

**PPP Loans: Do Businesses Owned By Large Companies Qualify?**  
**NADA Preliminary Guidance**  
**April 29, 2020**

***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). However, as with all of the analyses NADA has issued in connection with the CARES Act, 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 April 23, 2020, the SBA and Treasury issued [a new FAQ 31](#) regarding the implementation of the CARES Act Paycheck Protection Program (PPP) that has injected considerable uncertainty into the loan qualification and application process. SBA and Treasury compounded this ambiguity by issuing a cryptic follow-up [FAQ 37](#) on April 28, 2020. In issuing these FAQs, the government was acting largely in response to media stories focused on the fact that some very large, publicly traded businesses were apparently eligible (and qualifying) for loans under the PPP. Here are the questions the government presented and the answers it gave in response:

*Question 31: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

*Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.*

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*Question 37: Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

*Answer: See response to FAQ #31.*

In reaction to these FAQs, several dealers and their advisors have asked about how the foregoing governmental guidance applies to their PPP applications and loans. Foundationally, it is important to keep in mind that the PPP purposefully aims to incentivize a business concern to keep on – or bring back to – its payroll employees that it would otherwise let go or furlough. Thus, whether and to what extent a PPP borrower has determined that, in the absence of a PPP loan, it needs to terminate or furlough employees to ensure that it can weather the pandemic and be capable of re-employing those people in the long run, is highly relevant to any evaluation of the bona fides of the borrower's certification of necessity that is at issue in FAQ 31.

It is also important to note (as FAQ 31 does) that the PPP casts aside the time-honored “no credit elsewhere” test traditionally applied to SBA loan applications. Under that test, SBA loans are unavailable to applicants with access to funds from other credit sources. The PPP, however, expressly employs a much looser standard – namely, the requirement that the borrower certify that the “[c]urrent economic uncertainty makes this loan request necessary to support [its] ongoing operations.” The absence of the “no credit elsewhere” test generally means that a borrower can qualify for a PPP loan even if some form of alternative credit is available to it and thus should inform what a borrower is certifying to when it confirms that the current uncertainty makes the loan request necessary to support ongoing operations.

The specific language of the question posed by FAQ 31 is also instructive. In particular, it asks: “Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?” (Emphasis added.) This suggests that SBA and Treasury are focused on certain entities with greater access to capital, notably publicly traded companies. (They are also focused on companies owned by private equity firms. An [Interim Final Rule](#) issued on April 24, 2020 references the necessity certification when discussing the holdings of private equity companies.) Importantly, the only example that FAQ 31 gives of a situation where the borrower may not be able to make the required certification is that of a large publicly traded company with ready access to capital markets. Specifically, the FAQ states that “*it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.*”<sup>1</sup> As a general matter, both publicly traded companies and private equity firms have access to sources of capital that are typically unavailable to traditional dealers. Privately held dealerships cannot rely on public capital markets to sell stocks or bonds or issue commercial paper. Instead, the average dealership typically relies on individual loans from banks or captive finance companies to obtain the working capital that is essential to operate a franchised dealership. Moreover, virtually all of these loans are collateralized and contain cross-default clauses that exacerbate financial stress within a dealership during a severe, unexpected downturn in revenue.

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<sup>1</sup> This focus on size was reiterated in an [April 28 SBA/Treasury press release](#) stating that PPP loans over \$2 million will be subject to special scrutiny. A \$2 million loan translates into an annual payroll of a little less than \$10 million and data provided to NADA suggests that the payroll of a typical dealer is about half that amount.

To be sure, the issuance of FAQ 37 casts some doubt on whether the focus of SBA and Treasury in this context is limited to the large companies with special access to capital discussed in FAQ 31. FAQ 37 can be read in two ways:

- Its reference to FAQ 31 can be read to expand FAQ 31's reach to include smaller private companies.
- At the same time, that reference can also be read to inform the reader that the exclusion of smaller and private companies from FAQ 31 was intentional and consequential.

Unfortunately, it is not clear which of these interpretations was intended. NADA has requested clarification.

Finally, FAQ 31 indicates that, in making the required certification, borrowers should take into account both *"their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business."* (Emphasis added.) This suggests that a PPP applicant need not access otherwise available capital if doing so would be detrimental to the business. Whether this is the same thing as making a prudent business judgment to terminate or furlough employees rather than drain a business's cash and capital reserves or lines of credit is an open question, but there certainly is an argument that it is.

The foregoing analysis attempts to highlight some of the questions that FAQ 31 presents and to provide some ways of thinking about those questions.<sup>2</sup> However, without further guidance on this matter, there are no generally-applicable, clear-cut answers to these questions. For example, among the questions that remain unanswered include (1) whether the required "necessity" certification was made in good faith is measured at the time the PPP loan application was made, (2) whether in order for a loan to be "necessary to support ongoing operations" a business concern would need to be facing permanent closure and liquidation in the absence of a PPP loan, and (3) what types of liquidity sources – sources with which the borrower currently has an existing relationship? sources that have previously committed to fund the borrower? new sources that are not currently committed to fund the borrower and whose willingness to do so is untested or unknown? – need to be considered in determining whether the business concern has "adequate sources of liquidity to support the business's ongoing operations." NADA is seeking guidance from SBA on these questions as well as others.

Ultimately, whether the required PPP loan application certification can be (or was) made in good faith by a particular dealer requires an individual decision informed by that dealer's individual circumstances. This was true before FAQ 31 came out, and it remains true today. As always, dealers are encouraged to consider these individual questions with the assistance of their legal and other professional advisors.

Finally, for a dealer-applicant who previously had made the certification regarding the necessity of a PPP loan but has since changed its mind, FAQ 31 indicates that disbursed PPP loan funds may be repaid by May 7, 2020 without consequence.

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<sup>2</sup> The analysis found [here](#), while not specific to franchised dealers, may also provide valuable insights on the subject matter of this memo.