

# SOS – Save Our Stages! COVID-19 Relief for Shuttered Venue Operators Is Coming Soon

## WRITTEN BY

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### Who Needs to Know

All parties that operate or promote live venues or theatrical productions, or are live performing arts organization operators, museum operators, motion picture theatre operators, or talent representatives such as interested in participating in SBA's shuttered venue operator grant program.

### Why It Matters

On December 27, the President signed into law a \$15 billion appropriation for a new relief program (the shuttered venue grant program) to be administered by the U.S. Small Business Administration (SBA). Under this program live venue operators or promoters, theatrical producers, or live performing arts organization operators, museum operators, motion picture theatre operators, and talent representatives will be eligible to receive grants (a grant) of up to \$10 million to pay certain costs if they:

- were in operation on February 29, 2020;
- experienced a 25% or greater revenue decline due to the COVID-19 pandemic during any quarter of 2020 as compared to the same quarter in 2019; and
- satisfy other eligibility requirements.

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On December 27, the President signed into law the Consolidated Appropriations Act, 2021, which included the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Act). The Act includes a \$15 billion appropriation for a new relief program (the shuttered venue grant program) to be administered by the U.S. Small Business Administration (SBA). Under this program, live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, and talent representatives will be eligible to receive grants (a grant) of up to \$10 million to pay certain costs if they were in operation on February 29, 2020, experienced a 25% or greater revenue decline due to the COVID-19 pandemic during any quarter of 2020 as compared to the same quarter in 2019, and satisfy other eligibility requirements. Grants will be phased in, with priority allocations made during the first 28 days to applicants that have been hardest hit. The Act also includes a \$2 billion set-aside allocation during the first 60 days for eligible grantees that employ 50 or fewer full-time employees. After this initial 60-day period, SBA is free to award any unused portion of this \$2 billion set-aside to other eligible grantees.

This is a summary of the shuttered venue grant program established under the Act as enacted on December 27, 2020. The Act requires the SBA to issue regulations to carry out the Act. We are tracking these regulations and will provide updates when appropriate.

## **ELIGIBILITY FOR GRANTS**

### **Categories of Eligible Grantees**

A person or entity that falls within one of the following categories (each, a relevant category) is eligible to receive a grant if the applicant satisfies: (1) the general eligibility requirements for all relevant categories; and (2) the specific eligibility requirements for the applicant's relevant category.

- A **“live venue operator or promoter, theatrical producer, or live performing arts organization operator”** is *either* –
  - an individual or entity that –
    - as a principal business activity, organizes, promotes, produces, manages, or hosts live concerts, comedy shows, theatrical productions, or other events by performing artists for which (1) a cover charge through ticketing or front door entrance fee is applied and (2) performers are paid in an amount that is based on a percentage of sales, a guarantee (in writing or standard contract), or another mutually beneficial formal agreement, *and*
    - derives at least 70 percent of its earned revenue through, to the extent related to any such live events, cover charges or ticket sales, production fees or production reimbursements, nonprofit educational initiatives, or the sale of event beverages, food, or merchandise; or
  - any individual or entity that, as a principal business activity, makes available for purchase by the public an average of at least 60 days before the date of the event tickets to live concerts, comedy shows, theatrical productions, or other events by performing artists for which performers are paid in an amount that is based on a percentage of sales, a guarantee (in writing or standard contract), or another mutually beneficial formal agreement.

A live venue operator or promoter, theater producer, or live performing arts organization operator can be a for-profit entity, a nonprofit organization,<sup>[1]</sup> a government-owned entity, or a business operated as a sole proprietorship.

- A **“museum”** is defined with reference to the meaning of the term “museum” in Section 273 of the Museum and Library Services Act, *but excludes* a museum that operates as a for-profit entity. As so defined, a “museum” is a public, tribal, or private nonprofit agency or institution organized on a permanent basis for essentially educational, cultural heritage, or aesthetic purposes, that utilizes a professional staff, owns or utilizes tangible objects, cares for the tangible objects, and exhibits the tangible objects to the public on a regular basis. This term includes museums that have tangible and digital collections, and includes aquariums, arboretums, botanical gardens, art museums, children’s museums, general museums, historic houses and sites, history museums, nature centers, natural history and anthropology museums, planetariums, science and technology centers, specialized museums, and zoological parks.
- A **“motion picture theatre operator”** is an individual or entity that, as its principal business activity, owns or operates at least one place of public accommodation for the purpose of motion picture exhibition for a fee. A motion picture theater operator can be a for-profit entity, a nonprofit organization, a government-owned entity, or a business operated as a sole proprietorship.
- A **“talent representative”** is an agent or manager that—
  - engages at least 70% of its operations to representing or managing artists and entertainers;
  - books or represents musicians, comedians, actors, or similar performing artists primarily at live events in venues or at festivals; *and*
  - represents musicians, comedians, actors, or similar performing artists primarily at live events in venues or at festivals that are paid in an amount that is based on the number of tickets sold, or a similar basis.

A talent representative can be a for-profit entity, a nonprofit organization, a government-owned entity or a business

operated as a sole proprietorship.

## General Eligibility Requirements for All Relevant Categories

To be eligible to receive a grant, a person or entity that falls within any of the relevant categories must:

- have been fully operational on February 29, 2020 in the business described for the applicant's relevant category;
- have gross earned revenue during the first, second, third, or fourth quarter in 2020 that represents a 25 percent or greater gross earned revenue reduction during the same quarter in 2019; *and*
- satisfy the specific requirements for the applicant's relevant category as described under "Specific Eligibility Requirements Applicable to Each Relevant Category" below.

However, any person or entity that presents live performances of a prurient sexual nature or derives, directly or indirectly, more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature is not eligible to receive a grant.

In addition, the following persons or entities are not eligible to receive a grant, even if they fall within one of the relevant categories:

- any person or entity that has, or that is majority-owned or controlled by, an issuer whose securities are listed on a national securities exchange (a publicly traded company);
- any person or entity that has received greater than 10 percent of its gross revenue from federal funding during 2019, excluding amounts received under the Robert T. Stafford Disaster Relief and Emergency Assistance Act;<sup>[2]</sup>
- any person or entity that has, or that is majority-owned or controlled by an entity with, more than two of the following characteristics:
  - owning or operating venues, relevant museums, motion picture theatres, or talent agencies or talent management companies in more than one country;
  - owning or operating venues, relevant museums, motion picture theatres, or talent agencies or talent management companies in more than 10 states, and
  - employing more than 500 employees as of February 29, 2020, determined on a full-time equivalent basis.<sup>[3]</sup>
- any person or entity that receives at any time on or after December 27, a loan under SBA's Paycheck Protection Program (PPP).<sup>[4]</sup>

For purposes of applying the characteristics described in the preceding four bullet points to an entity owned by a state or a political subdivision of a state, the relevant entity is the entity falling within the applicable relevant category, and does not include entities of the state or political subdivision other than the entity falling within the applicable relevant category.

A grant applicant that falls within one of the relevant categories that is a business entity of another person or entity which also falls within one of the relevant categories is required to be treated by SBA as an independent, non-affiliated entity for purposes of making grants. However, as noted below, no more than five business entities of an eligible person or entity that would be considered "affiliates" under SBA's affiliation rules can receive a grant under the shuttered venue grant program.

## **Specific Eligibility Requirements Applicable to Each Relevant Category**

To be eligible for a grant, a person or entity that falls within one of the relevant categories is required to satisfy the additional specific eligibility requirements for the applicant's relevant category.

### ***For (1) a live venue operator or promoter, theatrical producer, or live performing arts organization operator, or (2) a talent representative –***

- As of the date of the grant,
  - *In the case of a live venue operator or promoter, theatrical producer, or live performing arts organization operator* – such operator, promoter or producer is or intends to resume organizing, promoting, producing, managing, or hosting future live concerts, comedy shows, theatrical productions, or other events by performing artists for which: (1) a cover charge through ticketing or front door entrance fee is applied; and (2) performers are paid in an amount that is based on a percentage of sales, a guarantee (in writing or standard contract), or another mutually beneficial formal agreement.
  - *In the case of a talent representative* – such talent representative is representing or managing artists and entertainers.
- The venues at which such operator, promoter or producer promotes, produces, manages, or hosts the live events of the kind described in the preceding bullet point, or at which the artists and entertainers represented or managed by the talent representative perform have the following characteristics:
  - A defined performance and audience space.
  - Mixing equipment, a public address system, and a lighting rig.
  - Engages one or more individuals to carry out not less than two of the following roles:
    - A sound engineer;
    - A booker;
    - A promoter;
    - A stage manager;
    - Security personnel;
    - A box office manager.
  - There is a paid ticket or cover charge to attend most performances, and artists are paid fairly and do not play for free or solely for tips, except for fundraisers or similar charitable events.
  - For a venue owned or operated by a nonprofit entity that produces free events, the events are produced and managed primarily by paid employees, not by volunteers.
  - Performances are marketed through listings in printed or electronic publications, on websites, by mass email, or on social media.

### ***For a motion picture theater operator –***

- As of the date of the grant, the motion picture theatre operator is open or intends to reopen for the primary purpose of public exhibition of motion pictures.
- The motion picture theatre or motion picture theatres operated by the motion picture theatre operator have the following characteristics:
  - At least one auditorium that includes a motion picture screen and fixed audience seating;
  - A projection booth or space containing at least one motion picture projector;
  - A paid ticket charge to attend exhibition of motion pictures;
  - Motion picture exhibitions are marketed through showtime listings in printed or electronic publications, on websites, by mass mail, or on social media.

### ***For a museum operator –***

- As of the date of the grant, the museum operator is open or intends to reopen.
- The museum or museums for which the museum operator is seeking a grant have the following characteristics:
  - Serving as a relevant museum as its principal business activity;
  - Indoor exhibition spaces that are a component of the principal business activity and which have been subjected to pandemic-related occupancy restrictions;
  - At least one auditorium, theater, or performance or lecture hall with fixed audience seating and regular programming.

## **ISSUANCE OF GRANTS**

The shuttered venue grant program is administered by SBA's Office of Disaster Assistance, which will be responsible for coordinating and issuing policies relating to the program.

### ***Priority Allocations of Initial Grants***

Initial grants will be phased in on a priority allocation during the initial 28-day period, when SBA will award grants as follows:

- *First priority awards* — During the first 14 days, SBA is permitted to award grants only to eligible persons or entities that had revenue between April 1 and December 31, 2020 that is not more than 10 percent of the revenue of such person or entity during the same period in 2019 due to the COVID-19 pandemic.
- *Second priority awards* — During the second 14 days, SBA is permitted to award grants only to eligible persons or entities that had revenue between April 1 and December 31, 2020 that is not more than 30 percent of the revenue of such person or entity during the same period in 2019 due to the COVID-19 pandemic.

SBA is not permitted to allocate more than \$12 billion of the \$15 billion appropriated for the shuttered venue grant program for these priority allocations. For purposes of determining "revenue" in allocating these priority awards:

- any amounts received under the CARES Act is not counted as revenue;
- SBA is required to use an accrual method of accounting for determining revenue; and
- SBA is permitted to use alternative methods to establish revenue losses for a person or entity that is a seasonal employer,<sup>[5]</sup> and that would be adversely impacted if January, February, and March are excluded from the calculation of year-over-year revenues.

### ***Initial Grants After Priority Periods***

Initial grants will generally be available to any eligible person or entity after the initial 28-day priority grant period. No more than five business entities of an eligible person or entity that would be considered "affiliates" under SBA's affiliation rules can receive a grant under the shuttered venue grant program.<sup>[6]</sup>

Until the end of the 60-day period after SBA begins awarding grants, at least \$2 billion of the initial grants are to be awarded to eligible persons or entities that employ not more than 50 full-time employees.<sup>[7]</sup> After this initial 60-day period, SBA is free to award any unused portion of this \$2 billion set-aside to other eligible grantees.

### ***Supplemental Grants After 60 Days***

After SBA has completed processing (which includes determining whether or not to award a grant) each grant application that is submitted within 60 days after the date on which SBA begins accepting applications, SBA may make a supplemental grant to any eligible person or entity that received an initial grant. A recipient of an initial grant is eligible for a subsequent grant if, as of April 1, 2021, the revenues of the recipient for the most recent calendar quarter are not more than 30 percent of the revenues of the recipient for the same calendar quarter during 2019 due to the COVID-19 pandemic.

### ***Certifications Required by the Act***

*No outsourcing or offshoring of jobs* – An applicant with between 500 and 10,000 employees is required to make a good faith certification that it will not outsource or offshore jobs, and that it will remain neutral in any union organizing effort. The provision of the Act that requires this certification refers to the so-called “Main Street Lending Program” authorized under the CARES Act. Within the context of a loan under the Main Street Lending Program, these certifications are limited in duration to the term of the loan and, in the case of the certification relating to outsourcing or offshoring of jobs, an additional two years after repayment of the loan. Given that the Act requires these certifications to be made in connection with the issuance of grants that are not required to be repaid, we expect that SBA will need to address the duration of these certifications.

*Need for the Grant* – Each applicant will be required to make a good-faith certification that “uncertainty of current economic conditions makes necessary the grant to support the ongoing operations of the eligible person or entity.” This “need certification” is substantially identical to the “need certification” required for a loan under the PPP. Although it remains to be seen, we expect that SBA will issue the guidance for this certification along the same lines it provided with respect to the PPP. However, one interesting wrinkle is that, unlike the shuttered venue grant program, the PPP as initially structured did not (and for new initial draw loans authorized under the Act still does not) require an applicant to demonstrate any revenue drop *per se*. Rather, in making the “need certification” under the PPP, SBA guidance requires an applicant to take into account its current business activity, and its ability to access other sources of liquidity sufficient to support its ongoing operations in a manner that is not significantly detrimental to the business. As discussed below, grant recipients will be able to use the proceeds of a grant for permitted expenses incurred as far back as March 1, 2020, while loans under the PPP can only be used prospectively from the date of the loan. It will be interesting to see how (or whether) SBA’s guidance as to the need certification reconciles these differences.

## **GRANT AMOUNTS**

### ***Initial Grants***

The amount of the initial grant to any eligible person or entity is entitled is the lesser of \$10 million, and

- *In the case of an eligible person or entity that was in operation on January 1, 2019* – 45 percent of the gross earned revenue of the eligible person or entity during 2019.
- *In the case of an eligible person or entity that began operations after January 1, 2019* – an amount equal to 6x the average monthly gross earned revenue for each full month during which the eligible person or entity was in operation during 2019.

An overall cap on initial grants to museum operators limits the maximum amount of grants that can be received

with respect to all museums operated by a museum operator to \$10 million.

### ***Supplemental Grants***

The amount of a supplemental grant issued to any eligible person or entity is 50 percent of the initial grant received by the applicant.

### ***Overall Maximums***

The total amount of initial and supplemental grants that can be received by an eligible person or entity is \$10 million.

## **USES OF GRANT AMOUNTS**

### ***Timing to Spend Requirements and Obligation to Return Unused Amounts***

A grant recipient is generally required to use the amounts received for permitted expenses incurred between March 1, 2020 and December 31, 2021, except that, if an grant recipient receives an initial grant and a supplemental grant, then the recipient can use the amounts received under either grant for permitted expenses incurred between March 1, 2020 and June 30, 2022. If a grant recipient does fully deploy all amounts received on or before the first anniversary of the disbursement date for the grant, then the recipient is required to return the unused amounts to SBA, except that, if a recipient receives an initial grant and a supplemental grant, then the recipient has 18 months from the disbursement date of the initial grant to fully deploy the grant before being required to return the unused amounts to SBA.

### ***Permitted Expenses***

Grant proceeds are permitted to be used for the following purposes:

- “payroll costs;”
- payments on any “covered rent obligation;”
- any “covered utility payment;”
- scheduled payments of interest or principal on any “covered mortgage obligation,” but not including any prepayment of principal on a covered mortgage obligation;
- scheduled payments of interest or principal on any indebtedness or debt instrument (but not including any prepayment of principal) incurred in the ordinary course of business that is a liability of the eligible person or entity and was incurred before February 15, 2020;
- “covered worker protection expenditures;”
- payments made to independent contractors, as reported on Form–1099 MISC, not to exceed a total of \$100,000 in annual compensation for any individual employee of an independent contractor;
- 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;
  - payments required for insurance on any insurance policy; 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 grant under this section may not be used primarily for such expenditures.

However, grant proceeds are not permitted to be used for any of the following purposes:

- to purchase real estate;
- for payments of interest or principal on loans originated after February 15, 2020;
- to invest or re-lend funds;
- for contributions or expenditures to, or on behalf of, any political party, party committee, or candidate for elective office; or
- for any other use as may be prohibited by SBA.

See Appendix A to this summary for the definitions of the terms “payroll costs,” “covered rent obligation,” “covered utility payment,” “covered mortgage obligation,” and “covered worker protection obligations.”

## **SBA OVERSIGHT AND AUDIT PLAN**

The Act imposes various requirements on SBA with relating to the oversight of the shuttered venue grant program. SBA is required to increase oversight of grant recipients, including by:

- implementing documentation requirements that are consistent with the eligibility and other requirements of the program (including requiring grant recipients to retain employment records for four years following receipt of the grant, and all other relevant records for three years following receipt of the grant); and
- reviewing the use of the grant proceeds, including by:
  - auditing grants; and
  - in the case of fraud or other material noncompliance with respect to a grant, requiring repayment of misspent funds and pursuing legal action to collect funds.

No later than February 10, SBA is required to submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives an audit plan that details SBA’s policies and procedures for conducting oversight and audits of grants awarded, and the metrics SBA will use to determine which grants will be audited. In addition, no later than February 25, and each month thereafter until the first anniversary of the date on which the \$15 billion appropriated for the shuttered venue grant program has been expended, SBA is required to submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report on SBA’s oversight and audit activities including as to:

- the total number of initial grants approved and disbursed;
- the total amount of grants received by each eligible person or entity, including any supplemental grants;
- the number of active investigations and audits of grants;
- the number of completed reviews and audits of grants, including a description of any findings of fraud or other material noncompliance; and
- any substantial changes made to the oversight and audit plan initially submitted.



## Appendix A

The Act defines the terms “payroll costs,” “covered rent obligation,” “covered utility payment,” “covered mortgage obligation,” and “covered worker protection obligations,” with reference to how those terms are defined in the CARES Act with respect to the Paycheck Protection Program (PPP). We include those definitions in this Appendix A.

**“Payroll costs”** consist of:

- *As to Companies Having Employees* – The sum of payments of any compensation with respect to employees that is a:
  - salary, wage, commission, or similar compensation;
  - payment of cash tip or equivalent;
  - payment for vacation, parental, family, medical, or 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; or
  - payment of state or local tax assessed on the compensation of employees.
- *As to Self-Employed Persons and Individuals that Have Organized as a Sole Proprietor* – 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, and that is in an amount not more than \$100,000 on an annualized basis, as prorated for the period during which the payments are being made or the obligation to make the payments is incurred.

However, payroll costs do not include the following:

- the cash compensation of an individual employee in excess of \$100,000 on an annualized basis, as prorated for the period during which the compensation is being paid or the obligation to pay the compensation is incurred;
- taxes imposed or withheld under Chapters 21 (social security and Medicare taxes, employee and employer portion), 22 (railroad retirement tax), or 24 (withholding obligations from employees) of the Internal Revenue Code during the applicable period;
- any compensation of an employee whose principal place of residence is outside of the United States; and
- qualified sick leave wages and qualified family leave wages, in each case, for which a credit is allowed under the Families First Coronavirus Response Act.

**“Covered rent obligation”** means payments on any rent obligated under a leasing agreement in force before February 15, 2020.

**“Covered utility payment”** means payments for a service for the distribution of electricity, gas, water, transportation, telephone or internet access for which service began before February 15, 2020.

**“Covered mortgage obligation”** means payments of interest on any liability of the borrower that is a mortgage on real or personal property and that was incurred before February 15, 2020.

- **“Covered worker protection obligations”** are 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, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the president with respect to COVID–19 expires, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19. Covered worked protection expenditures do not include residential real property, or intangible property, but may include:

- the purchase, maintenance, or renovation of assets that create or expand:
  - a drive-through window facility;
  - an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
  - a physical barrier, such as a sneeze guard;
  - an expansion of additional indoor, outdoor, or combined business space;
  - an onsite or offsite health screening capability; or
  - other assets relating to compliance with the requirements or guidance related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19, as determined by the administrator of SBA in consultation with the secretary of health and human services and the secretary of labor; and
- the purchase of:
  - “covered materials” described in 44 C.F.R. 328.103(a) [<https://www.law.cornell.edu/cfr/text/44/328.103>], or any successor regulation;
  - particulate filtering face-piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
  - other kinds of personal protective equipment, as determined by the administrator of SBA in consultation with the secretary of health and human services and the secretary of labor.

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[1] A “nonprofit organization” is an organization is exempt from taxation under section 501(a) of the Internal Revenue Code.

[2] The Robert T. Stafford Disaster Relief and Emergency Assistance Act constitutes the statutory authority for most federal disaster response activities especially as they pertain to the Federal Emergency Management Agency (FEMA) and FEMA programs.

[3] For purposes of determining the number of full-time equivalent employees, (1) any employee working at least 30 hours per week is considered a full-time employee, and (2) any employee working at least 10 but fewer than 30 hours per week is counted as one-half of a full-time employee.

[4] For additional information regarding the recent modifications made by the Act to the PPP, please see our recent [article](#) summarizing these modifications.

[5] A “seasonal employer” is an employer that: (1) does not operate for more than seven months in any calendar year; or (2) during the preceding calendar year, had gross receipts for any six months of that year that were not more than one-third of the gross receipts of the employer for the other six months of that year.

[6] The Act does not make clear which of SBA’s affiliation rules will be applied for this limitation. SBA has two sets of affiliation rules – those in 13 C.F.R 121.301(f) (which apply to SBA’s Business Loan Programs, including the 7(a) Loan Program under which the PPP falls) and those in 13 C.F.R 121.103 (which apply to SBA’s government contracting and other programs). As a general matter, the affiliation rules that apply to SBA’s Business Loan Programs are simpler and less far-reaching than those that apply to SBA’s government contracting and other programs. Given the substantial similarities of the policy purposes between the PPP and the shuttered venue

grant program, we hope that SBA will apply the affiliation rules in 13 C.F.R. 301(f). For more information on SBA's affiliation regulations under 13 C.F.R. 301(f) as they apply to Paycheck Protection Program loans, please see our April 1, 2020 [article](#).

[7] For purposes of determining the number of full-time equivalent employees: (1) any employee working at least 30 hours per week is considered a full-time employee; and (2) any employee working at least 10 but fewer than 30 hours per week is counted as one-half of a full-time employee.

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