LANE POWELL

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Did We Say Eight Weeks? Congress Reconsiders Key PPP Terms in More Alphabet Soup Bills — PPFA, PPP DEALS and RESTART

COVID-19 Resource

A flurry of bills are being introduced in Congress to expand, revise or re-imagine the Paycheck Protection Program (PPP). The one we are betting on becoming law in the immediate future is the bipartisan Paycheck Protection Flexibility Act (undoubtedly to be nicknamed the PPFA). The PPFA, as it stands now (subject to change without notice) proposes expanding the current eight-week forgiveness period, continuing employer deferral of Social Security taxes after forgiveness, and extending the re-hiring deadline.

Our optimism that Congress will return to bipartisan agreement about the PPP derives from recent testimony to Congress by Fed Chairman Powell saying that the outlook for the COVID-19 devastated American economy remains “highly uncertain and subject to significant downside risks.” We believe this sent the message that all stimulus efforts to today could be squandered if Congress doesn’t do more soon to help the economy. Plus, upcoming elections this November helps ensure that virtually all of Congress (and the White House) is more focused on helping than limiting deficits.

There are several proposed bills floating around, including those contained in the HEROES Act, which we discussed here. Some of the proposals offer altered versions of the PPP, though most iterations contemplate continuation of the current PPP with some enhancements for borrowers, albeit without much additional funding. Although there are many versions of the proposals for a new and improved PPP, there are five thematic variations in the PPFA that seem to be included in legislative proposals coming from both sides of the aisle, and thus that are likely to actually become law. We examine those five themes after a quick refresher of the relevant PPP law (and lore).

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Eric J. Kodesch
kodesche@lanepowell.com

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How We Got Here: Five Themes Under Examination

1. *Eight-Week Forgiveness Period*. Our readers are no doubt aware, and as we discussed in this article, that the CARES Act provides that PPP loans could be forgiven to the extent qualified expenses were incurred during the eight-week period following receipt of the loan. At the time the CARES Act passed, Congress anticipated a relatively brief shutdown period, and so the eight-week forgiveness period made sense because the purpose of the PPP loan was to encourage employers to maintain their payroll at pre-COVID-19 levels.[1] The eight-week period also made sense because the PPP loan was two-and-a-half times average monthly payroll from 2019 – as the SBA explained in its first of twelve interim final rules (IFR), 75 percent of the PPP loan would cover payroll at the 2019 level, leaving 25 percent for the other forgivable costs. Expenditures past eight weeks were considered above and beyond both what was necessary to ride out the shutdown and what Congress funded. Any portion of the loan not used during the forgiveness period would be repaid at low interest over a period not to exceed 10 years.

2. *PPP vs. Deferral of the 6.2 Percent Employer Portion of Social Security Tax*. The CARES Act contained several stimulus provisions. Although the PPP loan was the most beneficial for many small businesses, the CARES Act also allowed businesses to defer paying the 6.2 percent employer portion of social security taxes otherwise due between March 27 and December 31, to December 31, 2021 (half) and December 31, 2022 (other half). This is essentially an interest-free loan. However, the CARES Act provides that this deferral is not available to a business that has had a PPP loan forgiven. As we discussed in the article, the IRS has explained that forgiveness of a PPP loan prevents further deferrals. The employer portion of social security taxes deferred until forgiveness remain deferred until the end of 2021 and 2022.

3. *Deadline to Re-hire Employees and Restore Compensation.* The CARES Act provides that a business potentially suffers a reduction in forgiveness if the business reduces headcount or compensation during the eight-week period. However, Congress provided a safe harbor for a business to avoid either or both reductions by restoring the decrease in headcount or compensation by June 30. As we discussed, in this article, the PPP loan forgiveness application generally provides business-friendly rules for all of these calculations. Still, reductions in forgiveness remain possible, and the safe harbor is not available as a practical matter for some businesses.

4. *Two Year Loan Maturity*. In the first IFR and many of the PPP loan FAQs, the SBA, and the Treasury Department of which the SBA is a part, used their regulatory authority to "adjust" PPP loans in ways that the CARES Act did not necessarily contemplate. (That assessment is from the SBA's Inspector General, not (just) us.) The SBA limited the repayment period to two years for amounts not forgiven. We believe that discretion was squarely within the Treasury's grant of administrative authority to provide repayment terms of up to 10 years for amounts not forgiven, as was their discretion to set the interest rate at one percent (below the four percent maximum allowed by the CARES Act).

5. *25 Percent Cap on Forgivable Non-Payroll Cost Qualifying Expenses*. The SBA also limited forgiveness for non-payroll costs (rent, mortgage interest and utilities) to 25 percent of the total forgiveness. In other words, borrowers were "rewarded" with $1 of forgiveness of qualifying non-payroll costs for every $3 spent on payroll costs. In IFR 2(o) and 2(r), the SBA provided lengthy justifications for this limitation (perhaps they doth protest too much). Although the 25 percent cap for qualifying non-payroll costs had absolutely no foundation in the enabling legislation, we believe that it was a reasonable policy decision given that the program was designed to protect paychecks, not just commercial landlords, utility companies and mortgage lenders. Further, the SBA did not choose 75 percent at random – eight weeks is about 75 percent of the two-and-a-half-month period used to determine the loan.

Where We Seem to Be Going to Change Those Five Themes

The legislative proposals that seem to have the most bipartisan support alter some or all of the program themes discussed above. The PPFA in the House contains the broadest modifications. Dueling bills introduced in the Senate, the PPP DEALS Act and RESTART Act, offer higher-quality acronyms but more moderate changes.[2]

- First, Congress wants to expand the Eight-Week Forgiveness Period. Both the PPP Deals Act and the RESTART Act propose an additional eight weeks, though the RESTART contains a means test, a favorite trope of many bipartisan bills. Not to be outdone, the PPFA proposes an additional 16 weeks, for a total of 24 weeks. Extending the forgiveness period addresses growing concerns about the potential duration of economic hardship as state lockdowns continue or are slowly unwound. For many PPP borrowers, such an extension potentially doubles or triples the value of loan forgiveness.

  Treasury and the SBA have been reluctant to extend or expand the

Eight-Week Forgiveness Period on their own. We believe this stems from at least two sources. First and foremost, Treasury likely felt it lacked authority to do so given the explicit statutory eight-week requirement. It is one thing to use 2019 payroll to determine the PPP loan amount, instead of the statutory trailing 12 months – which, we note, greatly simplified calculations for businesses and the banks. Ignoring the clear statutory eight-week limitation is another matter. Second, Treasury likely was reluctant to expand the Eight-Week Forgiveness Period precisely because it wanted to encourage borrowers to maintain their payrolls even though (or precisely because) they might be closed – rather than covering a borrower's payroll only after they reopened.

It is easy to understand why a PPP borrower that was partially or fully closed (e.g., most restaurants) would prefer to furlough their employees and let them claim (enhanced) unemployment benefits until they could again reopen – and only then use their forgivable PPP funds to cover payroll. It is above our pay grade to say whether the PPP was intended to encourage employers who were shut down to continue payroll or whether it was intended to help all "small" businesses survive the pandemic-induced economic trauma. But what Congress did in the CARES Act it can certainly undo soon. In addition to extending the eight weeks to at least 16 weeks, we are intrigued by another variation being considered: allowing borrowers to choose any eight weeks during the 24 week period following receipt of their PPP loan for purposes of calculating forgiveness.

- Second, PPFA would allow businesses to continue deferring the employer portion of social security taxes after forgiveness. This allows businesses to continue to put cash in their pockets (more accurately, keep the cash in their pockets) well after the eight, 16 or 24 week period with an interest-free loan.

- Third, PPP DEALS extends the re-hiring deadline out to 16 weeks after PPP loan origination. PPFA extends the deadline through the end of July. Depending on when a borrower received its loan distribution, it might do better or worse under the different legislative alternatives, but every borrower should have greater opportunity to maximize forgiveness than under existing law.

The next two legislative proposals may seem unnecessary given the bipartisan and White House support because they can be changed by the SBA itself. However, because the SBA has not reversed course yet, it appears that the SBA is waiting for a push from Congress:

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1. Elimination of the regulatory forgiveness cap of 25 percent for non-payroll costs.

2. Two-year loan maturity for amounts not forgivable. We are more skeptical about this change, as it would require amending all of the PPP loans issued to date.

It is unclear if Congress will be able to reach a consensus on revisions to the PPP. After all, the party-line vote in the House on the HEROES Act may demonstrate a return to partisanship. Further, the Senate just adjourned for its Memorial Day recess without taking action on this. We will have to see if any of these bills become a law, and what it looks like when it does.

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1 The benefits to our country from reducing furloughs and layoffs were obvious, including reducing pressures on already overwhelmed state unemployment departments, keeping more Americans covered by their employer-sponsored health insurance during a pandemic, making it easier to restart the economy when the virus subsides and minimizing the impact of the virus on tens of millions of workers who might otherwise have been laid off. Borrowers that spent their PPP on qualified expenses could count on loan forgiveness, effectively turning their PPP loans into grants.

2 At the time of publishing, the full text of RESTART was unavailable.