House and Senate considering bills to enhance flexibility for PPP borrowers, including by extending forgiveness period

22 May 2020 (revised as of 28 May 2020)

Since its rollout on 3 April 2020, the Paycheck Protection Program (PPP or the Program) has issued loans totaling more than US$510 billion to roughly 4.3 million businesses. After exhausting its initial capitalization of US$349 billion, the PPP was replenished on 24 April 2020, with an additional US$310 billion. Owing to the Program's popularity, a bipartisan consensus has emerged around maintaining its viability. According to a report released by Treasury, about 70% of second-round PPP loans approved between 27 April and 1 May were for amounts of US$50,000 or less, and the overall average size of a Program loan, as of 1 May, was just US$79,000.

The House of Representatives and Senate are each taking action in the near term on separate pieces of legislation intended to strengthen the Program. Given significant overlap in these bills, broad bipartisan support, and the pressing need for Program revisions, in particular with respect to the forgiveness period, there appears to be a good chance that the House and Senate will agree soon on a compromise package.

House of Representatives

H.R. 7010, the Paycheck Protection Program Flexibility Act, sponsored by Representatives Dean Phillips (D-MN) and Chip Roy (R-TX), passed the House of Representatives by a vote of 417-1 on 28 May 2020. Rep. Phillips secured a commitment from the House Democratic leadership that the legislation would receive a vote on the House Floor in exchange for him supporting the Heroes Act, an economic stimulus measure, which passed the House on 15 May.

If enacted, the Paycheck Protection Program Flexibility Act would:

- Allow PPP borrowers to obtain forgiveness of covered expenses for a period ending the earlier of (i) twenty-four weeks from the date of loan origination or (ii) 31 December 2020, rather than eight weeks;
    - Borrowers receiving loans prior to the date of enactment of the proposed legislation may elect for the covered period of the loan to last only for the initial eight-week period;

- Expand the cap on non-payroll expenses (interest payments on mortgages, rent, or utilities) to 40% rather than 25% of PPP loan proceeds, meaning that borrowers are required to spend only 60% of the loan proceeds on payroll expenses;
- Extend the borrowers' PPP loan terms from two years to a minimum of five years;
- Extend the "covered period" in which prospective borrowers can apply to the program from 30 June 2020 to 31 December 2020;
- Calculate loan forgiveness without regard to a proportional reduction in the number of full-time equivalent employees if the borrower can document an inability to restore previous employment and operating levels that existed as of 15 February 2020;
- Change the mandatory deferral period by when borrowers must pay any interest and principal on the loan from 6 months to the date on which SBA makes a loan forgiveness determination, or, if borrowers do not apply for loan forgiveness within ten months of the earlier of (i) the end of the twenty-four or eight-week loan forgiveness periods, as applicable, or (ii) 31 December 2020, then repayment is deferred ten months from that earlier date;
- Ensure borrowers' full access to payroll tax deferment for businesses that take PPP loans; and
- Extend the rehiring deadline for PPP borrowers to offset the effect of enhanced unemployment insurance payments from 30 June 2020 to 31 December 2020.

Each of these elements will enhance borrower flexibility in using and obtaining forgiveness for PPP loans. Notably, with the exception of loan terms being extended from two to five years, the legislation would appear to apply retroactively to loans already issued prior to the date of enactment. The bill would not, however, increase the overall size of the program or respective authorized loan amounts.

H.R. 6886 has gained over 60 bipartisan co-sponsors and is expected to pass the House on a strong bipartisan basis. In the Senate, a bipartisan group of Senators has introduced a companion version of the legislation. Major trade associations representing small businesses support both versions of the legislation.

Senate

A new bill proposed by Senators Marco Rubio (R-FL), Chairman of the Small Business Committee, Ben Cardin, Ranking Member of the Small Business Committee (D-MD), Susan Collins (R-ME) and Jeanne Shaheen (D-NH) seeks to expand the Program in a number of ways. S.3833, the "Paycheck Protection Program Extension Act," would extend the "covered period" in which applicants can apply for PPP loans from 30 June 2020, to 31 December 2020 to better mirror the duration of mandated business shutdowns. According to a draft version of the legislation distributed by the sponsors, the bill would also adapt the program to conform to present economic circumstances by:

- Doubling the current eight-week period during which businesses must use PPP loan proceeds to 16 weeks in order to have those amounts forgiven;

- Clarifying that borrowers who have maintained payroll for 8 weeks will not lose loan forgiveness due to the extension of the program to 16 weeks, meaning that PPP borrowers with existing loans may use the additional 8 weeks toward their loan forgiveness;
- Allowing borrowers to use loan proceeds for “covered worker protection expenditures,” which will allow businesses to invest in protective equipment and fixtures to facilitate safe working environments. Examples of these expenditures include creating or expanding a drive-through window, physical barriers such as sneeze guards, ventilation system upgrades, and onsite or offsite health screening capabilities, among other measures; and
- Clarifying that lenders are not held liable for the borrower certification and documentation they provide when applying for a PPP and subsequent forgiveness. Additionally, lenders who followed PPP guidance released by SBA/Treasury are not held liable for doing so if that guidance changed.

Like the House bill, the Senate bill would provide greater flexibility to borrowers. Unlike the House bill, however, the Senate bill does not apply all changes retroactively.

The Senate began hotlining the bill on the afternoon of 21 May (a process by which the Senate majority and minority check their members for objections to eventual passage by Unanimous Consent). As timing begins to become a factor for early PPP participants approaching the end of their 8-week loan forgiveness period, we expect the Senate to pass this bill in near term. It is possible that the Senate could pass the bill during a pro forma session between now and 1 June. This would take a unanimous consent agreement. However, it is more likely that the Senate will pass the bill once it resumes legislative activities on 1 June. Once this occurs, the advent of remote proxy voting should enable a timely vote on passage on the House side as well.

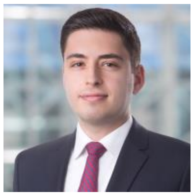
On a related but separate note, the Senate passed by Unanimous Consent S. 3782, a bill providing a technical fix for the lending cap for general business loans authorized under section 7(a) of the Small Business Act (15 U.S.C. 636(a)). The CARES Act created a combined authorized lending cap for PPP loans and the already existing 7(a) loan program, rather than creating separate caps. S. 3782 would revert the 7(a) program, excluding PPP, to the US$30 billion lending cap set under Title V of Division C of the Consolidated Appropriations Act, 2020 (Public Law 116–93).

Contacts

James M. Wickett
Partner, Washington, D.C.
T +1 202 637 6422
james.wickett@hoganlovells.com

Aaron Cutler
Partner, Washington, D.C.
T +1 202 637 5648
aaron.cutler@hoganlovells.com

Ari Fridman
Senior Associate, Washington, D.C.
T +1 202 637 5449
ari.fridman@hoganlovells.com



Victor A. Ghazal
Associate, Washington, D.C.
T +1 202 637 5433
victor.ghazal@hoganlovells.com

Charles Kolo Rathburn
Associate, Washington, D.C.
T +1 202 804 7791
kolo.rathburn@hoganlovells.com