            - Payments for the distribution of electricity, gas, water, transportation, telephone, and internet access.
                - Unresolved issue: What "transportation" means in this context.
        - Interest (but only interest) on any "mortgage" obligation.
        - Interest (but only interest) on any "other debt" obligations that were incurred before 2/15/20.
            - "Other debt" likely includes floorplan interest (but not curtailment) for inventory acquired before 2/15/20.
                - Unresolved issue: Whether "other debt" applies to floorplan interest on inventory acquired on or after 2/15/20.

[1] The CARES Act states that PPP proceeds may also be used for the other purposes generally allowed under SBA Section 7(a) programs. In an Interim Final Rule (IFR) issued on 6/11/20, SBA indicates that at least 60% of PPP loan proceeds must be used for Payroll Costs (and that no more than 40% of loan proceeds may be used for Non-Payroll Costs).

- *Time period for allowed use*.

    - The CARES Act, as amended by the PPP Flexibility Act, provides that the proceeds of a PPP loan may be used for allowable expenses incurred from 2/15/20 through 12/31/20.

- *Loan Forgiveness: What allowable uses are forgivable*?

    - *In general*. The loan proceed uses that qualify for loan forgiveness are a subset of the universe of allowable uses listed above, and different time periods are involved.

    - *Expenses eligible for forgiveness*. Under the CARES Act, PPP loan proceeds may be forgivable only to the extent they are used to pay for the following expenses within the relevant time period of use. As noted, these categories are subject to more restrictions, and therefore are (or may be) generally narrower, than the allowable uses listed above.

        - Payroll Costs ("Cash Compensation" below $100,000; health care benefits; retirement benefits; and state and local payroll taxes).

            - "Cash Compensation" is defined as paid or incurred gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, but not including Families First Coronavirus Response Act leave), and allowances for dismissal or separation.

            - Health care benefits are payments by a borrower for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but excluding any pre-tax or after-tax contributions by employees.

                - Unresolved issue: Do health care benefits include payments for dental plans, health savings accounts, etc.?

            - Retirement benefits include the total amount paid by a borrower for employer contributions to employee retirement plans but excluding any pre-tax or after-tax contributions by employees.

            - State and local payroll taxes include the total amount paid by a borrower for employer state and local taxes assessed on employee compensation (e.g., state unemployment insurance tax), but not including any taxes withheld from employee earnings.

        - Non-Payroll Costs. Important: In light of the fact that, as discussed below, the PPP Flexibility Act extends the covered period for loan forgiveness from 8 to 24 weeks, it is expected that most dealers electing the 24-week period will have sufficient forgivable Payroll Costs to exhaust all of their PPP loan proceeds.

- Rent (on a leasing agreement in force before 2/15/2020).
    - "Rent" includes amounts due on equipment leases and other leases of personal property.
- Utilities for which service began before 2/15/2020.
    - Payments for the distribution of electricity, gas, water, transportation, telephone, and internet access.
    - Unresolved issue: What "transportation" means in this context.
- Interest (but only interest) on mortgages on real estate or personal property (originated before 2/15/2020).
    - Unresolved issue: Whether a floorplan line of credit qualifies as a "mortgage on . . . personal property."

- *Timing issues for forgivable uses*.
    - General: The PPP Flexibility Act provides that, to qualify for forgiveness, PPP loan proceeds must generally be used for the foregoing expenses incurred, and payments made, during a period that begins on the date of the origination of a PPP loan and ending on the earlier of (1) the date that is 24 weeks after the date of origination or (2) 12/31/2020 (the "Covered Period").
        - SBA/Treasury has issued guidance providing that a PPP loan is considered to have been originated as of the time of the disbursement of the funding of the loan.
        - The PPP Flexibility Act also provides that a borrower under a PPP loan that was originated prior to 6/5/20 may elect to have its Covered Period end on the date that is 8 weeks after the loan origination date.
            - **Practical tip: As noted above, in deciding whether to retain its current 8-week covered period or switch to a 24-week covered period, among the factors a PPP borrower should consider are (1) the degree to which it is satisfied that it has already maximized its forgiveness entitlement and (2) whether it expects to at least maintain, if not increase, both the number of workers it employs and the pay rates for those workers during the 24-week period.**
        - Unresolved issue: Alternative Payroll Covered Period**.** For administrative convenience, SBA/Treasury guidance currently permits a borrower with a biweekly (or more frequent) payroll schedule to elect to calculate eligible Payroll Costs using the eight-week (56-day) period that begins on the first day of its first pay period following the

disbursement of loan proceeds. It is unclear whether this accommodation will be extended to 24-week Covered Periods. However, given the expanded length of the forgiveness Covered Periods, it is expected that most dealers *will not need* the flexibility provided by the Alternative Payroll Covered Period.

    - <u>Timing of Payroll Costs</u>: Payroll Costs are considered paid on the day paychecks are distributed or a borrower originates an ACH credit transaction. Payroll Costs are considered incurred on the day that an employee's pay is earned. Payroll Costs incurred but not paid during a borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, Payroll Costs must be paid during the Covered Period (or Alternative Payroll Covered Period). Payroll Costs that were both paid and incurred may be counted only once.

        - <u>Unresolved issue</u>: Whether a borrower with multiple pay periods applicable to its employees may apply those multiple pay periods for PPP loan forgiveness purposes.

    - <u>Timing of Non-Payroll Costs</u>: Eligible Non-Payroll Costs must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period. Non-Payroll Costs that were both paid and incurred may be counted only once.

- <u>*Loan Forgiveness: What Triggers a Reduction in Loan Forgiveness?*</u>

  - <u>*Why did Congress set limits on the forgivable amounts to begin with*</u>?

    - Congress created the PPP to put people back on the payroll, even if there is no work for those employees. Congress intended for people to get paid, even if hotel rooms are not occupied, if meals are not served, if cars are not sold, or repairs are not made.

    - The extraordinary nature of this program is that the federal government is using private sector payroll departments to deliver a government benefit to employees. As a result, the level of loan forgiveness (in essence, the extent of the government grant) is heavily tied to Payroll Costs incurred over a 24-week period and may be reduced based on certain payroll-related calculations.

  - <u>*How are loan forgiveness reductions calculated?*</u>

    - <u>Types of loan forgiveness reduction</u>. Three types of events can trigger a reduction in the amount of loan forgiveness: 1) a reduction in employee pay level ("Pay Level Reduction Basis"); 2) a reduction in employee headcount ("Headcount Reduction Basis"); and 3) the use of 40% or more of loan proceeds for non-Payroll Cost expenses ("60%/40% Reduction Basis").[2] These reduction types are described below along with some unresolved questions.[3]

- Order of application of the forgiveness reduction bases. In the Forgiveness Application, SBA/Treasury determined that the three reduction types are to be applied in the following order: first the Pay Level Reduction Basis, then the Headcount Reduction Basis, and finally the 60%/40% Reduction Basis.[4]

- Application of the forgiveness reduction bases

  - Pay Level Reduction Basis

    - Generally, if employee pay levels go down during the Covered Period (or Alternative Payroll Covered Period) relative to the earlier measuring period, the dealer will have to reduce the level of forgiveness by a specific dollar amount.

      - Unresolved issues: Although SBA/Treasury have provided some guidance, this reduction basis remains confusing. Additional guidance from SBA is expected.

    - Calculation of the pay level forgiveness reduction **(Note: the following calculations are specific to individual employees)**:

      - For each employee who is on a borrower's payroll at some point during the Covered Period (or Alternative Payroll Covered Period) determine the average annual salary or hourly wage rate paid to that employee for Q-1 of 2020. This is the base level of salary and wages used to assess reductions based on pay level in comparison to the levels paid during the Covered Period (or Alternative Payroll Covered Period).

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[2] Prior to the 6/5/20 enactment of the PPP Flexibility Act, this latter reduction basis provided that at least 75% of any loan forgiveness had to be for proceeds used to pay Payroll Costs. The PPP Flexibility Act lowers this minimum to 60% and provides that *no forgiveness* will be available if less than 60% of loan proceeds are used for Payroll Costs. Notwithstanding this statutory provision, SBA/Treasury's rules take the position that that a borrower who fails to meet the 60% Payroll Cost minimum will suffer only a pro rata – and not a total – forgiveness reduction.

[3] An earlier version of this analysis employed different names for the three reduction bases. The old and new nomenclature is as follows:

| Former name | Current name |
|---|---|
| Reduction Basis 1 | Headcount Reduction Basis |
| Reduction Basis 2 | Pay Level Reduction Basis |
| Reduction Basis 3 | 60%/40% Reduction Basis |

The change in nomenclature aims to avoid confusion in light of the guidance in the Forgiveness Application regarding the order in which these three reduction bases are to be applied.

[4] The Forgiveness Application provides that the former 75%/25% Reduction Basis is applied last. Expected revisions to the Forgiveness Application should incorporate the 60%/40% Reduction Basis without changing this ordering.

                - <u>But</u>, exclude any employee who earned an annualized pay rate of more than $100,000 in any single pay period in 2019.

            - For each employee not excluded, determine the average annual salary or hourly wage rate paid to that employee during the Covered Period (or Alternative Payroll Covered Period).

                - <u>Unresolved issue</u>: How to calculate the average annual salary or hourly wage rate of an employee who was on the borrower's payroll for only a portion of either the Q-1 of 2020 or the Covered Period (or Alternative Payroll Covered Period). It is assumed that the average will be calculated with reference only to the time worked, but guidance from SBA/Treasury is needed to definitively resolve this issue.

            - Utilizing the formula set out in the Forgiveness Application:

                - First, determine whether the amount of any employee's average annual salary or hourly wage rate deceased during the Covered Period (or Alternative Payroll Covered Period) by more than 25% of the average annual salary or hourly wage rate paid to that employee in Q-1 2020.

                - Then, calculate the dollar amount of any actual payroll payment reductions that resulted from a pay rate reduction in excess of 25%.

                - Then, reduce the amount eligible for forgiveness by that dollar amount.

- <u>Headcount Reduction Basis</u>

    - Generally, if a dealer's employee headcount is lower during the Covered Period (or Alternative Payroll Covered Period) relative to the chosen earlier measuring period, the dealer will receive a pro rata reduction in the overall amount of forgiveness.

    - Key terms for the determining headcount-based reductions (positions, **<u>not</u>** specific people):

- Average Full-time Equivalents (AFTEs): the average number of full-time equivalent employees (FTEs) for each pay period falling within a month. An FTE involves 40 hours per week of work. Borrowers have two alternative options for calculating AFTEs but should consistently use the same method for all FTE-related calculations:

    - Option 1: For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0.

    - Option 2: Assign a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

- Total Expenses: Loan proceeds used to pay Payroll Costs and other forgivable costs incurred or paid during the Covered Period (or Alternative Payroll Covered Period) less any amounts subtracted by virtue of the application of the Pay Level Reduction Basis (above).

o Calculation of the headcount-based forgiveness reduction:

- Compute both Options 1 and 2 and, to minimize the reduction amount, dealers will likely want to choose the higher of the two resulting percentages:

**Option 1** AFTEs during Covered Period (or Alternative Payroll Covered Period) ÷ AFTEs during 2/15/19 to 6/30/19 = ____%

OR, at the borrower's option,

**Option 2** AFTEs during Covered Period (or Alternative Payroll Covered Period) ÷ AFTEs during 1/1/20 to 2/29/20 = ____%

- Then apply the percentage chosen to the Total Expenses incurred as follows:

    - Total Expenses X _% from Option 1 or 2 = $ ___

- The resulting dollar amount is the most that a dealer would be able to have forgiven.

            - Unresolved issue: In calculating the amount of loan forgiveness reductions under the Headcount Reduction Basis, the Forgiveness Application states that FTE reductions resulting from employees who during the Covered Period (or Alternative Payroll Covered Period) (1) decline re-hire offers, (2) are fired for cause, (3) voluntarily resign, or (4) request and are given a reduction in hours worked, will not operate to reduce the borrower's loan forgiveness. The Forgiveness Application is unclear on how these FTE reductions exceptions will be implemented, or whether other employment termination scenarios will be similarly treated.

        - **Practical tip: To the extent possible, dealers should attempt to have on their payrolls during the Covered Period (or Alternative Payroll Covered Period) the same number of AFTEs as they did during whichever measuring period they choose. This could involve re-hiring employees previously terminated.**

- 60%/40% Reduction Basis

    - Generally, at least 60% of the PPP loan forgiveness must be for proceeds applied to Payroll Costs. In other words, Payroll Costs must account for at least 60% of the loan forgiveness.

    - Calculation of the 60%/40% Reduction Basis:

        - As indicated above, the 60%/40% Reduction Basis is expected to be applied last. SBA's 6/11/20 IFR states that if less than 60% of the loan proceeds are used to pay Payroll Costs, a borrower will only be subject to a pro rata reduction in forgiveness.

        - Utilizing the formula set out in the Forgiveness Application (but replacing 75% with 60% and 25% with 40%), determine whether the 60%/40% Reduction Basis requires an additional reduction in the amount of loan forgiveness. The IFR states by way of example that if a borrower with a $100,000 PPP loan spends $54,000 (or 54%) on payroll costs during its forgiveness covered period, since it used less than 60 % of its loan on payroll costs, the maximum amount of loan forgiveness it may receive is $90,000 (with $54,000 in payroll costs constituting 60% of that amount, and $36,000 in nonpayroll costs constituting 40%).

- *Loan Forgiveness Reduction Avoidance: If my anticipated loan forgiveness is subject to reduction, can I avoid any of those reductions in the amount forgivable*?

  - *In general*.

    - As described above, three types of events can trigger a reduction in the amount of loan forgiveness: 1) the use of 40% or more of loan proceeds for non-Payroll Cost expenses, 2) a reduction in employee pay levels, and 3) a reduction in employee headcount.

    - However, the CARES Act, as amended, provides alternative means ("safe harbors") to avoid the loan forgiveness reductions that could result under the Headcount Reduction Basis and the Pay Level Reduction Basis.

    - In particular, the CARES Act, as amended, recognizes two "circumstances" in which otherwise mandated reductions in forgiveness will be avoided if headcount reductions or pay level reductions made during the period beginning on 2/15/20 and ending on 4/26/20 are eliminated by 12/31/2020.[5]

    - The PPP Flexibility Act also provides a further means/safe harbor to avoid the loan forgiveness reductions that could result under the Headcount Reduction Basis.

  - *Implementation of forgiveness reduction avoidance*.

    - In general. Under the SBA/Treasury forgiveness reduction avoidance interpretation, Path One avoids forgiveness reductions based on headcount reductions and Path Two avoids forgiveness reductions based on pay level reductions. As a result, if a dealer is facing loan forgiveness reductions based on both headcount reductions and pay level reductions, both forgiveness reduction avoidance Paths will need to be present for the dealer to fully benefit.

    - Application of the two circumstances that avoid forgiveness reduction under the SBA/Treasury interpretation. A description of the two Paths to avoiding forgiveness reduction follows.

      - Path One – Headcount. To use the first Path, a borrower needs to follow the formula set out in the Forgiveness Application. This would, in effect, take that borrower through the following three step evaluation:

[5] The provision of the CARES Act laying out these circumstances is subject to at least two interpretations as to how it will be implemented, and an earlier version of this analysis set out both interpretations. SBA/Treasury, however, has now clarified that what was identified as "the more conservative approach" in the earlier version is the one PPP borrowers will need to follow. Accordingly, the analysis in the text below walks dealers through the approach that SBA/Treasury has opted to follow.

    - Count the number of FTEs the borrower had on its payroll on 2/15/2020 (the "2/15 Number");
        - For purposes of this calculation, the Forgiveness Application provides that the number of FTEs on 2/15/2020 will be equal to the number of FTEs on the borrower's payroll during the pay period of which 2/15/2020 was a part.
    - Confirm that, at some point during the period beginning on 2/15/20 and ending on 4/26/20, the number of FTEs employed by the borrower dropped below the 2/15 Number; and
    - Ensure that the number of FTEs on the borrower's payroll is equal to or greater than the 2/15 Number by no later than 12/31/20.
    - If, by no later than 12/31/20, the number of FTEs on the borrower's payroll is equal to or greater than the 2/15 Number, then the borrower would not be subject to any forgiveness reduction based on headcount.

- Path Two – Pay levels. To use the second Path, a borrower needs to follow the formula set out in the Forgiveness Application for each employee on its payroll during the Covered Period (or Alternative Payroll Covered Period) This would, in effect, take that borrower through the following three step evaluation:
    - Determine what the rate of pay for that employee was on 2/15/2020;
    - Confirm that the rate of pay for that employee was reduced at some point during the period beginning on 2/15/20 and ending on 4/26/20; and
    - Ensure that, by no later than 12/31/20 the rate of pay for that employee (assuming he or she is still on the borrower's payroll) is equal to or greater than the rate of pay at which that person was paid on 2/15/20.[6]

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[6] There is a possible alternative interpretation of Path Two that would require this step to be restated as follows: "Ensure that each employee who was on the borrower's payroll on 2/15/20 is also on the borrower's payroll on 12/31/20 and ensure that as of 12/31/2020 the rate of pay for each of those employees is equal to or greater than the rate of pay at which that person was paid on 2/15/20." Of course, this alternative language would reduce the value of this avoidance path significantly. Until the SBA provides guidance, it is not possible to know which interpretation is correct.

    - If the circumstance described in the preceding bullet is true, then the borrower would not be subject to any forgiveness reduction based on pay levels.

    - <u>Unresolved issue</u>: The Forgiveness Application does not clearly address how borrowers are to perform pay level-based forgiveness reduction avoidance calculations for employees who voluntarily depart a borrower's employ during the Covered Period (or Alternative Payroll Covered Period) and are for that reason not on a borrower's payroll when the borrower's rehiring restoration is measured. This contrasts with the situation under Path One, where the Forgiveness Application addresses how to handle such departed employees.

- <u>New safe harbor created by the PPP Flexibility Act</u>. As noted above, the PPP Flexibility Act creates a new means to avoid the loan forgiveness reductions that could result under the Headcount Reduction Basis – a safe harbor based upon employee availability (the "Employee Availability Safe Harbor").

  - The Employee Availability Safe Harbor provides that a borrower's forgiveness will be calculated without regard to the Headcount Reduction Basis if:

    - the borrower can document that it is unable, on or before December 31, 2020, both:

      - to rehire terminated employees who were in its employ on 2/15/20; and

      - to replace those employees with other, similarly qualified individuals;

    – OR –

    - the borrower can document that during the period from 3/1/20 through 12/31/20 it was unable, due to its compliance with COVID-19 related safety, sanitation, or social distancing requirements or guidance established by the Department of Health and Human Services (HHS), the Center for Disease Control (CDC), or the Occupational Health and Safety Administration (OSHA), to return to "the same level of business activity" it had achieved prior to 2/15/20.

      - <u>Unresolved issue</u>: The PPP Flexibility Act does not indicate how or when the "level of business activity" for a given borrower should be measured or determined. Guidance from SBA/Treasury is expected.

- *<u>Loan Forgiveness Process and Documentation</u>*
    - The Forgiveness Application provides guidance on how the forgiveness process works.
        - Forgiveness applications must be submitted by borrowers to their lenders and not to the government.
            - **Practical Tip: It is recommended that borrowers hold off on applying for loan forgiveness until further guidance, including a revised Forgiveness Application, is issued by SBA/Treasury.**
        - <u>Unresolved issue</u>: Timing of forgiveness applications.
            - The PPP Flexibility Act is unclear as to whether a borrower that is subject to forgiveness reduction under either the Pay Level Reduction Basis or the Headcount Reduction Basis must wait until after 12/31/20 to file its forgiveness application if it wishes to avail itself of one or both of the two forgiveness reduction avoidance Paths described above.
            - In particular, guidance from SBA/Treasury is needed to determine whether those Paths require that the stated circumstances need to be satisfied "as of" 12/31/20 – which will result in borrowers having to wait until after 12/31/20 to file for forgiveness – or simply by "not later than" 12/31/20 – in which case applications will be timely as soon as the stated circumstances are fully satisfied.
            - The CARES Act, as amended, uses the phrase "not later than 12/31/20," but the SBA/Treasury guidance to date is less clear.
            - Note, however, that borrowers seeking to avail themselves of the new Employee Availability Safe Harbor will, by its terms, need to wait until after 12/31/20 to file their forgiveness applications.
    - The Forgiveness Application also lists many of the documents that borrowers will need both to submit with their formal applications and to retain for their own records.
        - Review carefully the documentation provisions of the Forgiveness Application.
        - The Forgiveness Application states that required documents must be preserved and retained for 6 years after a PPP loan is fully forgiven or paid in full.

**Practical Tips to Minimize Loan Forgiveness Reduction**

Based on the foregoing analysis, a dealer PPP loan borrower seeking to maximize its loan forgiveness should, to the extent possible, consider the follow practical tips:

1. Ensure that at least 60% of the loan proceeds used to pay permitted expenses are used for Payroll Costs and that no more than 40% are used for non-Payroll Costs.

2. Avoid reducing employee headcount or compensation during the Covered Period.

3. Headcount: Choose the Option that results in the lower number of AFTEs as the base number. If the average headcount at the end of the Covered Period is less than the base number, it may be possible to avoid any headcount-based forgiveness reduction if you restore any headcount reductions by 12/31/20.

4. Compensation: During the Covered Period (or Alternative Payroll Covered Period) avoid reducing the rate of compensation of any employee who earned less than $100,000 (annualized in 2019) by more than 25% of his or her rate of compensation in the first quarter of 2020. Also, it may be possible to avoid any pay level-based forgiveness reduction if you fully restore any rate of compensation reductions by 12/31/20.

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