TRANSPARENCY INTERNATIONAL
the global coalition against corruption

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BRIEFING MEMO

To: Interested Parties
From: Transparency International U.S. Office
Date: August 2020

Re: HEALS Act Could Give Banks a Free Pass to Violate Anticorruption and Fair Lending Laws

While there is a pressing need to ensure that lenders quickly disburse PPP loans, the HEALS Act, as written, could provide blanket immunity from all federal, state, and other laws applicable to lenders, enabling them to disregard safeguards against corruption, fraud, and discrimination. HEALS could not only absolve all lender wrongdoing going forward, but any misconduct that may have occurred since the CARES Act was adopted in March, leaving regulators powerless to assess penalties or take enforcement actions in response.

Additional legislative language, which we are developing, is needed to ensure that our nation's key lending laws are not discarded at this critical time.[1]

Background

The Paycheck Protection Program (PPP) was established in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide loans to small businesses. While CARES outlined the essential pieces of the Program, guidance from the Treasury Department, the Financial Crimes Enforcement Network (FinCEN), and the Consumer Financial Protection Bureau (CFPB) has since sharpened the legal framework for lenders.

- In April, Treasury issued an Interim Final Rule stating that to properly engage in PPP lending, lenders would need to confirm receipt of the borrower certifications required in the PPP application form; confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes; confirm the dollar amount of average monthly payroll costs by reviewing the payroll documentation submitted with the borrower's application; and, critically, follow applicable Bank Secrecy Act (BSA) requirements.

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[1] Transparency International's U.S. office (TI-US) is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, the organization partners with businesses, government, and citizens to promote transparency and accountability and curb the abuse of power in both the public and private sectors.

- Guidance issued by FinCEN emphasized that compliance with the BSA "remains crucial to protecting our national security by combating money laundering and related crimes, including terrorism and its financing. FinCEN expects financial institutions to continue following a risk-based approach, and to diligently adhere to their BSA obligations."
- A CFPB post made clear that anti-discrimination laws such as Equal Credit Opportunity Act remained in force and applicable to PPP loans.

Proposals for "Safe Harbor" Provisions

Because the urgency of the pandemic required lenders to move quickly in disbursing PPP loans, the Treasury Department's Interim Rule expressly permitted them to rely on documentation and certifications provided by borrowers in doing so. Yet nothing in CARES or subsequent guidance interpreting the law spoke to the standard of care that lenders needed to use when relying on this information.

Recent legislative proposals have sought to be more specific and extend some amount of immunity to lenders for their role in the PPP. At the low end, this immunity would be tailored to the specific requirements created by CARES: if lenders acted "in good faith" in relying on borrower information with regard to loan origination or forgiveness, they would be immune from any penalties and enforcement actions based on that reliance. At the high end, lenders would receive blanket immunity for any loan activity based in any way on such reliance: if a lender acted "in good faith" regarding a loan that was based on its reliance on borrower information, they could not be subject to any penalties or enforcement action, under any law whatsoever. One legislative proposal said as much, expressly insulating all lenders from any claims, actions, or penalties under any "Federal, State, or other criminal or civil law or regulation."

The HEALS Act

While HEALS does not expressly provide such blanket immunity, it can be interpreted to grant it. Section 102 of HEALS, titled "Lender Safe Harbor," reads:

> **SEC. 102. LENDER SAFE HARBOR.**
> Subsection (h) of section 1106 of the CARES Act 19 (15 U.S.C. 9005) is amended to read as follows:
> "(h) HOLD HARMLESS.—
> "(1) IN GENERAL.—A lender may rely on any certification or documentation submitted by an applicant for a covered loan or an eligible recipient of a covered loan that—
> "(A) is submitted pursuant to any statutory requirement relating to covered loans or any rule or guidance issued to carry out any action relating to covered loans; and

"(B) attests that the applicant or eligible recipient, as applicable, has accurately verified any certification or documentation provided to the lender.

"(2) NO ENFORCEMENT ACTION.—With respect to a lender that relies on a certification or documentation described in paragraph (1)—
"(A) an enforcement action may not be taken against the lender acting in good faith relating to origination or forgiveness of a covered loan based on such reliance; and
"(B) the lender acting in good faith shall not be subject to any penalties relating to origination or forgiveness of a covered loan based on such reliance.".

At bottom, section 102 is vague and subject to conflicting interpretations. The question is: what does the phrase "based on such reliance" refer to? There are at least three viable interpretations:

1. (h)(2) means that lenders will be immune from enforcement actions relating to origination or forgiveness that are *based solely* on the lender's reliance on borrower information (in other words, they are immune from CARES-based penalties and enforcement actions only):

   "(B) the lender acting in good faith shall not be subject to **any penalties** relating to origination or forgiveness of a covered loan **based on such reliance**.".

2. (h)(2) means that lenders will be immune from penalties and enforcement relating to *origination or forgiveness* that is based *to any extent whatsoever* on such reliance:

   "(B) the lender acting in good faith shall not be subject to any penalties relating to **origination or forgiveness** of a covered loan **based on such reliance**.".

3. Even more expansively, (h)(2) means that lenders will be immune from penalties and enforcement relating to "a covered loan" that is *in any way* based on such reliance:

   "(B) the lender acting in good faith shall not be subject to any penalties relating to origination or forgiveness of **a covered loan based on such reliance**.".

The Consequences of HEALS's Ambiguity

The text of section 102 allows for both a narrow reading and an expansive reading that would fundamentally transform oversight of PPP loans by suspending key federal laws that regulate lending in the U.S., including:

- The Bank Secrecy Act, which serves as the federal government's primary tool for combating corruption, financial fraud, money laundering, terrorist financing, and other forms of illicit finance.
- The False Claims Act, which operates as the U.S. government's primary tool for combating fraud against the government; and
- The Financial Institutions Reform, Recovery, and Enforcement Act, which deters fraud in housing loans.

As written, section 102 would also have truly disastrous consequences for fair lending laws at a time when minority and women-owned businesses have been hit disproportionately hard by the pandemic:

- While discrimination in mortgage, auto, and small dollar lending is well-documented, discrimination in small business lending has attracted more attention in the last few years. A 2019 report from the Federal Reserve Bank of Atlanta, for example, found that Black- and Latinx-owned businesses received approval for smaller shares of the financing they sought compared to white-owned small businesses; larger shares of Black- and Latinx-owned businesses did not receive any of the financing they applied for; and a larger share of white-owned business applicants received approval for all the financing they applied for.
- Evidence also shows that minority-owned businesses receive proportionately fewer recovery funds from the PPP than their white counterparts. The National Community Reinvestment Coalition tested the experience of Black and white business owners applying for PPP funding, using a match-pair "mystery shopper" test where a Black and a white applicant with nearly identical business profiles and strong credit histories would contact the same bank. In almost half of the cases, Black applicants received less favorable treatment than their white counterparts.

Fair lending laws that can counteract these disturbing trends are needed now more than ever. And as our nation confronts its own record of racial injustice, Congress must not give discrimination a pass and threaten the recovery of some of the hardest hit communities by ignoring discrimination in the name of expediency.

Additional, Straightforward Language Would Correct this Ambiguity

These are the moments when anticorruption, fair lending, and other protections can make the greatest difference. The HEALS Act must be amended to make certain that these protections are maintained for PPP loans. Short and concise language that would do so is being developed and will be available upon request.

Please reach out to Scott Greytak, TI-US's Advocacy Director, at sgreytak@transparency.org with any questions.