PPP Loans: Use of Proceeds and Forgiveness
Updated as of July 9, 2020

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 (1) all guidance and application materials published by the Small Business Administration (SBA) and the Department of the Treasury (Treasury) as of the above date and (2) the Paycheck Protection Program Flexibility Act of 2020 (PPP Flexibility Act) that was signed into law on 6/5/20. 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 a borrower applies for PPP loan forgiveness. SBA/Treasury subsequently set a uniform 5-year maturity.
      - This applies to PPP loans originated on or after 6/5/20. PPP loans originated before 6/5/20 have a 2-year maturity unless the parties mutually agree to modify the loan to incorporate a 5-year maturity. The applicable maturity should be set out in the loan promissory note;
    - 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, effective 3/27/20.
      - Previously, the "covered period" ended on 6/30/20;
    - extending the similarly named but different "Covered Period" for forgiveness calculations from 8 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 an 8-week Covered Period or switch to 24-weeks, among the factors a PPP borrower should consider are (1) whether all loan proceeds have been spent, enabling it to apply for forgiveness prior to the end of the applicable Covered Period, (2) the degree to which it is satisfied that it has maximized its forgiveness entitlement, and (3) whether it has maintained, if not increased, both the number of workers it employs and their pay rates relative to the baseline measuring period**;

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

- providing for alternative forgiveness reduction relief in the event a borrower can document that it is unable, by 12/31/20, 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.

    - <u>Unresolved issue</u>: exactly how these reduction relief provisions apply to a borrower that is applying for forgiveness prior to 12/31/20;

- 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, it must begin making loan payments immediately thereafter.

    - <u>**Practical tip**</u>**: This deferral should provide a PPP borrower sufficient time to make all dispositive forgiveness decisions; and**

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

- *<u>Use of Loan Proceeds: For what expenses may the proceeds of PPP loans be used?</u>*

    - *<u>Expenses that are allowable uses</u>*. 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). Do not include payments made to independent contractors or sole proprietors.

            - 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.

                - <u>Unresolved issue</u>: 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.

                - <u>Unresolved issue</u>: 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.

                - <u>Unresolved issue</u>: Whether "other debt" applies to floorplan interest on inventory acquired on or after 2/15/20.

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[1] PPP proceeds may also be used for the other purposes generally allowed under SBA Section 7(a) programs. Again, at least 60% of loan proceeds must be used for Payroll Costs (and no more than 40% for Non-Payroll Costs).

- *Time period for allowed use*.

    - 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*. The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. But 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. Includes pay to furloughed employees and extra "hazardous" pay.

      - 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: Whether 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 the Covered Period has been extended from 8 to 24 weeks and that borrowers generally applied for loans equating to 2.5 times monthly payroll, it is expected that most dealers electing a 24-week period will have sufficient forgivable Payroll Costs to exhaust all of their PPP loan proceeds. The following Non-Payroll Costs are forgivable to the extent that they are deductible on IRS Tax Form 1040 Schedule C.

        - 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.
            - <u>Unresolved issue</u>: What "transportation" means in this context.
        - Interest (but only interest) on mortgages on real estate or personal property (originated before 2/15/2020). Excludes any pre-paid interest.
            - <u>Unresolved issue</u>: Whether a floorplan line of credit qualifies as a "mortgage on . . . personal property."

- *<u>Timing issues for forgivable uses</u>*.
    - <u>General</u>: 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 loan origination and ending on the earlier of (1) the date that is 24 weeks after the date of loan origination or (2) 12/31/2020 (the "Covered Period"). A PPP loan is considered to have been originated on the date of the disbursement of the funding of the loan.
        - 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.
            - **<u>Practical tip</u>: In deciding whether to retain an 8-week Covered Period or switch to 24-weeks, among the factors a PPP borrower should consider are (1) whether all loan proceeds have been spent, enabling it to apply for forgiveness prior to the end of the applicable Covered Period, (2) the degree to which it is satisfied that it has maximized its forgiveness entitlement, and (3) whether it has maintained, if not increased, both the number of workers it employs and their pay rates relative to the baseline measuring period**;
        - Alternative Payroll Covered Period: For administrative convenience, borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period (or for loans received before 6/5/20 at the election of the borrower, the eight-week (56-day) period) that begins on the first day of the first pay period following PPP loan disbursement. An Alternative Payroll Covered Period may not extend beyond 12/31/20.

                - **Note: it is expected that borrowers opting for a 24-week covered period *will not need* the flexibility provided by an 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 and how 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 and keep people on the payroll even if there was no work for those employees. 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 to which a PPP loan becomes a 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").

        - <u>Order of application of the forgiveness reduction bases</u>. In the Forgiveness Application (and instructions), the three reduction types are applied in the following order: first the Pay Level Reduction Basis, then the Headcount Reduction Basis, and finally the 60%/40% Reduction Basis.

- Application of the forgiveness reduction bases

    - Pay Level Reduction Basis

        - Generally, if an employee's pay level goes down during the Covered Period (or Alternative Payroll Covered Period) relative to an earlier measuring period by more than 25%, the dealer must reduce the level of forgiveness by a specific dollar amount.

        - 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 or wages used to assess reductions based on pay level in comparison to the levels paid during the Covered Period (or Alternative Payroll Covered Period).

            - Exclude employees 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).

                - Unresolved issue: How to calculate an average annual salary or hourly wage rate of employees on the payroll for only a portion of either the Q-1 of 2020, or the Covered Period (or Alternative Payroll Covered Period). It is likely that the averages may be based on time worked.

            - Utilizing the formula 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 total 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.

- A borrower applying for forgiveness prior to the end of a Covered Period (or Alternative Covered Period), must calculate Pay Level Reductions as if they occurred for the full Covered Period (or Alternative Covered Period).[2]

- <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 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 they elect 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).

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[2] *Example:* A borrower has a 24-week Covered Period. It reduces a fulltime employee's weekly salary from $1,000 per week during the reference period to $700 per week during the Covered Period. The employee continues to work on a full-time basis with an FTE of 1.0. The first $250 (25 percent of $1,000) is exempt from the loan forgiveness reduction. The borrower seeking forgiveness would list $1,200 as the salary/hourly wage reduction (the extra $50 weekly reduction multiplied by 24 weeks). If it applies for forgiveness before the end of the Covered Period, it must account for the salary reduction for the full 24-weeks ($1,200).

- 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 may be forgiven.

  - A borrower applying for forgiveness prior to the end of a Covered Period (or Alternative Covered Period), must calculate Headcount Reductions as if they occurred for the full Covered Period (or Alternative Covered Period).

  - In calculating 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, *do not operate to reduce a borrower's loan forgiveness.*

    - Unresolved Issue: Whether other employment termination scenarios may be similarly treated.

  - In calculating the loan forgiveness amount, a borrower may exclude any reductions under the Headcount Reduction Basis attributable to an individual employee if (1) it made a good faith, written offer to restore the reduced hours of such employee, (2) 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, (3) the offer was rejected by such employee, and (4) the borrower has maintained records documenting the offer and its rejection.

- **<u>Practical tip</u>: 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.**

- <u>60%/40% Reduction Basis</u>

  - 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.[3]

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

    - 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, determine whether the 60%/40% Reduction Basis requires an additional reduction in the amount of loan forgiveness. By way of example, 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%).

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

  - <u>*In general*</u>.

    - As described above, three events can trigger a loan forgiveness reduction: 1) a reduction in employee pay levels, 2) a reduction in employee headcount, and 3) the use of less than 60% of loan proceeds for Payroll Costs.

[3] Prior to the PPP Flexibility Act, this latter reduction basis conditioned forgiveness on at least 75% of loan proceeds being used for Payroll Costs. The PPP Flexibility Act provided that *no forgiveness* will be available if less than 60% of loan proceeds are used for Payroll Costs. SBA/Treasury 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.

- However, a borrower may qualify for alternative means ("safe harbors") to avoid the loan forgiveness reductions that could result under the Headcount Reduction Basis and the Pay Level Reduction Basis.

- The CARES Act recognizes two "circumstances" or "Paths" 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 no later than 12/31/2020.

- The PPP Flexibility Act added two new safe harbors that can be used to avoid Headcount Reduction Basis loan forgiveness reductions.

o *Implementation of forgiveness reduction avoidance*.

- In general. Under the SBA/Treasury forgiveness reduction avoidance interpretation, Path One avoids Headcount Reduction Basis forgiveness reductions and Path Two avoids Pay Level Reduction Basis forgiveness reductions. For borrowers facing both types of loan forgiveness reductions, both avoidance Paths must be present to fully benefit.[4]

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

    - 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 number of FTEs on 2/15/2020 is the number of FTEs on the borrower's payroll during the pay period in which 2/15/2020 fell.

    - 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

[4] The provision of the CARES Act laying out these Paths is subject to at least two interpretations as to how it will be implemented, including one that provides that both Headcount-based forgiveness reductions and Pay Level-based forgiveness reductions may be avoided if *either* of the two Paths are present. As noted, SBA/Treasury has now clarified that, in their view, a more conservative approach 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. Nonetheless, dealers should be aware of this alternative interpretation in the event a dealer ends up with both types of forgiveness reductions but only meets one of the avoidance Paths and, as a consequence, wishes to assert the alternative interpretation in defense of its forgiveness application.

  - Ensure that the number of FTEs on the borrower's payroll is equal to or greater than the 2/15 Number by the date of the Forgiveness Application or by not 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 is not be subject to any forgiveness reduction based on headcount.*

- <u>Path Two – Pay Levels</u>. 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 an employee's rate of pay on 2/15/2020;

  - Confirm that the employee's rate of pay was reduced at some point during the period beginning on 2/15/20 and ending on 4/26/20; and

  - Ensure that, as of the date of its Forgiveness Application or by not later than 12/31/20, the employee's rate of pay (if still on the borrower's payroll) is equal to or greater than on 2/15/20.[5]

  - *If the circumstance described in the preceding bullet is true, the borrower is not be subject to any pay level basis forgiveness reductions.*

    - <u>Unresolved issue</u>: How borrowers are to perform pay level basis 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 employed 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.

[5] A possible alternative interpretation of Path Two 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 the earlier of the date of the Forgiveness Application or 12/31/20 and ensure that, as of that date, 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. SBA/Treasury is expected to follow the approach outlined in the text, but until guidance is provided, the correct interpretation is uncertain.

- <u>Employee Availability and Business Activity Safe Harbors</u>. As noted above, there are two additional means to avoid the loan forgiveness reductions that could result under the Headcount Reduction Basis – a safe harbor based upon employee availability and one based on business activity.

    - 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 12/31/20, both:

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

            - to replace them with similarly qualified individuals.

        - The borrower must inform the applicable state unemployment insurance office of any employee's rejected rehire offer within 30 days of the employee's rejection of the offer. Documents the borrower should maintain to show compliance with this exemption include, but are not limited to, a written offer to rehire, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual.

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

        - the borrower, in good faith, documents that it was unable to operate, between 2/15/20 and the end of the Covered Period (or Alternative Payroll Covered Period), at the same level of business activity as before 2/15/20 due to compliance with requirements established or guidance issued between 3/1/20 and 12/31/20 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, and/or the Occupational Safety and Health Administration, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19; and

        - the borrower certifies and documents, in good faith, that its reduction in business activity stems directly or indirectly from compliance with such requirements or guidance.

            - Indirect compliance includes compliance with state or local government shutdown orders that are based at least in part on guidance from one of the three federal agencies.

        - Such documentation may include copies of the applicable requirements or guidance for each business location and relevant borrower financial records.

- *Loan Forgiveness Process and Documentation*
    - The Forgiveness Application (Form 3508) provides guidance on how the forgiveness process works. Borrowers may not apply for forgiveness until all loan proceeds are spent but should apply no later than 10 months following the end of their forgiveness covered period to avoid having to make principal and interest payments on the loan.
        - Forgiveness Applications must be submitted by a borrower to its lender.
        - The lender has 60 days to review and submit to SBA for full or partial approval.
        - SBA has 90 days to act and issue a notice to the lender and borrower. Whatever is not approved becomes a PPP loan.
        - A borrower may request a review within 30 days after receipt of SBA decision.
        - SBA may review a borrower's loan by providing a notice to the borrower. The borrower must provide information to SBA upon request.
        - A borrower subject to forgiveness reduction under either the Pay Level Reduction Basis or the Headcount Reduction Basis need not 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.
            - Instead, the Forgiveness Application contemplates that a borrower will make its forgiveness reduction avoidance determinations by "not later than" 12/31/20 – in which case its Forgiveness Application will be timely as soon as the stated circumstances are fully satisfied. **But,** a borrower that seeks to avail itself of the Employee Availability Safe Harbor will, by its terms, need to wait until after 12/31/20 to file its Forgiveness Application.
    - SBA/Treasury have also issued a simplified EZ Forgiveness Application (and instructions).
        - To qualify to use this form, borrowers must make two showings: one related to there being no Pay Level Basis reductions and the other related to the Headcount Basis reduction safe harbors.
        - Dealers should refer to the specific requirements in the EZ Forgiveness Application instructions to determine whether they qualify.

- The Forgiveness Application lists many of the documents that borrowers must submit and to retain for their own records.

    - Borrowers should review carefully the documentation provisions of the Forgiveness Application. 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. However, 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.