

Front and Center: New SBA Grant Program for Shuttered Venue Operators

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The [Consolidated Appropriations Act, 2021](#) (the “CAA”), which provides \$900 billion in new COVID-19 relief funding, was signed into law on December 27, 2020. Section 324 of Title III of the CAA, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “[Hard Hit Act](#)”), introduces a new \$15 billion grant program through which the U.S. Small Business Administration (the “SBA”) will provide aid to struggling live venue operators and related businesses. This program offers a critical lifeline from the Federal government for the nation’s performing arts venues, movie theatres and museums. Grants made under such program are referred to in this publication as “[SOS Grants](#)”.

This article details the key terms of the SOS Grant program. For information about the changes implemented to the Paycheck Protection Program (the “PPP”) under the Hard Hit Act, see our article [[Where Are We Now? -- Paycheck Protection Program Redux](#)].

I. What Persons, Entities or Organizations are Eligible for a SOS Grant?

To be eligible to receive a SOS Grant, an entity or an individual must be (i) a live venue operator or promoter, theatrical producer or live performing arts organization operator, (ii) a talent representative, (iii) a movie theatre, or (iv) a “relevant” museum. There are specific requirements for whether an individual or entity fits within one of these categories:

- ***Live venue operator or promoter, theatrical producer or live performing arts organization operator*** – For an individual or an entity, which may be for-profit, nonprofit, or

government-owned, to qualify as a live venue operator or promoter, theatrical producer or live performing arts organization operator, it must either:

- (i) have a principal business activity of organizing, promoting, producing, managing or hosting live concerts, comedy shows, or theatrical productions or other events by performing artists for which (1) a cover charge is applied (through ticketing or front door entrance fee) and (2) performers are paid in an amount that is based on a percentage of sales, a guarantee or another mutually beneficial formal agreement, and (ii) generate at least 70% of revenue through ticket sales, production fees/reimbursements, nonprofit educational initiatives or the sale of event food, beverages or merchandise; or
 - have a principal business activity of making tickets available for purchase by the public at least 60 days in advance of live concerts, comedy shows, theatrical productions, or other qualifying events for which performers are paid in an amount that is based on a percentage of sales, a guarantee or another mutually beneficial formal agreement.
- **Motion Picture Theatre Operator** – For an individual or entity, which may be for-profit, nonprofit, or government-owned, to qualify as a motion picture theatre operator, it must have as its principal business activity the ownership or operation of at least one place of public accommodation for the purpose of showing movies for a fee. Additional venue requirements apply to the spaces that qualify as a motion picture theatre (described below).
 - **Relevant Museums Operator** – For an individual or entity to qualify as a relevant museum operator, it must operate a public, tribal or private **nonprofit** agency or institution organized on a permanent basis for essentially educational, cultural heritage, or aesthetic purposes. Additional venue requirements apply to the spaces that qualify as a relevant museum (described below).
 - **Talent Representative** – For a person or entity that is an agent or manager, which may be for-profit, nonprofit or government-owned, to qualify as a talent representative: (i) 70% of its operations must involve representing or managing artists and entertainers; (ii) it must book or represent musicians, comedians, actors or similar performing artists primarily at live events in venues or at festivals; and (iii) such performers must be paid in an amount that is based on the number of tickets sold, or a similar basis (e.g., entrance fees).

Persons or entities that might otherwise satisfy the above criteria may nonetheless be ineligible (see **Ineligible Entities and Persons** below). Note that any entity that is a federally tax exempt organization under Section 501(a) of the Internal Revenue Code qualifies as a nonprofit for purposes of the SOS Grant program.

II. What Are the Eligibility Requirements?

To receive a SOS Grant a live venue operator or promoter, theatrical producer, or live performing arts organization operator, relevant museum operator, motion picture theatre operator, or a talent representative must satisfy certain eligibility requirements. To be eligible, such a person or entity seeking a SOS Grant:

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- **Fully Operational** – must have been “fully operational” as of February 29, 2020;
 - **Gross Revenue Reduction** – must have a reduction of **at least 25%** in gross earned revenue during (at least) one quarter of 2020 as compared to the corresponding quarter of 2019; and
 - **Resumption of Operations** – as of the date of its receiving a SOS Grant, must:
 - for **live venue operators, promoters, theatrical producers or live performing arts organization operators**, have resumed or intend to resume organizing, promoting, managing or hosting future live events;
 - for **motion picture theatre operators**, have reopened or intend to reopen for the primary purpose of publicly showing motion pictures;
 - for **relevant museum operators**, be open or intend to reopen; and
 - for **talent representatives**, be representing or managing artists and entertainers.
 - **Venue Requirements** – must satisfy (or the venue applicable to an applicant must satisfy) certain venue-specific requirements:
 - for **live venue operators, promoters, theatrical producers or live performing arts organization operators**, the venues at which/for which events are promoted, produced, managed or hosted events, and for **talent representatives**, the venues at which the artists/entertainers represented or managed perform must:
 - contain a defined performance and audience space, mixing equipment, a public address system and a lighting rig;
 - hire at least one individual to do at least **two** of the following activities: (i) sound engineer; (ii) booker; (iii) promoter; (iv) stage manager; (v) security personnel; (vi) box office manager;
 - have paid tickets or cover charges to attend most performances;
 - pay artists “fairly” (e., artists do not play solely for free or for tips);
 - market performances (in print, online, mass media or on social media); and
 - solely for nonprofit venues that produce free events, produce events managed primarily by paid employees and not volunteers.
 - for **motion picture theatre operators**, a motion picture theatre must: (i) have at least one auditorium that includes a movie screen and fixed audience seating; (ii) have a projection booth (or other space) with at least one projector; (iii) have paid ticketing; and (iv) market movies (in print, online, mass media or on social media).
 - for **relevant museum operators**, a relevant museum must have: (i) been serving as a relevant museum as its principal business activity; (ii) indoor exhibition space that is a

component of the principal business activity and which has been subject to pandemic-related occupancy restrictions; and (iii) at least one auditorium, theatre, performance or lecture hall with fixed audience seating and regular programming.

- **Certification of Need** – must make a certification that the uncertainty of current economic conditions makes necessary the SOS Grant to support ongoing operations. A similar certification is required for PPP loan applicants, and the SBA has published guidance as to how to evaluate “necessity” in the context of that program. Persons seeking a SOS Grant should take care to create a thoughtful and detailed record demonstrating how necessity was determined and the lack of availability (or difficulty in obtaining) funds from other sources.

III. Affiliation.

Recognizing the manner in which separate venues or productions may be organized, the Hard Hit Act specifically acknowledges that each business entity of an (otherwise eligible) applicant shall be treated as an independent, non-affiliated entity for purposes of this program. However, not more than five business entities of an eligible person or entity that would be considered its affiliates under the SBA’s (very broad) affiliation rules may receive SOS Grants. (See our publication [Paycheck Protection Program, Where Are We Now](#) for a description of those affiliation rules). This implies that an eligible person or entity, together with five of its affiliates may receive a total of six SOS Grants. It is not expressly stated whether initial grants and supplemental grants are counted as a single “grant” for purposes of such affiliation rules, but the structure of the program suggests that to be the case.

IV. Ineligible Entities and Persons.

The following categories of individuals or entities are ineligible to receive a SOS Grant:

- **Public Issuer** – if it is *or* is majority owned or controlled by another entity that is an issuer, securities of which are listed on a national securities exchange;
- **10% of Gross Revenue from Federal Funding** – if it received *or* is majority owned or controlled by another entity that received more than 10% of gross revenue from federal funding during 2019 (excluding certain disaster relief funding received under the Robert T. Stafford Disaster Relief and Emergency Assistance Act);
- **Large Operator** – if it is owned or controlled by another entity with **two** or more of the following qualities:
 - owns or operates locations in more than one country;
 - owns or operates locations in more than ten States; and/or
 - employed more than 500 full-time employees as of February 29, 2020.
- **PPP Borrower** – if it received after December 27, 2020, a PPP Loan (whether under a standard or second draw PPP loan); or
- **Prurient Sexual Nature** – if it presents live performances of a prurient sexual nature, or derives more than *de minimis* gross revenue through sale of products/services of a prurient

sexual nature.

V. Size of SOS Grants.

The total amount of SOS Grants that any individual applicant may receive (whether solely in the initial grant or taking together the initial and any supplemental grant) is capped at **\$10 million**. Further, for relevant museum operators specifically, a relevant museum operator may not receive total grants in excess of \$10 million for all relevant museums operated by the operator. Applying the affiliation rules (described above), an applicant, together with its affiliates that receive grants, cannot collectively receive more than **\$60 million** in grants.

- ***Initial Grants*** – Subject to a \$10 million cap noted above, initial SOS Grants are (i) for an eligible person that was in operation **on** January 1, 2019 equal to **45%** of the gross earned revenue of the entity during 2019 and (ii) for an eligible person that began operations **after** January 1, 2019 may receive a grant equal to 6x the average monthly gross earned revenue for each full month of 2019 that the eligible person was in operation.
- ***Supplemental Grants*** – Individuals or entities that receive an initial SOS Grant may receive a supplemental grant if, as of April 1, 2021, such person's revenue for the first quarter of 2021 is not more than **30%** of the revenue for the first quarter of 2019. A supplemental grant will be equal to **50%** of an initial grant (subject to the total \$10 million cap on all SOS Grants received by the recipient). Supplemental grants cannot be administered until all applications for initial grants submitted within the program's first 60 days have been processed.

The SBA is authorized to establish alternative methods to calculate revenue losses for seasonal employers that would be adversely impacted if January, February and March are excluded from the calculation of year-over-year gross earned revenue.

VI. Priority of Disbursement of SOS Grants.

SOS Grants are to be allocated in an order of priority laid out in the Hard Hit Act. Up to **80% (\$12 billion)** of the funds appropriated for the SOS Grant program may be allocated to initial grants made to applicants eligible to receive grants in the 28-day priority period described below.

- ***First Priority Period*** – During the **first 14 days** of the program, the SBA may only award grants to (otherwise eligible) applicants with revenue for the period from 4/1/2020 through 12/31/2020 that is **not more than 10%** of such applicant's revenue during the same period of 2019 due to the COVID-19 pandemic.
- ***Second Priority Period*** – During the **next 14 days** of the program, the SBA may only award grants to (otherwise eligible) applicants with revenue for the period from 4/1/2020 through 12/31/2020 that is **not more than 30%** of such applicant's revenue during the same period of 2019 due to the COVID-19 pandemic.
- Thereafter, initial grants of any remaining funds can be made to all other eligible applicants.

For purposes of calculating revenue, an applicant's revenue does not include amounts received under the CARES Act (as amended) (*i.e.*, PPP loans or other funding) and the SBA is to use the accrual method of accounting for determining revenue.

In addition to these priority periods, there is an added overlay of \$2 billion of appropriated funds for the first 60 days of the program for grants to eligible persons or entities with 50 or fewer full-time employees. For such purposes, a "full-time" employee works at least 30 hours per week, and any employee working 10–30 hours per week counts as one-half (0.5) of a full-time employee.

VII. Permitted Uses of SOS Grant Funds.

Initial grants may be used for costs incurred between **March 1, 2020** and **December 31, 2021**, and supplemental grants may be used for costs through **June 30, 2022**. Any initial grant proceeds not spent (on allowable expenses) within one year and any supplemental grant proceeds not spent within **18 months** of disbursement must be returned to the SBA. SOS Grant funds *may* be used for any of the following:

- **payroll costs** (as defined in the PPP, limited to the following and solely with respect to employees who have a principal residence in the United States):
 - salary, wages, commissions, or similar compensation, and payment of cash tips or the equivalent up to a \$100,000 cap per employee on an annualized basis of cash compensation (as prorated for the period during which the compensation is paid or the obligation to pay the compensation is incurred);
 - payment for vacation, parental, family, medical, and sick leave;
 - allowance for dismissal or separation;
 - payment required for the provisions of group health care or group life, disability, vision or dental insurance benefits, including insurance premiums;
 - payment of any retirement benefit;
 - payment of State or local tax assessed on the compensation of employees; and
 - the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation up to a cap of \$100,000 on an annualized basis (as prorated for the period during which the payments are made or the obligation to make the payments is incurred);^[1]
- **covered rent obligations** (as defined in the PPP, any rent obligation under a leasing agreement in effect before February 15, 2020);
- **covered utility payment** (as defined in the PPP, payment for electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020);
- **covered worker protection expenditures** (as defined in the PPP, operating or capital

expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government beginning on March 1, 2020, such as ventilation systems, physical barriers, or an expansion of indoor, outdoor or combined business space);

- **interest payments on covered mortgages/debts incurred prior to February 15, 2020;**
- **payments to independent contractors** (capped at \$100,000 in annual compensation for any individual employee of an independent contractor); and
- **other ordinary and necessary business expenses**, including:
 - maintenance expenses;
 - administrative costs, including fees and licensing costs;
 - State and local taxes and fees;
 - operating leases in effect as of February 15, 2020;
 - required insurance payments; and
 - advertising, production, transportation, and capital expenditures related to producing a theatrical or live performing arts production, concert, exhibition, or comedy show, **except** that a SOS Grant **cannot be** primarily for such production-related expenditures.

Entities may not use funds to purchase real estate, pay interest on loans originated after February 15, 2020, to invest or re-lend, political contributions, or other use prohibited by the program administrator.

VIII. Authority and Oversight.

The Associate Administrator for the SBA Office of Disaster Assistance will coordinate and formulate policies for the administration of these grants. Accordingly, while we anticipate that the Office of Disaster Assistance will implement an application process (perhaps akin to the [disaster loan assistance page](#) that exists for Economic Injury Disaster Loans), in the interim the SBA's disaster assistance customer service center can be reached at 1-800-659-2955 or by e-mail at disastercustomerservice@sba.gov.

The SBA will provide increased oversight of eligible persons/entities receiving SOS Grants. Those receiving grants must retain records that document compliance with grant requirements for (i) four years for employment records and (ii) three years for all other records. Grants may be audited, and in the case of fraud, will require repayment of misspent funds or result in legal action to collect.

The SBA is required to deliver to Congress by February 10, 2021, a plan for oversight and audit of the SOS Grant program. Further, beginning on February 25, 2021, the SBA must submit to Congress monthly reports that detail (i) total grants approved and disbursed, (ii) the total amount of grants

received by each eligible person or entity, including any supplemental grants, (iii) the number of active investigations and audits of grants, (iv) the number of completed reviews and audits of grants under this section, including a description of any findings of fraud or other material noncompliance, and (v) any substantial changes to the oversight and audit plan.

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