## *Policy Resolution Group COVID-19 Legislative Update*

## *May 26, 2020*

With the Senate out of session, all eyes are on the House this week as lawmakers work to pass a standalone Paycheck Protection Program (PPP) reform bill. Our update apprises you of these developments, in addition to discussing new Phase 4/CARES 2 proposals.

Our Agency Report contains information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with updates for the Department of Justice and Food and Drug Administration.

### ***This Week (Like Every Week) Is PPP Week***

**Thursday House vote.** The House plans to vote this Thursday on the *Paycheck Protection Program Flexibility Act* (PPPFA), based on legislation authored by Reps. Dean Phillips (D-MN) and Chip Roy (R-TX). Rep. Phillips negotiated a vote on this PPP fix bill in exchange for his *HEROES Act* support.

- **Technically a new bill.** In an illustration of the politics at play, Democrats insisted on re-introducing the measure as a Phillips-led bill, relegating his Republican counterpart to original cosponsor status. The new bill is substantially similar, with changes limited to technical tweaks in the forgiveness section.
    - H.R. ?: *Paycheck Protection Program Flexibility Act of 2020* (Bill Text)
- **Roll call expected.** In spite of safety concerns, and wide bipartisan support, the Thursday vote is expected to be a recorded vote.
    - A strong number (substantially better than the 2/3 required under suspension of the rules) would bolster House leverage in the lower chamber's talks with the Senate.
    - Consideration of the *TRUTH Act*, a Phillips-led PPP disclosure measure, is also expected, though it lacks the requisite GOP support for passage.
- **Bill contents.** Our previous updates have discussed the bill's provisions. As a refresher, the PPPFA would make the following changes:
    - **8-week forgiveness window.** Extends the loan forgiveness period from eight to 24 weeks.
        - Allows existing recipients to elect to keep the eight weeks if they prefer.

    - **75-25 forgiveness rule.** Prohibits SBA from limiting the non-payroll portion of the loan eligible for forgiveness, thereby repealing the existing rule requiring that 75 percent of the funds be used on payroll costs.

    - **Rehire deadline.** Extends the exemption for re-hiring workers (currently June 30, 2020) to the end of the year.

        - The bill also expands this exemption to loan recipients that are unable to return to the level of business activity that they were operating at on February 15, 2020.

    - **Payroll tax deferral.** Allows full access to payroll tax deferral for businesses receiving PPP loans.

    - **Loan maturity.** Increases loan maturity from two to five years.

        - Banks have expressed reservations to this change because it would create paper work discrepancies for existing loans, but such concerns are mitigated by the flexibility provisions helping to ensure full forgiveness, and the likelihood that SBA and Treasury could accommodate a fix administratively.

            - While they currently prefer the Senate version, which contains new language holding lenders harmless, financial industry opposition is not strong enough to cause them to oppose the House bill.

**Meanwhile in the Senate.** As we discussed last week, Senators Marco Rubio (R-FL), Susan Collins (R-ME), Ben Cardin (D-MD), and Jeanne Shaheen (D-NH) introduced their own PPP bill, the *Paycheck Protection Program Extension Act*. Our previous update discusses the details of this legislation.

- **Notable differences.** The chief distinction between the approaches taken in each chamber is that the Senate bill includes a narrower extension of the covered period (16 weeks versus 24 in the House bill) and remains silent on the 75-25 rule, which the House seeks to remove. Additionally, the House bill would allow payroll tax deferral, while the Senate bill would broaden allowable uses to personal protective equipment (PPE) and other COVID-/safety- related operating expenses.

- **Timing.** Senators on both sides of the aisle voiced objections to the Senate bill, keeping it in limbo as the chamber left for recess.

    - It is possible that the Senate could move its PPP fix legislation during a pro forma session this week.

    - Short of pro forma action, Senators could instead take up the PPPFA House bill when they return next week, assuming successful House passage.

**Squaring the circle.** Both chambers (and both parties) are committed to fixing the PPP covered period before it begins to expire for the earliest loan recipients in the coming weeks.

- **Hoyer expresses optimism.** House Majority Leader Steny Hoyer (D-MD) told reporters today that the two chambers broadly agree: “There is a general consensus, both House and Senate, that the time frame was set way too short.”

- **On the differences between the bills.** "There's not much difference in terms of the weeks – eight weeks."

- **On the Senate taking up the House bill.** "I would hope that the Senate would pass it. I talked to Senator Cardin yesterday, he believes that would be an acceptable alternative."

    - While we think it is unlikely that the Senate would simply swallow the House bill in its current iteration, you could see a compromise sorted out in the interim that the Senate could consider and send back.

- **Primary sticking point.** What to do about the 75-25 rule.

    - As we previously noted, GOP Senators, while open to reform of the 75-25 rule, do not support its elimination. Senator Rubio said that while this rule is not something Congress put in the law, there needs to be a minimum threshold:

        - "It was going to be some standard. It was going to be more than 50 percent no matter what. Because this is the paycheck protection [program]."

    - The rule was left unaddressed in the pending Senate legislation because the bill was crafted to win unanimous support. Now that unanimous consent is no longer an issue, the Senate has a broader range of motion.

    - **Splitting the baby.** While Treasury Secretary Steven Mnuchin has drawn a hard line on the 75-25 rule he and the SBA Administrator created, he is likely to agree to something between 75 percent and the 50 percent floor mentioned by Senator Rubio. We expect this to land somewhere around 60 percent, which, when combined with the additional flexibility in the timeframe, would allow the vast majority of businesses to qualify for full forgiveness.

**Big picture context: The trickle continues.** The woes of the broader program continued this week, with PPP outlays again diminishing overall, this time by $2 billion, meaning cancelled or returned loans once again outstripped new issuance despite more than 85,000 additional loans on net. While the reforms under consideration are critical for current recipients laboring under unworkable rules, the fixes may be even more important in terms of broadening the utility of the program for restaurants, hotels and other industries that have stayed disproportionately on the sidelines despite being ravaged by the pandemic. Done correctly, flexibility legislation can help stanch the current bleeding while giving the program a jolt of momentum it desperately needs.

- Paycheck Protection Program (PPP) Report—Approvals Through 5/23/20

**More Forgiveness Guidance.** Treasury and SBA on Friday evening released two new interim final rules (IFRs) related to PPP forgiveness procedures and review thereof. This comes on the heels of the loan forgiveness application released last week, which many deemed insufficient.

- Interim Final Rule on Loan Forgiveness (5/22/2020)

- Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities (5/22/2020)

## ***Phase 4/CARES 2 Developments***

**McConnell on Phase 4/CARES 2.** Back in the commonwealth of Kentucky, Senate Majority Leader Mitch McConnell (R-KY) acknowledged that there will likely be another phase of COVID-19 stimulus.

- "So many of you are asking, 'What next?' I think there's likely to be another bill, it will not be the $3 trillion that the House passed the other day, but there's still a likelihood that more will be needed."

- In response to a question of if Leader McConnell would agree to the *HEROES Act* in exchange for liability reform, the Leader responded unequivocally:

    - "No, no. We're not going to be doing a $3 trillion bill, that won't happen. No, that isn't going to happen."

**White House messaging.** The White House has begun to converge on a set of policy ideas that it will push to be included in any Phase 4/CARES 2 package. White House economic adviser Kevin Hassett told the *Wall Street Journal* that plans include a payroll tax cut and a capital-gains holiday:

- "It looks like the economy is picking up at a very rapid rate… In which case we could potentially move on to other things that the president has mentioned, like the payroll tax cut and potentially even a capital-gains holiday."

- The President himself previously tweeted a rough outline of the Administration's priorities:

    - "Well run States should not be bailing out poorly run States, using CoronaVirus as the excuse! The elimination of Sanctuary Cities, Payroll Taxes, and perhaps Capital Gains Taxes, must be put on the table. Also lawsuit indemnification & business deductions for restaurants & ent.."

While the White House is more of an arbiter of the federal response than a driver, its public messaging remains a useful directional indicator of the Administration's priorities, and its sense of urgency. In this case, they remain oriented toward getting the country back to work, and resistant to any legislative measures that would maintain the status quo.

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# *Policy Resolution Group COVID-19 Legislative Update*

## *May 22, 2020*

Today's update provides insight from Bracewell/PRG Principal Liam Donovan on the state of play for Paycheck Protection Program (PPP) reforms and what to expect moving forward with the next phase of COVID-19 relief.

Our Agency Report contains information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with updates for the Department of Agriculture and Small Business Administration.

### ***PPP Reforms***

Reforms to the PPP have dominated the headlines, and for good reason—small businesses represent an essential aspect of the economic recovery. Bracewell/PRG Principal Liam Donovan closely tracks the issue and below you will find his insights on the current PPP reform debate and what to expect for the next phase of stimulus. As events rapidly evolve, you can also see Liam's analysis in real time via his Twitter @LPDonovan.

**False start for Senate PPP fix.** Yesterday, a bipartisan group of senators led by Small Business Committee Chairman Marco Rubio (R-FL) introduced a PPP fix bill (S. 3833) that would most notably extend the covered period for PPP loans from the current 8 weeks to 16 weeks, affording businesses more time to re-open, re-hire, and put the funds toward allowable expenses. The bill would also push the PPP application deadline to December 31, while expanding allowable uses to include personal protective equipment (PPE) and other COVID-related safety costs.

- **75-25 Requirement.** Importantly, unlike the pending House proposal, the Senate PPP fix would not eliminate the forgiveness requirement that businesses spend at least 75 percent of the funds on payroll.
    - Treasury Secretary Steven Mnuchin has doubled- and tripled-down on his belief that the 75-25 rule is in keeping with the intent of the statute, and that any changes would require congressional action.
    - Senator Rubio has said that while this rule is not something Congress put in the law, he believes there needs to be a minimum threshold:
        - "It was going to be some standard. It was going to be more than 50 percent no matter what. Because this is the paycheck protection [program]."

  Still, extending the covered period would go a long way toward alleviating the chief problem posed by the rule. Combined with the 8-week window, the 75 percent payroll threshold means that a recipient can only qualify for full forgiveness if they maintain their entire staff at full pay for the whole period. Put another way, 75 percent of 2.5 months payroll amounts to roughly 8 weeks' pay, notwithstanding any safe harbors for rehiring. Stretching the window to 16 weeks (or more) would allow even those with reduced staff to spread their spending over several more pay periods.

- **Not so fast.** While there was an attempt to quickly pass the bill via unanimous consent, it failed to clear hotlines run by either cloakroom, meaning that the holds were bipartisan. Instead, Senator Rubio's coauthor Senator Susan Collins (R-ME) went to the floor to speak on behalf of the effort before the chamber recessed for the remainder of the month.

- With cooperation from Democratic co-sponsors, including Small Business Ranking Member Ben Cardin (D-MD) and Minority Whip Dick Durbin (D-IL), there is a chance that any concerns could be resolved in the coming days, meaning the bill could be passed during a pro forma session before the Senate returns June 1. Per Senator Cardin:
  - "Hopefully, within the next couple of days, we can have a bicameral understanding and get it done, hopefully by [unanimous consent]."
- The Senate's no-huddle approach to a PPP fix appears to be an attempt to head off House plans to vote on their version of a PPP fix bill next week. Senator Rubio's comments made it clear that they are mindful of the collision course with the House:
  - "If we can't [pass the bill under unanimous consent], then we'll take it up when we get back. My hope is that we'll have something in place. My guess is by the time we get back, the House will have probably passed something and sent it to us."
- The sudden urgency is mostly a practical matter. The PPP opened to applicants on April 3, with the earliest recipients being funded by mid-April, meaning their 8-week window will be coming to a close in early June.

- **PPP and future phases.** As we have said in previous updates, stunted demand has removed PPP funding as a driver of near-term legislative action, but the program remains central both to the GOP's policy goals and to public perception of the federal response. Bifurcating these critical policy tweaks from broader negotiations over Phase 4, and securing them without major unrelated concessions to Democrats à la 3.5, would further insulate the GOP's current wait-and-see posture on anything further.

**House side.** As we reported in our last note, the lower chamber plans to vote on the Phillips-Roy PPP fix bill next week. Like the Rubio bill, the *Paycheck Protection Flexibility Act* would push out PPP's June 30 deadlines to the end of the year and extend the 8-week covered period, in this case to 24 weeks. Unlike the Senate bill, it would prohibit payroll restrictions such as the 75-25 rule, and allow PPP recipients to defer payroll taxes, something the *CARES Act* prevents. As the Phillips-Roy bill will be considered on the suspension calendar, passage will need buy-in from both parties' leadership.

- House Speaker Nancy Pelosi (D-CA) said she does not believe this PPP vote will undermine Democratic leverage in negotiations: "No, I'm not worried about that….But this has a sense of urgency about it."
- In a possible indication of the coming showdown, Speaker Pelosi called the 75-25 rule "debilitating."

**Resolution unclear**. While it's good news that both chambers and both parties have identified the same problems and appear committed to fixing them in short order, it's unclear how these differences will be resolved. The leverage may depend on who is able to pass their version first.

## ***Next Phase of Relief***

**Timing.** June remains the earliest kick-off for negotiations over the next phase, a timeline that is only reinforced if Congress passes a PPP fix that further relieves pressure for the GOP to come to the table. GOP Leaders Mitch McConnell (R-KY) and Kevin McCarthy (R-CA) remain in lockstep with the Trump administration in their wait-and-see approach. Republicans know the *CARES Act* was not the end of the Congressional COVID response, but they don't feel the same urgency as their blue state counterparts, who are staring down the end of the fiscal year.

Think of the ongoing pause as the GOP walking away from the legislative bazaar—blithely dismissing what they deem a liberal wish list, winding down the clock, and lowering the price on the inevitable next phase.

What's missing from the immediate term is a forcing mechanism for legislative action. Democrats have one at the end of June, with the state budget crunch, and again at the end of July, with the expiration of the unemployment supplement. Until Republicans feel a similar urgency—or sense corresponding opportunity—they will continue to draw the process out.

**McConnell sets a UI marker.** Leader McConnell said on a call with his Republican colleagues this week that the next phase of stimulus would not include an extension of the $600/week enhanced Unemployment Insurance created by the *CARES Act*.

- This is easier said than politically done, particularly for the vulnerable GOP members whose fate will determine whether the Majority Leader retains that title, but the more convincing the McConnell bluff on a UI cliff, the more likely Democrats are to agree to wind down and/or restructure the benefit so that it does not create a disincentive to reopening. But by putting down this marker, Leader McConnell ensures that the *HEROES Act* proposition of a $600 federal supplement through next January is a non-starter.

With more than 38 million people joining the unemployment rolls since March, a significant dip in benefits represents real political and economic risk. Balancing relief for those who can't safely work—or who no longer have an employer to go back to—with the challenges of reviving the country from an induced economic coma will be perhaps the chief policy challenge of the next phase of the congressional response. And, relatedly, its July 31 expiration may be the last best forcing mechanism for legislative action before August recess.

**Plans abound.** Proposals on how to square this circle continue to percolate. Here are some new ones that came across our radar.

- **Portman Back-to-Work Bonus.** In response to concern from small business owners that the generous UI provisions in the *CARES Act* create disincentives for employees to return to work, Senator Rob Portman (R-OH) proposed shifting the UI program to a "Back-to-Work Bonus" program.
    - Instead of extending the additional $600/week federal UI benefit, Senator Portman's proposal would replace the federal supplement with a $450/week Back-to-Work Bonus.
    - The $450 number represents the average amount that would be needed to make a person earning the average minimum wage better off in the workforce than on unemployment.
    - Senator Portman argues that it would lessen the administrative burden on State unemployment systems and reduce the likelihood of fraud.

- **Opportunity Zones.** Reps. John Curtis (R-UT) and Henry Cuellar (D-TX) introduced the *COVID-19-Impacted Small Business Opportunity Zone Act*, a bill to allow small businesses impacted by the pandemic to qualify for opportunity zone tax benefits. Some view the proposal as a supplement to the PPP.

# *Policy Resolution Group COVID-19 Legislative Update*

## *May 20, 2020*

Today's note covers the effort to operationalize the Federal Reserve's lending facilities, potential Paycheck Protection Program (PPP) reforms, evolving Phase 4/CARES 2 proposals, and the White House's regulatory relief Executive Order.

Our Agency Report contains information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with updates for the following:

- Cybersecurity and Infrastructure Security Agency,
- Department of Agriculture,
- Department of Labor,
- Occupational Safety and Health Administration, and
- Small Business Administration.

### ***Fed Watch***

**Senate Banking Hearing.** On Tuesday, the Senate Banking, Housing and Urban Affairs Committee held a hearing on the Quarterly CARES Act Report to Congress. The question on everyone's mind was when would the Federal Reserve launch its lending facilities, including the Main Street Lending Program. Federal Reserve Chairman Jerome Powell and Treasury Secretary Steven Mnuchin agreed that the facilities should be operational by the end of the month:

- Powell: "We expect all of them to be stood up and ready to go by the end of this month… People are working literally around the clock and have been for weeks."

- Mnuchin: "We fully expect [the Main Street and Municipal Lending] facilities to be up and running by the end of the month."

Secretary Mnuchin further indicated that Treasury expects to fully exhaust the $454 billion in stabilization funds provided in the *CARES Act*:

> "I have allocated about half of that—and let me be clear: I am prepared to allocate the rest of that. The only reason I have not allocated it fully is we are just starting to get these facilities up and running. We want to have a better idea of which one of the facilities needs more capital, as well as the potential for adding additional facilities. So I expect to allocate all the capital, as needed, as was given to us."

In the same exchange with Senate Banking Committee Chairman Mike Crapo (R-ID), Secretary Mnuchin addressed questions regarding Treasury's appetite for risk:

> "For any facility that the Fed believes puts them at risk, I put up capital, so by definition that capital is at risk, and we are fully prepared to take losses in certain scenarios on that capital."

He later called the absorption of these losses his "base case scenario." This is a significant departure from previous public comments in which Secretary Mnuchin indicated he intended to fully recover the money used to seed the Federal Reserve programs, and an indication of Treasury's willingness to take on more risk.

**Warren letter.** Senator Elizabeth Warren (D-MA) penned letters to the Boston Fed President Eric Rosengren and New York Fed President John Williams, the individuals in charge of the Federal Reserve's midsize and large business programs. The letters called for "a comprehensive and robust set of requirements for top executives of these companies [receiving relief] to verify their eligibility before they receive any bailout funds." In particular, Senator Warren requested that the Federal Reserve impose the following requirements:

- Require executives to periodically conduct due diligence to ensure they still meet eligibility criteria.
- Make clear that executives are subject to civil and criminal penalties, including disgorgement, if they provide fraudulent or misleading information or misuse funds, and that companies should be required to immediately repurchase bonds if eligibility criteria are breached.

Senator Warren used her time at the Banking Committee hearing to press Secretary Mnuchin on whether recipients of stabilization loans would be required to keep their workers on payroll, while echoing the sentiments of her letter in requesting that Treasury "create a certification process that insures executives are held personally liable and subject to criminal penalties if they provide false information or misuse bailout funds."

## ***PPP Developments***

**House Action.**

- **Phillips-Roy Bill.** On May 11, Reps. Dean Phillips (D-MN) and Chip Roy (R-TX) introduced the *Paycheck Protection Flexibility Act* (PPFA) (H.R. 6886). The bill would make the following reforms to the PPP:
  - **Expand eight-week period.** Allow 24 weeks of forgiveness for rather than the eight-week period in the current statute.
  - **Change 75-25 payroll to non-payroll expense ratio.** Remove administrative restrictions limiting non-payroll expenses to 25% of loan proceeds.
  - **Eliminate two year loan limit.** The bill would extend the PPP loan term from two years to five years.
  - **Allow payroll tax deferment.** Current law prohibits PPP recipients from utilizing the *CARES Act* payroll tax deferral benefit. PPFA would allow businesses to access PPP loans and defer payroll tax payments.
  - **Extend the rehiring deadline.** Extends the deadline for rehiring workers for PPP forgiveness purposes from June 30 to December 31, 2020.
- **Vote next week.** In exchange for his vote on the *HEROES Act*, Rep. Phillips secured a commitment from Democratic leadership to hold a vote on H.R. 6886, potentially as a standalone measure. The bill is expected be considered on the suspension calendar, meaning it would require a supermajority (two-thirds of voting members) to pass.

- Reports indicate that the House may consider another Phillips-lead PPP reform bill, H.R. 6782, which would require the SBA administrator to disclose the recipients on PPP loans.
- The *Paycheck Protection Flexibility Act* has support from both sides of the aisle and key industry stakeholders, and should have no problem passing by itself, even under suspension of the rules.
  - However, disclosure efforts are more partisan and divisive, and would jeopardize passage if somehow combined.

**Senate Thinking on PPP.** Senators have also been contemplating reforms to the PPP and the Phillips-Roy bill could find purchase in the upper chamber. Here are some of the changes contemplated in the Senate:

- **Timeframe extension.**
  - **Rubio.** Senate Small Business Committee Chairman Marco Rubio (R-FL) called for an extension of the eight-week timeframe for loan money to be spent, saying:
    - "I think the more important thing to change is the timeframe in which they can use it for... We do need to give them more time to spend those monies."
    - In a weekend tweet, Senator Rubio said he hopes to move quickly on this extension before the first wave of PPP loan recipients hit the eight week mark:
      - "The legislative fix needed to #PPP is extending beyond 8 weeks the time period a #SmallBusiness has to spend the funds on payroll. We are hoping to move quickly on this before the first wave of #PPPloan recipients reach the 8 week point."
  - **Gardner.** On May 18, Senator Cory Gardner (R-CO) sent a letter to his Republican colleagues outlining potential reforms to the PPP.
    - The missive identified the following tweaks to the program, albeit not in great detail.
      - Extension of the timeline for the PPP, including the time businesses have to spend their PPP loans and the timeline for rehiring employees.
      - Permit borrowers that received earlier loans to "reload their funds so that they can continue to keep their workers employed."
    - Senator Gardner concluded by saying Congress must act quickly to make these changes: "we should waste no time extending the program."
- **75-25 requirement reform.**
  - **Feinstein letter.** Senator Dianne Feinstein (D-CA) echoed the need to change the 75-25 requirement in a letter to the Senate Small Business Committee. From the letter:

        - "The Small Business Administration's (SBA's) implementation of this directive requires small businesses to use 75% of PPP funds on payroll in order to be fully forgiven, which is impossible for many small businesses, particularly those in high-cost regions that pay higher relative rent and mortgage costs."

    - **Republicans open to limited changes.**

        - **Rubio.** Senator Rubio said the ratio cannot dip below 50 percent:

            - "It was going to be some standard. It was going to be more than 50 percent no matter what. Because this the paycheck protection [program]. ...This was designed as an alternative for unemployment and to prevent unemployment and that's why that standard was in there."

        - **Thune.** Senator John Thune (R-SD) said he was "open" to looking at the 75-25 requirement, but he echoed Senator Rubio's reservations about bringing it below 50 percent.

            - "Part of the problem is that there are some industries where, you know, they have a lot of fixed cost and not so much payroll. But the whole purpose of the program was to keep people employed … so I would not want to deviate too far from that."

- **Financial hardship.** Senator Rick Scott (R-FL) has been critical of waste in the program, calling for reforms to the standard to demonstrate "financial hardship" for a business to qualify.

- **More funding unlikely.** Senate Republicans and the White House appear united in thinking that another round of PPP funding is not required at this moment.

    - Treasury Secretary Mnuchin said last month that he expects the second tranche to be the last.

    - SBA's recent breakdown of PPP lending data shows ample funds remain as the rate of loans has slowed to a trickle. About $513.3 billion has been approved via 4.3 million loans during Rounds 1 and 2. No data have been released yet on returned loans. The total dollar amount of loans approved is approximately $24 billion lower than the previously disclosed sum of Rounds 1 and 2 for the same period, meaning the overall outlay has actually diminished since the first week of the program's relaunch. With roughly $150 billion left under the current authorization, the funds are on pace to last through the end of July.

    - White House Adviser Kevin Hassett remarked on the PPP, "The government has lent money to businesses to stay afloat. It's not something the government can do forever, but it is something that we can do through June, I would guess, if there's enough cash for that."

**Direct payroll alternatives.** Some lawmakers have proposed bills that would have the federal government itself directly cover the cost of payroll. Although this is in effect what PPP loans should do if they are forgiven.

- **Van Hollen-Merkley-Murphy.** Senators Chris Van Hollen (D-MD), Jeff Merkley (D-OR), and Chris Murphy (D-CO) introduced the *Rebuilding Main Street Act*, a bill to allow small businesses to share their payroll costs with the federal government. The legislation is an implicit rebuke to the PPP, which the Senators see as not providing assistance to all businesses, and in some cases, penalizing recipients for reducing payrolls through Work Sharing.

- **Hawley.** Senator Josh Hawley (R-MO) introduced his Rehire America plan, which would create a refundable payroll tax rebate covering 80 percent of employer payroll costs applicable up to median wages; a real-time advance system to provide immediate payroll support; a back to work reinvestment credit for firms; among other measures. As we noted in Monday's update, Senator Hawley now has a notable partner in Senator Gardner.

**PPP Guidance Updates.**

- Interim Final Rule on Treatment of Entities with Foreign Affiliates – *Updated 5/18*

- Coronavirus Recovery Information in Other Languages – *Updated 5/18*

## ***Other Phase 4/CARES 2 Developments***

**GOP Re-affirms "Pause."** GOP Leaders Mitch McConnell (R-KY) and Kevin McCarthy (R-CA) met with Vice President Mike Pence yesterday morning regarding the status of the congressional COVID-19 response and the need for further action. Later the same day, President Trump joined the Senate GOP conference for their weekly lunch. The unmistakable consensus coming out of each of these meetings was that all sides are comfortable with the current wait-and-see approach.

- McCarthy: "I don't see the need [for another legislative package] right now."

- McConnell: "We'll discuss a way forward in the next couple weeks."

While this posture essentially validates the June-centric timetable we have been contemplating in this update, the public double-down extends the window for action into July, particularly with no near-term forcing mechanism.

- As we have discussed, the end of the fiscal year is a key driver for Democrats seeking state and local relief; other than the end of the statutory covered period for PPP, no such cliff exists for Republicans. Looking out on the legislative horizon, the next meaningful deadline is the expiration of the current surface transportation bill on September 30, 2020.
    - **Infrastructure Week?** House Speaker Nancy Pelosi (D-CA) told reporters today that an infrastructure bill would be "coming soon." Recall that last month Speaker Pelosi and Democratic leaders sought to reboot their previously introduced Moving America Forward proposal as an element of the Phase Four response. A brutal jobs report quickly put a broader infrastructure plan on the back burner, but between this and rumblings of a new White House proposal, this is once again an area to watch.

**State and locality aid.** House Democrats staked out additional funds for states and localities as a top priority in their *HEROES Act*, pledging $1 trillion in aid. A bipartisan group of Senators—Bob Menendez (D-NJ), Bill Cassidy (R-LA), Susan Collins (R-ME), Cindy Hyde-Smith (R-MS), Joe Manchin (D-WV), and Cory Booker (D-NJ)—introduced a proposal on Monday that would establish a $500 billion "SMART Fund" to assist state and local governments cope with the pandemic.

- Three important details about the bill to note:
  - It would divide money into three tranches, distributed according to population size, infection rates, and revenue losses.
  - The bill does not include a population requirement, so municipalities regardless of size could receive funds.
  - States, including Puerto Rico and DC, would receive a minimum of $2 billion.
- Reps. Mikie Sherrill (D-NJ) and Peter King (R-NY) introduced a companion House bill.

**Onshoring incentives.** Bipartisan interest has begun to coalesce around the provision of onshoring incentives in the next phase of COVID-19 relief, as a mechanism to bolster manufacturing in the United States.

- Ways and Means Chairman Richard Neal (D-MA) said he is "very interested in" examining targeted incentives to provide rewards to corporations that move factories and jobs back to the United States.
- Top GOP tax writer Kevin Brady (R-TX) said that such a targeted incentive could include lowering the corporate income tax rate or providing a tax credit.
  - "The top-line rate may stay the same, but they may get a credit underneath it. We haven't decided on whether it will be a credit or a rate reduction."
- Senate Finance Chairman Chuck Grassley (R-IA) voiced support of incentives to bring industry back to the US:
  - "I think it's pretty important in health care and pharmaceuticals… But I'm not sure that I have a position on how you do that. It will be a business decision: Either come home or diversify to other countries outside of China."
- Senator Debbie Stabenow (D-MI) said she would push to include a version of her *Bring Jobs Home Act* in the next phase of stimulus, a proposal for a 20 percent tax credit for insourcing expenses.
- White House economic adviser Larry Kudlow yesterday said to reporters that in addition to a 7.6% payroll tax cut, the President is interested in incentives for companies to return to the United States, such as full expensing for returns, a cut in the corporate tax rate, and a targeted tax cut.

## ***White House EO on Regulatory Relief***

On May 19, 2020, the President signed an Executive Order intended to provide regulatory relief to support the economic recovery from COVID-19. The EO directs federal agencies to use the full extent of authorities to ensure that the federal regulatory framework does not prevent the economic response to COVID-19 and instead promotes job creation and economic growth. The EO provides federal agencies the necessary direction and impetus to take action on COVID-19 response measures that should become permanent, or other regulatory standards that impose significant hurdles. Any action taken will still need to comply with applicable law and resource constraints as near the end of the President's first term. This type of deregulatory action has long been a pillar of the President's domestic agenda.

The EO directs federal agencies to take the following actions in support of the economic response to COVID-19:

- Identify regulatory standards that may inhibit economic recovery and shall consider modifications to provide relief from those requirements in order to promote job creation and economic growth. Agencies are to use all emergency authorities to support the economic response to COVID-19.

- Review all administrative actions taken in response to COVID-19 and report to the White House those that would promote economic recovery if made permanent.

- Provide for pre-enforcement rulings with respect to whether proposed activities in response to COVID-19 are consistent with law.

- Consider the development of enforcement discretion for reasonable good faith compliance, including compliance with any guidance from HHS on actions to stem the transmission and spread of COVID-19.

- Revise enforcement and adjudication procedures to support the following principles of fairness (as consistent with law and the appropriate context):

    - The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.

    - Administrative enforcement should be prompt and fair.

    - Administrative adjudicators should be independent of enforcement staff.

    - Consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative

    - enforcement action.

    - All rules of evidence and procedure should be public, clear, and effective.

    - Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

    - Administrative enforcement should be free of improper Government coercion.

    - Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

    - Administrative enforcement should be free of unfair surprise.

    - Agencies must be accountable for their administrative enforcement decisions.

## *Policy Resolution Group COVID-19 Legislative Update*

## *May 18, 2020*

Our note provides a succinct update on developments since last Friday, notably the House passage of the *HEROES Act*, a new oversight report, Paycheck Protection Program (PPP) loan forgiveness guidance, business liability legislation, and bipartisan interest in reforming and expanding the Employee Retention Tax Credit (ERTC). We conclude with analysis of what to expect moving forward.

Our Agency Report contains information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with updates today for the Small Business Administration.

### ***Noteworthy Developments***

- **HEROES Act passage.** The House passed H.R. 6800, the *HEROES Act* in a 208-199 vote last Friday.
    - **Defections.**
        - **GOP.** A SALT-district revolt failed to materialize as only one Republican lawmaker, Rep. Peter King (R-NY), broke ranks and voted for the relief bill.
        - **Democrats.** On the Democratic side, more than a dozen Representatives demurred, including Cindy Axne (D-IA), Joe Cunningham (D-SC), Sharice Davids (D-KS), Abby Finkenauer (D-IA), Jared Golden (D-ME), Kendra Horn (D-OK), Pramila Jayapal (D-WA), Conor Lamb (D-PA), Elaine Luria (D-VA), Ben McAdams (D-UT), Kurt Schrader (D-OR), Abigail Spanberger (D-VA), Xochitl Torres Small (D-NM), and Susan Wild (D-PA).
            - With the notable exception of Congressional Progressive Caucus co-chair Jayapal, most Democratic opposition came from the center, concentrated among vulnerable freshmen representing Trump districts and/or formerly GOP-held seats secured in the mid-term wave.
                - Four other targeted Democrats—Tom Malinowski (D-NJ), Chris Pappas (D-NH), Collin Peterson (D-MN), and Elissa Slotkin (D-MI)—joined the entire GOP conference in support of the motion to recommit, a procedural move that would have stripped language allowing undocumented immigrants to receive economic impact payments while effectively throwing a wrench into the bill. That measure failed, 209-198, with independent Justin Amash (I-MI) supporting.
                - If you're interested in establishing the House battleground for 2020, this self-selective list is a good place to start.
- **Proxy voting approved.** The House passed the proxy voting resolution, H. Res. 965, in a 217-189 vote.
    - Republicans decried the change as a partisan power grab, noting that 22 Democratic members could pass a bill on their own.

- It remains to be seen how Democrats will administer this new system in practice, though we may see it in action following the Memorial Day break—Majority Leader Steny Hoyer (D-MD) indicated on Friday that the House would return on May 27th and 28th, with votes expected on FISA reauthorization.

- **What's next for CARES 2?** While the ball is nominally in the Senate's court following the passage of the *Heroes Act*, Senate leaders and their allies in the White House have not signaled any urgency in moving forward with a counter-proposal, and continue to take a wait-and-see approach while the original *CARES Act* programs continue to come online. One key exception is the leadership-driven push for liability protections, which will make up a core element of any eventual Senate package, and is expected to be released early this week.

  - **Cornyn-McConnell liability legislation imminent.** Senator John Cornyn (R-TX) and Majority Leader Mitch McConnell (R-KY) are crafting legislation to establish liability protection for employers – businesses, universities, nonprofits, and more – from COVID-19 lawsuits.

    - While a final bill has not yet been released, it will likely contain the following elements:

      - **Medical malpractice protection.** Create malpractice protections for hospitals and healthcare workers, including an increase in the liability threshold for COVID-related malpractice lawsuits.

      - **Legal safe harbor.** Create a new legal safe harbor for businesses, raising the standard to prove a business is at fault.

      - **Manufacturer protections.** Create additional legal protections for manufacturers. Leader McConnell said the bill would "find ways to expand existing protections for the manufacturers of therapeutics, diagnostics, and potential vaccines."

      - **Not immunity.** The bill would not provide immunity from lawsuits, as Leader McConnell put it, legislation would safeguard employers who follow "public health guidelines to the best of their ability…We are not talking about immunity from lawsuits… There will be accountability for actual gross negligence and intentional misconduct."

        - Businesses might have to show they required mask wearing, provided PPE, provided hand sanitizer, conducted tests, etc.

      - **Temporary changes.** Business groups have advocated for making any liability changes temporary, tying protections to the duration of the national emergency.

    - **Democratic opposition.** Expect Democrats to maintain their strong opposition to liability protections. Senate Minority Leader Chuck Schumer (D-NY) commented on McConnell's proposal saying,

- “How does that make sense? … Instead of making sure businesses have PPE for their employees, McConnell wants to make it harder for workers to show up at their jobs and to hold their employers accountable for providing safe working conditions.… Instead of fighting for more testing to help everyone working on the front lines, Sen. McConnell is fighting to protect corporate executives.”

- **Campaign-driven urgency**. While leadership is in no hurry to pass the next phase of stimulus, vulnerable GOP incumbents are singing a different tune. And with no leadership-sanctioned vessel for their enthusiasm, many are finding other legislative outlets.

  - Sen. Cory Gardner (R-CO) has now joined forces with Sen. Josh Hawley (R-MO) to support the latter’s “Rehire America” plan, which we have mentioned as a GOP counterpoint to House Progressives’ “Paycheck Guarantee.”

  - Sen. Susan Collins (R-ME) has joined a bipartisan group of senators in introducing the *SMART Act*, which would provide $500 billion in relief for state and local governments.

  - While these one-off efforts work as a way to channel these concerns for now, expect pleas from in-cycle senators—and an increasingly shaky GOP majority—to be a key driver of Phase Four urgency going forward.

- **Rare bipartisanship over ERTC.** As we have noted in previous updates, despite being tagged as a partisan wish list, the *Heroes Act* does contain one area of emerging bipartisan agreement: ERTC. The *CARES Act* created the credit for COVID-impacted employers that retained their workers. The *Heroes* language, pulled verbatim from a bipartisan bill we have previously highlighted from Rep. Stephanie Murphy (D-FL), would make the credit significantly more generous, phase in eligibility for a broader range of companies, and clarify the credit’s interaction with PPP loans.

  - JOBS Credit One-Pager

  - **Top GOP tax writer signals openness.** Ways and Means Ranking Member Kevin Brady (R-TX) told reporters last week “we are willing to discuss, in a bipartisan way, how to make the credit work better and to expand it.”

***CARES Implementation***

- **First oversight report.** The Congressional Oversight Commission created by the *CARES Act* issued its first report on the $500 billion in Emergency Economic Stabilization funds in Title IV of the law.

  - **Still no chair.** While appointees have been named from each of the chambers—Reps. Donna Shalala (D-FL) and French Hill (R-AR) represent the House, while Sen. Pat Toomey (R-PA) and former Warren staffer Bharat Ramamurti represent the Senate—Speaker Nancy Pelosi (D-CA) and Leader McConnell have yet to agree on a chair.

  - **More questions than answers.** The report is appropriately entitled “Questions About the CARES Act’s $500B Emergency Economic Stabilization Funds,” because at this point that is all there is.

        - As the report notes:

            > On April 9, the Treasury and the Fed announced that the Treasury *will* use money from the CARES Act to invest in several facilities established by the Fed. But, to date, the Treasury has only disbursed $37.5 billion of CARES Act funds, which were invested in the Fed's Secondary Market Corporate Credit Facility (SMCCF) on May 11.

        - Congress is growing increasingly frustrated with the pace of the implementation of these facilities. As we noted last week, Senate Banking Committee Chairman Mike Crapo (R-ID) pressed Federal Reserve Vice Chairman Randal Quarles on timing for the Main Street and Municipal Lending Facilities; Quarles indicated that it was "premature" to say how many weeks it might be before the programs are operational, but that it is the "highest priority."

            - **Upcoming hearing.** Federal Reserve Chairman Jerome Powell and Treasury Secretary Steven Mnuchin will have the opportunity to answer lingering questions about the lending facilities, in particular the timeline to bring them online, at a 10:00 AM Tuesday hearing before the Senate Committee on Banking, Housing, and Urban Affairs.

                - See Chairman Powell's testimony here.

            - Today's *Wall Street Journal* ("The Fed's $600 Billion Challenge") contained a note of caution via former Fed chair Janet Yellen: "The Main Street program is going to be tremendously complicated… One of the problems with this program is that it may turn out to be insufficiently generous."

- **PPP loan forgiveness.** Treasury/SBA released the long-awaited Loan Forgiveness Application for the PPP. While industry stakeholders and recipients have to be pleased to get some direction at long last, practitioners including the American Institute of Certified Public Accountants (AICPA) are warning that the guidance is insufficient. More analysis here from the leaders of Bracewell's COVID-19 task force.

    - Despite the new guidance, and a relaxation of the administration's previous posture toward PPP certification, the stream of loans remains a trickle. After processing $342 billion in less than two weeks of Round One and an additional $175 billion in the first week of Round Two, SBA has approved just $20 billion in PPP loans in more than two weeks since.

        - At the current rate, the remaining $115 billion could last through the end of July.

        - Today is the deadline for returning funds under the certification safe harbor. As reported by *POLITICO*, more than $2 billion had been returned as of April 27, and another $900 million were "canceled" between May 8-10. Additional repayments could give the program even more time.

    - Other new PPP guidance: IFR on Entities with Foreign Affiliates

## *Policy Resolution Group COVID-19 Legislative Update*

## *May 15, 2020*

House lawmakers today will consider the expansive Democratic COVID-19 disaster relief bill, the *HEROES Act*. Our update outlines the vote process and foreshadows the legislation's likely passage in the House. While the act as written is dead on arrival in the Senate, we discuss provisions of the *HEROES Act* that could become part of a bipartisan compromise bill or serve as a source of controversy, such as net operating loss accounting changes. We conclude with a forecast of what comes next.

As always, our Agency Report contains information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with updates for the following:

- Department of Homeland Security,
- Federal Energy Regulatory Commission,
- Federal Motor Carrier Safety Administration, and
- Small Business Administration.

### ***What To Expect Today: Party-Line Vote***

**Process.** Today the House will consider and vote on the Democratic COVID-19 disaster relief package. Events will unfold according to the following process, beginning with a procedural vote on a combined rule and followed by a substantive vote on the legislation itself.

- **Rules debate.** The House convened this morning at 9:00 AM and began debate on the combined rule providing for consideration of a proxy voting resolution and H.R. 6800, the bill Democrats have titled the "*Heroes Act*" (and Republicans have lovingly dubbed "*Pelosi's Socialist Wish List Act*").

- **Democrats (narrowly) passed the rule.** For their first vote of the day, lawmakers considered whether to adopt the combined rule; while the resolution passed, 207-199, leadership saw 14 Democratic defections for across the ideological spectrum. Whether this is a statement on the process or the substance of the underlying bill is unclear.

- **Substantive debate.** The House will then debate the contents of the proxy voting resolution and the *HEROES Act*.

- **Substantive vote.** Following the substantive debate on the proxy voting resolution and *HEROES Act*, lawmakers will take their second vote of the day on the resolution and law itself.

  - **Evening vote.** This vote is expected to take place around 5:30-6:00 PM EDT. However, the timeline is fluid. For example, the House may recess throughout the day to allow for cleaning of the Chamber.

  - **Public health procedure.** Lawmakers will vote in six groups, with each wave expected to take ten minutes, but the process could last into the evening.

**Likely outcome.** The bill will likely clear the House, but it may be close. GOP representatives will overwhelmingly vote nay, and some Democratic lawmakers may join them.

- **Vulnerable moderates.** Democratic lawmakers in districts that voted for President Trump in 2016 then flipped blue in 2018 might face pressure to reject a bill they view as fodder for attack ads. So far, at least four "frontline" freshman—Reps. Kendra Horn (D-OK), Abigail Spanberger (D-VA), Joe Cunningham (D-SC), Cindy Axne (D-IA)—have announced their opposition to the bill citing concerns with the partisan process. Others, including Conor Lamb (D-PA), Haley Stevens (D-MI), and Abby Finkenauer (D-IA) opposed the rule, which could be an indication of their intent. A number of other freshmen in Trump districts have not committed one way or another.

- **Progressives.** The Congressional Progressive Caucus petitioned House Speaker Nancy Pelosi (D-CA) to delay the vote, angered by the omission of progressive priorities such as a paycheck guarantee. Only caucus co-chair Rep Pramila Jayapal (D-WA) has announced her opposition, but eight others, including "Squad" members Alexandria Ocasio-Cortez (D-NY), Ilhan Omar (D-MN), Ayanna Pressley (D-MA), and Rashida Tlaib (D-MI) joined her in opposing the rule.

- **Democrats enjoy a 37 seat cushion in the chamber, meaning they could theoretically afford up to 18 defections.** However, with the possibility of votes leaking from both ends of the caucus, and uncertainty surrounding attendance, it could be a relative squeaker.
  - **The addition of rogue GOP votes from SALT-minded blue states could seal the deal**. Retiring Rep. Peter King (R-NY) is the only Republican to publicly signal support for the bill, but a handful of other legislators, particularly within the New York delegation, could follow his lead.

**Dead on arrival in the Senate.** What is certain is that if the *HEROES Act* clears the House, it will meet a chilly reception in the GOP-controlled Senate. Majority Leader Mitch McConnell (R-KY) took to the Senate floor yesterday to make his first public comments on the bill, calling it "an unserious product from an unserious House majority that has spent months dealing itself out of this crisis."

## ***Signal In The Noise: Key Parts of HEROES To Watch***

**Cutting through the messaging.** Certain provisions of the *HEROES Act* have made headlines and consumed the bulk of the attention. This is by design, as Democratic leadership intend to use the bill to place a marker of the party's priorities and contrast their response to that of the Republicans. In this context, it is important to keep in mind that the most extreme progressive priorities are unlikely to clear the hurdle of the GOP-controlled Senate. The important question is not what provisions are in the Democratic package, but *which measures could actually become part of a bipartisan Senate compromise*. While non-exhaustive, the following provisions in the *HEROES Act* have a chance of becoming part of a Senate package, either because a degree of bipartisan support exists, or because they are red-lines for Democratic lawmakers:

- **Increased state and local aid.** Democrats will inevitably settle for less, but they laid down a marker of $1 trillion in the *HEROES Act*. Ultimately, agreeing on terms of how the money can be spent may be more difficult than the number itself.

- **Employee Retention Tax Credit reform.** Expansion of the ERTC has bipartisan support. Our last update detailed changes to the ERTC in the *HEROES Act*. The Manager's Amendment yesterday made a small tweak, expanding credit eligibility to domestic workers. The bill would also create a new credit for fixed costs with similar mechanics.

- **PPP reform.** The rapid decline in demand for Paycheck Protection Program (PPP) funds underscores the need for not only clearer guidance, but also necessary policy changes. The broad consensus is that the concept of the program is good, but its implementation has been plagued by uncertainty, insufficient funding, and ugly media narratives. See our previous update for details on the PPP reforms in the *CARES Act*. The Manager's Amendment yesterday inserted the following changes to the PPP:
    - **Expanded eligibility.** Expands PPP eligibility to nonprofit organizations of any type or size, including trade associations, but 501(c)(4) groups would be barred from making campaign contributions in the current election cycle.
        - Payroll costs would also exclude compensation for registered lobbyists.
    - **Reduced technical assistance**. Reduced technical assistance to community financial institutions for 7(a) loans from the original $1 billion to $250 million.
    - **New loan forgiveness exemption.** Adds an exemption based on employee availability for loan forgiveness under the PPP, if the eligible recipient is able to demonstrate an inability to return to the same level of business activity as such business was operating at prior to February 15, 2020.
    - **Forgivable expenditures.**
        - Expands forgivable expenditures to include payments on refinanced disaster loans and interest payments on additional types of debt.
        - PPP loans could be used and forgiven to purchase personal protective equipment for employees.
- **Multi-Employer Pensions.** A legacy problem that has only been exacerbated by the economic downturn, the solvency of the Pension Benefit Guarantee Corporation (PBGC) is an issue that must eventually be tackled, and that the COVID-19 crisis might create some urgency behind. While this is primarily a Democratic priority, it carries political weight in some critical electoral battlegrounds, particularly in the Rust Belt, and the White House could see value in claiming victory on behalf of the workers he views as his base.

## ***What Comes Next: Senate Is In No Rush***

**Still waiting and seeing.** As we have noted in previous updates, Leader McConnell is content to wait and see how the current phases of stimulus unfold before rushing headlong into another multi-trillion dollar bill. President Trump has also adopted this approach, making a bill in the immediate term unlikely. See our last update below for a discussion of factors that could force earlier consideration of Phase Four/CARES 2 legislation. The take away, expect legislative action in June at the earliest, with a key dates converging at the end of the month.

**McConnell's liability red-line.** As a perennial reminder to Democrats, Leader McConnell has not budged from his business liability shield red-line, so expect such a provision to be a source of significant debate if and when the Senate converges on its own version of Phase Four/CARES 2 bill.

- We expect to see a bill on liability protections for businesses and communities as early as next week from Leader McConnell and Senator John Cornyn (R-TX).

- This effort could provide a centerpiece for an eventual GOP proposal that would be geared toward safely reopening the country—and the economy.

***NOL Controversy***

The *CARES Act* passed in March temporarily rolled back changes made by the *Tax Cuts and Jobs Act (TCJA)* that restricted the traditional ability of companies to deduct net operating losses (NOL) from previous years' returns. By allowing companies to accelerate the utilization of losses, the policy allows businesses to access needed liquidity without a long-term cost to the Treasury. In essence, NOL deductions provide consistent tax treatment to firms that might experience volatile profitability.

- **CARES changes.** The *CARES Act* made three key changes to NOL deductions to improve business cash flow:

    - Provided a five-year carryback for losses in 2018, 2019, and 2020;

    - Suspended the NOL limit of 80% of taxable income; and

    - Allowed pass-through businesses to use NOLs to offset non-business income above the $250,000 (single) limit or $500,000 (joint) TCJA limit for 2018, 2019, and 2020.

- **Source of the controversy.** In recent weeks, and in the wake of significant revenue scores from the Joint Committee on Taxation, some congressional Democrats have seized on the NOL changes as an underhanded corporate giveaway that was snuck in without their knowledge. The attention led to a series of stories in national publications attacking the provisions as a handout to various industry bogeymen.

- In recent days, some in the energy trade have noted that oil and gas companies have claimed NOL deductions. This reporting has unfairly framed the sector-neutral tax deduction as a "stealth bailout for the oil and gas industry."

    - Some Democrats have seized on NOLs as a populist wedge issue, combining anti-corporate messaging with pro-climate appeals. This dovetails with previous Democratic characterization of discussions to provide oil and gas industry relief as a "fossil fuel bailout."

        - The *HEROES Act* contains provisions seeking to undo the earlier NOL changes in the *CARES Act*.

            - Instead of a 5-year carryback for 2018, 2019, and 2020 losses, the Heroes Act prevents companies from carrying back any losses before 2018.

            - Restricts even these limited NOL carrybacks for corporations engaging in "excessive" executive compensation, stock buybacks, or dividends.

            - Reinstates TCJA loss limitation rules and extends them beyond scheduled expiration.

- **NOL carrybacks have always been uncontroversial.** Of course, accelerating the utilization of losses is neither partisan, nor new or novel—it is a tried and true policy response to economic hardship, one that was not only a basic part of the tax code prior to TCJA, but that majorities and administrations from both parties overwhelmingly supported as part of economic stimulus efforts related to both the 9/11 attacks (2002) and the Great Recession (2009).
  - **In their own words.** Speaker Pelosi and other leading Democrats had glowing praise for this same policy in previous stimulus efforts:
    - "The bill also has the net operating loss carryback, which businesses tell us is necessary for them to succeed and to hire new people, and also to mitigate some of the damage that has been done to the economy from past policies." Speaker Nancy Pelosi, 11/5/09
    - "The bill provides an expanded tax cut to tens of thousands of struggling businesses, providing them with the immediate cash they need to pursue an expansion or avoid contracting or furloughing their workers…Business losses incurred in 2008 or 2009 can now be used to recoup taxes paid in the prior five years. This provision is a fiscally responsible economic kick-start, putting $33 billion of tax cuts in the hands of businesses this year when they need it most, while enabling Treasury to recoup the majority of that funding in the coming years as these businesses regain their strength and resume paying taxes." The White House, 11/6/09
  - Read more on the issue here.
- While the NOL issue is a non-starter for Republicans, and won't be a part of any law this year, the effectiveness of this narrative will determine whether this becomes a longer term policy objective for Democrats, or merely an exercise in political point scoring. The more traction this criticism gets, the more valuable it becomes as a bargaining chip in ongoing negotiations.

# *Policy Resolution Group COVID-19 Legislative Update*

## *May 13, 2020*

Today's note provides an update on the House Democrats' newly released *HEROES Act*; the state of play in the GOP-controlled Senate; and the status of original *CARES Act* programs.

Our Agency Report includes information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with new updates for the following:

- Department of Labor,
- Department of the Treasury,
- Environmental Protection Agency,
- Federal Reserve,
- Occupational Safety and Health Administration.

### ***The HEROES Act/"Pelosi's Socialist Wish List"***

**Summary.** House Democrats released the text of their 1,815 page, $3 trillion *HEROES Act* (H.R. 6800), an opening salvo to the fourth phase of the congressional COVID-19 response.

- **Key components.** As our previous updates have suggested, central elements of the *HEROES Act* include:
  - **State and local government aid.** $915 billion. More details here.
    - **States:** $500 billion
    - **Local:** $375 billion
    - **Territories**: $20 billion
    - **Tribes**: $20 billion
  - **Direct individual payments.** $1,200 per family member, up to $6,000 per household.
  - **Unemployment Insurance.** Six month extension (through January 2021) of the $600/week federal supplement.
  - **Public Health Fund.** $175 billion "Public Health and Social Services Emergency Fund."
    - $100 billion in grants for hospitals and other providers to reimburse health care expenses and lost revenue due to COVID-19.
    - $75 billion for testing, contact tracing, and other monitoring activities.
  - **Housing Assistance.**
    - $100 billion in rental assistance.

    - $75 billion in homeowner assistance, administered through the states.

- **Nutrition.** 15 percent increase in maximum SNAP benefit; additional $10 billion for program.

- **Hazard pay.** $200 billion "Heroes Fund" for frontline workers.

    - $13/hour premium pay up to $10,000 per employee ($5,000 for high earners)

    - Essential employers apply for grants to cover entire cost, including employer payroll tax.

    - According to bill, "essential worker" means workers in the health sector, emergency response, sanitation, and those deemed essential by state and local governments.

- **Debt collection moratorium.** Temporary moratorium on consumer debt for 120 days after the public health emergency ends.

- **Paycheck Protection Program (PPP) Reforms.**

    - Extends program from June 30 statutory end date through the end of the year.

    - Expands eligibility to all non-profits, including 501(c)(6) organizations.

    - Set-asides for the smallest businesses and lending institutions.

    - Bifurcation of PPP from traditional 7(a) lending authority.

    - Extends 8-week covered period for forgiveness to 24 weeks.

    - Eliminates SBA rule requiring 75 percent of forgiveness amount to go to payroll.

    - Improves coordination between PPP and Employee Retention Tax Credit (ERTC.)

- **Employee Retention Tax Credit (ERTC) Expansion.** Changes based on Senator Chris Murphy (D-CT) *JOBS Credit Act* proposal discussed in previous updates:

    - Increases value of the credit from 50 percent of wages to 80 percent.

    - Increases quarterly cap from $10,000 per employee to $15,000 ($45,000 in aggregate).

    - Modifies gross receipts threshold by allowing a phased-in partial credit for declines between 10 percent and 50 percent.

    - Raises threshold for large employer treatment from 100 employees to 1500 full-time employees and greater than $41,500,000 in 2019 gross receipts.

- **New Credit for Fixed Expenses of Employers Subject to Closure Due to COVID-19.**

    - 50 percent refundable payroll tax credit for qualified rent, mortgage, and utility costs.

        - Credit limited to 25 percent of ERTC-qualified wages or 6.25 percent of 2019 gross receipts per quarter (maxes out at $50,000)

    - **SALT Relief.** Two-year elimination of $10,000 cap on state and local tax deductions.

    - **Rollback of CARES NOL Treatment.**

        - Retroactively denies 5-year carryback for 2018 losses.

        - Restricts carryback of 2019 and 2020 losses for companies engaged in “excessive” executive compensation, stock buybacks, or dividends.

        - Reinstates loss limitation for pass-through businesses, effectively denying NOL treatment to non-corporate taxpayers.

    - **Paid Leave Expansion.** Expands the Phase Two paid leave mandate to all employers and extends it through 2021.

- **Omissions.** As expected, the bill did not include the Senate GOP’s top priority of business liability protections, nor President Trump’s desired payroll tax cut.

    - More surprisingly, the bill left out the “Paycheck Guarantee” proposal championed by Rep. Primala Jayapal (D-WA), prompting the Congressional Progressive Caucus she co-chairs to publicly call for the Friday vote to be postponed while they consider the legislation:

        - "We request delaying the Friday vote to the following week. We also request a full caucus meeting and conversation when we get back to Washington and any amendments that might be needed to ensure that it truly reflects the priorities and the work of the entire caucus."

    - Leadership has not responded to the request and will press forward with a vote.

    - The bill will almost certainly advance, but the signs of inter-caucus discord threaten to undermine any negotiating leverage its passage is meant to achieve.

- **Resources.**

    - Bill text

    - One-page summary

    - Section-by-section summary

    - State and local relief summary

**Republican Reaction.**

- Unsurprisingly, and indicative how seriously they intend to treat the proposal, Republicans in the House quickly branded the bill as "Pelosi's Socialist Wish List."
  - GOP Leader Kevin McCarthy (R-CA) tweeted: "This spectacle has **no chance** of becoming law. What a waste of taxpayer time."
- The White House condemned the bill, with spokeswoman Kayleigh McEnany tweeting:

  > President @realDonaldTrump has been clear that any future coronavirus aid package must prioritize Americans' health and the nation's economic prosperity.
  >
  > House Democrats are once again using this crisis to play politics and push their partisan agenda.

- Senate Majority Leader Mitch McConnell (R-KY) declined to even release a statement on the bill, an illustration of the dismissive reception in the upper chamber.

**Process.**

- **Proxy voting.** Democrats on the House Rules Committee this morning unveiled a measure to allow proxy voting and virtual committee work. The full House is expected to vote on the rule change on Friday when the chamber also takes up the *HEROES Act*.
- **Friday vote.** House Majority Leader Steny Hoyer (D-MD) announced that the House will meet at 9:00 AM this Friday to consider the *HEROES Act*, with votes beginning as soon as 10:00 AM.
  - **Public health delays.** Voting will happen in waves, out of public concerns, so it could last into the evening.
  - **Expect a party-line vote.** In a note to GOP lawmakers, Republican Whip Steve Scalise (R-LA) characterized the *HEROES Act* as "Pelosi's Socialist Wish List Act," a sentiment many GOP representatives share. The vote on Friday will unsurprisingly split along sharp partisan lines.
    - Senate Majority Leader Mitch McConnell (R-KY) similarly weighed in, calling the Democratic proposal "aspirational."

**Outlook.** While the *HEROES Act* as currently written has zero chance of clearing the GOP-controlled Senate and avoiding President Donald Trump's certain veto, a pared down Phase Four/CARES 2 bill is likely.

- **Timing.** A Phase Four/CARES 2 bill that could actually become law will likely coalesce by the end of end of June or early July.
  - **PPP funding no longer a driver.** While expiration of PPP funds was originally anticipated to drive lawmakers to pass the next phase of stimulus, the rate of lending has declined to sustainable levels. While the pace of funding has slowed, neither side will want to see the program lapse at the end of June.
  - **New drivers.** While Leader McConnell and the President have made clear that they are perfectly content waiting to see how existing stimulus programs play out before rushing into another round

of stimulus, the following drivers could force legislative action on the next phase of COVID-19 stimulus relief:

- **State budgets.** July 1 marks the new fiscal year for states, whose ravaged budgets are a central concern of congressional Democrats.
- **Jobs reports.** Continued bleak economic numbers could compel Congress to act sooner on another phase of stimulus. The next two jobs reports come on June 5 (May report) and July 2 (June report).
- **Unemployment Insurance.** The UI expansion from the *CARES Act* expires on July 31. If the public health and economic situation has not recovered, Congress may be pressed to extend this benefit for the unemployed. However, some GOP lawmakers voiced strong opposition to the initial expansion of UI, concerned the generous benefit could encourage workers to take unemployment.

- **Final contents.** As mentioned above, the Phase Four/CARES 2 bill that actually becomes law is unlikely to resemble the *HEROES Act*. This House draft will likely be ignored, and the Senate will create its own version to serve as the ultimate vehicle. The 60-vote threshold in the Senate means that this chamber's version will be bipartisan, similar to the original *CARES Act*. The House may find itself forced to pass the Senate version, a prospect progressive Democratic lawmakers may balk at, even if some ultimately swallow the bitter pill.
  - Even if the bill fails, its contents matter. While Democratic Leadership will likely back off from certain provisions in the *HEROES Act* in negotiations with the Senate and White House, they will likely stand firm on at least the following items:
    - Increased state and local government aid (albeit at a lower number than the initial $1 trillion salvo),
    - Additional direct checks to individuals,
    - Extension of Unemployment Insurance (expect strong GOP opposition),
    - Hazard pay for frontline workers, and
    - Public health funds for testing and hospitals,
  - Republicans in the Senate will insist on liability protections for businesses (more below). Without much else on the GOP must-have list, the White House demand for payroll tax relief, deductions for meals, and policies geared toward reopening the economy will loom large.
  - The bill also includes a number of provisions that have broad, bipartisan support, and could plausibly make it into a bipartisan compromise bill, including PPP reforms, expansions to the employee retention tax credit (ERTC), and a new credit to offset fixed costs for companies forced to close due to the pandemic.

***<u>Senate</u>***

**Liability protections.** Leader McConnell and Senator John Cornyn (R-TX) have begun work on a bill to expand liability protections. On the Senate floor on Tuesday, Leader McConnell said,

- "Senate Republicans are preparing a major package of COVID-related liability reforms. ... Our legislation is going to create a legal safe harbor for businesses, nonprofits, governments and workers and schools who are following public health guidelines to the best of their ability."
  - The bill would also look to "expand existing protections" for manufacturers who create COVID-19 therapeutics or vaccines, in addition to creating new protections for medical equipment manufacturers.
- Business groups have come out in support of liability protections, such as the US Chamber of Commerce and National Association of Manufacturers.

**GOP divided on state bailouts.**

- Some in the GOP have come out strongly against providing additional aid to states, which they view as a bailout.
  - Kevin Hassett, an economic adviser to the President, said on CNN, "I think President Trump has signaled that while he doesn't want to bail out the states, he's willing to help cover some of the unexpected COVID expenses that might come their way."
  - The President himself tweeted last month, "Why should the people and taxpayers of America be bailing out poorly run states (like Illinois, as example) and cities, in all cases Democrat run and managed, when most of the other states are not looking for bailout help? I am open to discussing anything, but just asking?"
  - Leader McConnell at the end of April said in an interview with Hugh Hewitt, "I think this whole business of additional assistance for state and local governments needs to be thoroughly evaluated. …There's not going to be any desire on the Republican side to bail out state pensions by borrowing money from future generations.
- However, there are notable exceptions, such as Senator Mitt Romney (R-UT) who noted at a Republican lunch that "Blue states aren't the only ones who are screwed."

## ***CARES Act Programs***

**Main Street delays.** In a Senate Banking Committee hearing yesterday, Federal Reserve regulatory chief Randy Quarles said that the Main Street and municipal lending programs would not be ready soon. Quarles did not think it would take months, but did not have an immediate timeline to provide lawmakers and businesses. He did, however, say that launching those facilities is the Federal Reserve's top priority.

**PPP developments.** Treasury/SBA recently updated its PPP FAQ, providing new information on how the SBA will review borrower's required good-faith certification concerning the necessity of their loan requests.

- The new guidance provides an automatic pass for loans less than $2 million and allows repayment for everyone else, in the event that the loan is found to be improperly certified.

- This clarification comes as quite a surprise, as Treasury and SBA have led borrowers to believe for weeks that they could face serious (potentially criminal) consequences if they incorrectly certify, which has caused some borrowers to forgo loans altogether.
    - The looming uncertainty over certification and forgiveness has slowed the pace of the program to a trickle, with just $16 billion approved since May 2, less than half of what had been the daily burn rate up to that point.
- The safe harbor deadline for returning PPP funds remains tomorrow, May 14, but the new guidance lowers the stakes significantly. Larger recipients can return the funds preemptively, or participate with the knowledge that, at worst, they may have to pay the loan back at a later date.

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## *Policy Resolution Group COVID-19 Legislative Update*

## *May 11, 2020*

Today's note provides an update on the House Democrats' coalescing Phase Four/CARES 2 package. The key take away: no House vote is likely this week, although we should get a first glimpse at the legislative text.

Our Agency Report includes information on how Federal agencies are managing their operations and oversight obligations in response to COVID-19, with new updates for the following:

- Department of Labor,
- Department of Health and Human Services,
- Department of the Treasury,
- Federal Energy Regulatory Commission, and
- Pipeline and Hazardous Materials Safety Administration.

### ***Phase Four/CARES 2 State of Play***

- **The House homes in on a bill.** House Democrats are currently assembling and fine-tuning their version of a Phase Four/CARES 2 disaster relief bill, with hopes of releasing legislative details in the coming days. Given what we know about the nascent proposal, it will be received coolly in the White House and the Senate. Why then are Democrats crafting legislation that will surely be dismissed by Republicans as a nonstarter? Here are some likely explanations.
    - **Rank and file pressure.** After earlier phases of stimulus emerged from a leadership-centric process, rank and file House democratic lawmakers want their voices heard and reflected in this next phase of relief.
        - The *CARES Act* in particular left a bad taste in the mouth of House Democrats, as the Speaker and the chamber was largely absent from the process, forcing them to swallow whatever the Senate sent over. Consequently, the Phase Four/CARES 2 bill is likely to read as an enumeration of stalwart progressive policy ideas.
    - **Messaging.** Democrats want to lay down a marker of their priorities, and use that to draw a contrast with the Republican COVID-19 response. With less than six months until the November election, this tension is likely to be a central aspect of the campaign at both the Presidential and Congressional level.
    - **Negotiating posture.** With no legislative forcing mechanism on the immediate horizon, unlike previous phases, CARES 2 will be an iterative process, with neither side willing to be jammed. The House bill will serve as an opening bid, and in staking out the left flank, even a partisan wish list serves to establish the center of gravity for a broader deal moving forward.
- **Pelosi's Message: "Think Big" for the People.** In a Dear Colleague letter to House Democrats late Sunday, House Speaker Nancy Pelosi (D-CA) laid out her vision:

Americans also agree that we owe our Heroes in the fight against coronavirus an enormous debt of gratitude – our health care, first responders, teachers, transit, food and other essential workers who risk their lives to save lives and who could now lose their jobs. To do that, **we must act boldly to support state and local entities to address coronavirus-related outlays and lost revenue.**

We all agree that we must put more money in the pockets of the American people. This is not only necessary for their survival but also is a stimulus to the economy. **Direct payments, unemployment insurance, rental and mortgage help and student loan assistance are essential to relieve the fear that many families are facing.**

The Chair of the Federal Reserve Bank has told us to "Think Big" because interest rates are so low. **We must "Think Big" For The People now, because if we don't, it will cost more later.** Not acting is the most expensive course.

- **Top Democratic priorities for Phase Four/CARES 2.** Our update from last week provides more granular analysis of these and other Democratic priorities, but it is worth reiterating that Speaker Pelosi and other Democratic leaders have homed in on the following elements as essential in any relief package:
    - increased aid for state and local governments,
    - money for hospitals and COVID-19 testing,
    - expanded SNAP benefits, Medicaid funding, and Unemployment Insurance,
    - funding for the Postal Service,
    - money to expand broadband access,
    - paid sick leave expansion,
    - hazard pay for health care workers, and
    - direct individual payments (in lieu of the bi-cameral push for a federal program to pay the salaries of certain workers).
    - **Notable absences.** The House bill will not include liability protections for businesses, a top priority for Senate Leader Mitch McConnell (R-KY) and his fellow Republicans.
        - The package will also leave aside recovery-oriented priorities sought by various industries, from tax breaks to broad-based infrastructure funding.
            - President Donald Trump has made taxes a red line, telling *Fox News*, "We're not doing anything without a payroll tax cut."
- **Bill timing.** While text of the Democratic initiative could be released as early as tonight, it is more likely to materialize on Tuesday.

  - **Any text is not final.** Given the large number of Democratic lawmakers seeking to fold their priorities into this bill, it is subject to change even upon release.

- **Hurry up and wait (on the Senate).** Leader McConnell, as we have noted in previous updates, intends to hold steadfast to his wait-and-see approach, hesitant to proceed with another round of stimulus before assessing the efficacy of the previous phases.

  - **PPP funding no longer a forcing mechanism.** When Paycheck Protection Program (PPP) loans were being doled out at a torrid pace, a third round of funding was seen as a plausible forcing mechanism for the Senate to consider another relief bill. However, recent reports from the Small Business Administration show that this is no longer the case; the rate of PPP lending has slowed to a trickle, pending clearer guidance, looser rules, and certainty on audit exposure. Absent legislative changes, this is unlike to pick back up in the immediate future, opening the possibility that current levels will sustain the PPP through its statutory terminus. This development makes immediate term action unlikely, and removes a key point of leverage for Democrats seeking to lure Republicans to the negotiating table.

  - **New legislative horizon: July 1.** While recent months have shown that events have a way of interceding, the default deadline will be the end of June, which marks both the close of the PPP program and the fiscal year for most states. This provides a convenient intersection of partisan priorities, while allowing the White House and Senate Republicans to get beyond their current posture of taking account of *CARES Act* spending and its effects. The White House this weekend indicated a break in talks, saying they won't engage in formal negotiations until late May or early June.

    - "We're kind of paused as far as formal negotiations go," Larry Kudlow, the director of the White House's National Economic Council, told reporters on Friday.

- **What to expect moving forward.**

  - **Votes likely slip to next week.** This morning, House Majority Leader Steny Hoyer (D-MD) announced that the House would not return until Friday at the earliest. Given that Leader Hoyer has indicated that members would have 72 hours' notice to return to DC, this timeline allows a narrow window for introduction on Tuesday. Given safety concerns within the caucus and broader lack of urgency, coming back to vote on a Friday seems like a stretch. We expect introduction by mid-week, with votes to follow the next.

  - **From the Majority Leader:**

    Members are advised that conversations surrounding additional CARES legislation and a Rule change related to remote work are ongoing.

    Members are further advised that pending introduction of legislation, it is possible that the House may meet this week, no earlier than Friday, May 15, 2020.

    Members will be given 72-hours' notice of when they would need to return to Washington, DC.

Further information will be provided as soon as it becomes available.