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# Front and Center: SVO Grants through the SBA



## Coronavirus Resource Center

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

**DISCLAIMER:** This publication will be updated regularly to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

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## Front and Center: SVO Grants through the SBA

Updated as of March 18, 2021

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 “[Economic Aid 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 certain 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 to these “shuttered venue operators” under this program are referred to by the SBA and in this publication as “[SVO Grants](#)”.

**[UPDATE]** The [American Rescue Plan Act of 2021](#) (the “[American Rescue Plan Act](#)”) was signed into law on March 11, 2021, and includes amendments to the SVO Grant program under Title V, Sec. 5005. The American Rescue Plan Act increases the funding available to the SVO Grant program by an additional \$1.25 billion, of which \$500,000 shall be used to provide technical assistance to help applicants access the grant application system. The American Rescue Plan Act also amends the Economic Aid Act to reflect that entities that received PPP loans on or after December 27, 2020, *will* be permitted to apply for an SVO Grant.

This article details the key terms of the SVO Grant program and incorporates further guidance issued by the SBA in response to certain [Frequently Asked Questions](#) (the “FAQs”), which were most recently updated on March 12, 2021 (the “3/12/21 FAQs”). For information about the changes implemented to the Paycheck Protection Program (the “PPP”) under the Economic Aid Act, see our article [[Where Are We Now? An Up-To-Date Guide to the Paycheck Protection Program](#)].

**[UPDATE – 3/12/21 FAQs]** In the FAQs [Application #3], the SBA stated that it is working toward opening SVO Grant applications in early April. To further assist applicants, the SBA published a [Preliminary Application Checklist](#) (updated March 11, 2021) and an [Eligibility Requirements Chart](#) on March 5, 2021. The SBA has also been releasing informational videos which summarize the guidance provided by the Economic Aid Act and the FAQs on the SBA’s [YouTube channel](#).

### **I. What Persons, Entities or Organizations are Eligible for an SVO Grant?**

To be eligible to receive an SVO 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 motion picture theatre operator; (iii) a “relevant museum operator” or (iv) a talent representative. 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; (2) performers are paid in an amount that is based on a percentage of sales, a guarantee or another mutually beneficial formal agreement and (3) generate at least 70% of earned revenue through ticket sales, production fees/reimbursements, nonprofit educational initiatives or the sale of event food, beverages or merchandise; or
  - In the FAQs [Definitions #10], the SBA defined “cover charges” to include front door entrance fees, food or beverage minimums or other similar charges required for admission whether collected via ticket sales, addition to a tab or direct payment.
  - In the FAQs [Revenue #1], the SBA defined both “earned revenue” and “gross earned revenue” in accordance with common principles of the accrual method of accounting, with “earned revenue” as only monies that organizations receive from the sale of goods or services and “gross earned revenue” as “the total of earned revenue from various sales of goods or services, such as admission tickets, merchandise, food and beverages, advertising sales and contracted presentation income.” These appear to mean the same thing.
    - In the FAQs [Revenue #1, 3], the SBA clarified that earned revenue does not include other sources of funds, such as donations, governmental assistance, returns on investments, foundation grants, individual gifts and other gratuitous contributions. In [Revenue #8], the SBA clarified that rental income from short-term rentals for event hosting and longer-term tenants is included in earned revenue.
    - In the FAQs [Revenue #4, 6], the SBA explained how entities should calculate gross earned revenue with respect to fundraising events and memberships. According to the SBA, the same general principles apply to tax deductions for donations to charity. The amount an individual pays in connection with a fundraising event or membership that reflects the estimated value of the goods or services received in exchange must be included in gross earned revenue. Any amount that exceeds that estimated value is considered a donation and not included in gross earned revenue.
    - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Revenue #16], the SBA said that if an entity is for-profit, sponsorship payments (such as naming rights) shall be considered earned revenue because the sponsorships represent payments made in exchange for a service. For a non-profit entity, sponsorship payments shall be considered part earned revenue and part gross revenue, like fundraising events and memberships. The portion of the sponsorship payment received by the non-profit that represents a fair market value for services in

exchange will be deemed earned revenue, and the remainder will be deemed a contribution and thus gross revenue.

- In the FAQs [Revenue #12], the SBA clarified that funds raised by nonprofits via capital campaigns should not be included in earned revenue.
  - In the FAQs [Revenue #5], the SBA stated that contributions and grants revenue are excluded from a nonprofit organization's earned revenue, but noted that any Federal grants will be taken into account to determine whether the nonprofit meets the eligibility limit of having no more than 10% of its gross revenue from Federal sources.
  - In the FAQs [Revenue #11], the SBA clarified that school tuition payments should be treated as earned revenue. The SBA provided the example of school tuition payments made to a dance school that operates a live venue.
  - In the FAQs [Revenue #14], the SBA clarified that amounts that represent the costs of taxes collected for and remitted to a taxing authority, refunds or returns and post-sale discounts may be deducted from earned revenues.
  - In the FAQs [Revenue #2, 15], the SBA stated that when the term "gross revenue" is used in the Economic Aid Act, it will be construed as functionally equivalent to "receipts," which are defined in 13 CFR Sec. 120.104 as "all revenue in whatever form received or accrued from whatever source." This definition includes contributions, donations and grants from any and all sources, excluding any disaster assistance funding, whether that disaster assistance funding is directly from the Federal government or indirectly through a state government.
- (ii) 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 a cover charge is charged and performers are paid in an amount that is based on a percentage of sales, a guarantee or another mutually beneficial formal agreement.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #11-12], the SBA clarified that "performing arts" for purposes of the SVO Grant program means events such as musical concerts, comedy shows, theatrical productions, dance performances or other live renderings of similarly artistic works. The SBA stated that an air show is not a performing art, so an air show operator would not qualify as a live venue operator or promoter for this program.
  - In the FAQs [Definitions #7], the SBA defined a "promoter" as "an entity or individual that organizes live events by performing artists and carries out tasks (other than as a vendor or service provider) such as renting a performance site,

contracting with artists or a production company for the performance, marketing events, and collecting gate receipts. A promoter must have: (1) a profit (net income or loss) interest in the live event's presentation; and (2) sole or joint rights to control the financial terms of the live event's presentation, use of the venue, and/or marketing of the event. Promoters may own and/or operate live venues or contract for space and may include festival promoters or the promotion of live performing arts events at outdoor, festival spaces that have all the required characteristics of a qualifying venue."

- In the FAQs [Definitions #8], the SBA defined a "theatrical producer" as "an eligible individual or entity (including the entity that employs the performers in a theatrical production) which has the responsibility for creating, producing, or operating live theatrical productions and that have either a non-passive profit (net income or loss) interest in a theatrical production (other than as a vendor or service provider) or sole or joint rights to control a theatrical production. Theatrical producers are responsible for functions such as negotiating debt or equity financing with lenders or investors, financial and tax reporting, and closing the production. The term 'theatrical producer' does not include individuals or entities that provide financial support for a theatrical production without either a non-passive profit (net income or loss) interest or the control described above."
- ***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 Museum Operator*** – [FAQs – Definition #4] For an individual or entity to qualify as a relevant museum operator, it must meet the definition of a museum under Section 273 of the Museum and Library Services Act (20 U.S.C. 9172). Under Section 273, a "museum" means 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. Relevant museums can have tangible and digital collections and include 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. Additional venue requirements apply to the spaces that qualify as a relevant museum operator (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).

- **[UPDATE 3/12/21 FAQs]** In the FAQs [Definitions #22], the SBA defined “talent representative” as “an agent or manager for whom no less than 70% of their business operations (as measured with reference to their overall revenues, costs, devotion of time, contracts, and other indicia of business activity) involves the representation or management of two or more artists or entertainers. These operations must involve booking or representing musicians, comedians, actors, or similar performing artists primarily at live events staged in venues or at festivals in exchange for compensation founded on the number of tickets sold or a similar basis.”
- In the FAQs [Definitions #1], the SBA described that it will ascertain “principal business activity” under the existing SBA size regulations [13 CFR Sec. 121.107]. The SBA will consider an entity’s receipts, employees and costs of doing business across the different lines of business activity for the most recently completed fiscal year, and that entity’s principal business activity will be the one in which it has the greatest combined amount of revenues, expenses, employees and work hours, assets, contracts and other business activity as compared to all its other lines of business.
- In the FAQs [Eligibility – All Applicants #16], the SBA clarified that service providers that support eligible entities are not eligible for SVO Grants. “Service providers” includes service and support companies that provide stages, lighting, sound, casts, and other support for live performing arts events or which showcase performers or pre-packaged productions to potential buyers.
- In the FAQs [Eligibility – All Applicants #1, Live Venue Operator or Promoter #5], the SBA made clear that entities of the type that are eligible that are owned by state, county and municipal governments (such as state college performing arts centers, museums or historic homes) are eligible to apply if the governmentally owned entity also acts solely as a venue operator, museum, etc., and does not also include other types of entities. As an example, the SBA stated that a city parks and recreation department that operates a bandstand in a public square along with running various nature parks would not qualify as an eligible entity.
- In the FAQs [Eligibility – All Applicants #9], the SBA clarified that an eligible entity based at a *private* university that lacks separate legal existence from the parent university and/or is majority owned and controlled by the university, it will have to use the gross revenue of the parent university to determine whether the entity meets the requirement that no more than 10% of its 2019 gross revenue come from Federal sources (excluding disaster assistance). If a *private* university owns less than a majority of the eligible entity, then the entity only needs to determine whether more than 10% of its own 2019 gross revenue came from Federal sources. The SBA also noted that public university-based eligible entities are not subject to the 10% cap on Federal funding because they are owned by state or local governments.
  - In the FAQs [Eligibility – All Applicants #10], the SBA stated that a non-profit foundation that exists solely to receive donations to a university-owned museum or live venue operator or promoter that is a sub-unit of a university without separate

legal existence is not eligible for an SVO Grant because the foundation's principal business activity would be serving as a fiscal agent, not acting as a museum operator or live venue operator or promoter as required by the Economic Aid Act.

- In the FAQs [Business Size/Employees #3], the SBA clarified that there is no cap on the number of employees an eligible business may have if it meets the other criteria and does not operate in *either* more than 10 states *or* another country.

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 SVO Grant program.

## **II. What Are the Eligibility Requirements?**

To receive an SVO 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 an SVO Grant:

- ***Fully Operational*** – must have been “fully operational” as of February 29, 2020;
  - In the FAQs, the SBA did not define “fully operational,” but in [Eligibility – All Applicants #2] the SBA simply stated that the entity must have been “in operation” (without the “fully” qualifier) as of February 29, 2020.
  - In the FAQs [Eligibility – All Applicants #3], the SBA stated that an entity that was not in business during 2019 but was “conducting business operations” on February 29, 2020, including incurring start-up costs in the time leading up to an anticipated opening date, is eligible for an SVO Grant *if* it had earned revenue in the first quarter of 2020 from sources such as advanced ticket sales or merchandising. The SBA clarified that entities which conducted business operations and incurred expenses but had no earned revenue in the first quarter of 2020 are not eligible for an SVO Grant. This means that a theatrical production that had not yet begun performances but had earned revenue from advanced ticket sales or merchandise in the first quarter of 2020 would be eligible for an SVO Grant, but a theatrical production that had not yet begun performances and had not sold any advance tickets or merchandise would not be eligible.
- ***Gross Earned 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, or, as clarified in the FAQs [Eligibility – All Applicants #3], if the entity was not in business in 2019, the test may be satisfied by comparing any of the second, third or fourth quarter of 2020 to the first quarter of 2020.
  - In the FAQs [Revenue #10], the SBA clarified that if an applicant's primary business activity places it within one of the categories of an eligible entity under the Economic Aid Act, but the applicant has multiple lines of business activity,



including a line or lines of business activity not covered by the SVO Grant program, the applicant should use its gross earned revenue across all business activities and not exclude any non-SVO Grant revenue streams.

- ***Resumption of Operations*** – as of the date of its receiving an SVO 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, 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;
    - In the FAQs [Definitions #11-15], the SBA defined “defined performance space,” “defined audience space,” “mixing equipment,” “public address system” and “lighting rig”:
      - [Definitions #11] “A defined performance space is the distinct physical space reserved solely for the presentation of a performance, such as drama, music, dance, comedy, or other live performing arts activity.”
      - [Definitions #12] “The defined audience space is the distinct physical area in which the audience experiences the performance for qualifying venues that host live performing arts events (not including museums and movie theatres).”
      - [Definitions #13] “Mixing equipment is a sound mixer that mixes two or more audio signals together, provides one or more output signals, allows adjustment of levels and enhancement of sound with equalization and effects, and creates monitor feeds.”

- [Definitions #14] “A public address system is an electronic system with at least one microphone, amplifies, and loudspeaker which increases the volume of a human voice, musical instrument, or other acoustic sound source or recorded sound or music.”
- [Definitions #15] “A lighting rig is a structure that holds lights in place for illuminating a stage or other defined performance space.”
- 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; and (vi) box office manager;
  - In the FAQs [Definitions #16-20], the SBA defined “sound engineer,” “booker,” “promoter,” “stage manager” and “box office manager”:
    - [Definitions #16] “A sound engineer is an individual who helps to produce a live performance by managing or enhancing source levels of sound, including by equalization and audio effects, mixing, reproduction, and reinforcement of sound.”
    - [Definitions #17] “A booker is an individual (e.g. a talent buyer) who books bands or other performing artists or venues and fields inquiries from performing artists and performing [venues] and their agents or representatives.”
    - [Definitions #18] “A stage manager is an individual who supervises the performance space and physical aspects of a production and oversees the performance space while a production is in progress.”
    - [Definitions #19] “Security personnel are individuals hired for a live event to provide protection and aid for attendees, performers, and venue employees. Duties of security personnel may include monitoring the event, maintaining order, escorting attendees out of events, and suppressing disturbances.”
    - [Definitions #20] “A box office manager is an individual who is responsible for overseeing the sale of all tickets or receipt of admission fees, and may include the task of ensuring the security of payments exchanged.”
- have paid tickets or cover charges to attend most performances;

- pay artists “fairly” (e.g., artists do not play solely for free or for tips);
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #15], the SBA clarified that a nonprofit that uses volunteers, including volunteer choruses or student performers, in its production casts is still eligible for an SVO Grant if the events staged are produced and managed primarily by paid employees.
  - [UPDATE – 2/28/21 FAQs] In the FAQs [Definitions #21], the SBA stated that “being paid fairly means that event performers are paid in an amount based on a percentage of sales, a guarantee, or another mutually beneficial formal agreement. Venues may also compensate performers by sharing an agreed upon portion of revenues received through door fees along with drink or meal tickets that may fall below 1099 reporting requirements.”
- 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.
- In the FAQs [Eligibility – All Applicants #7, 13], the SBA specified that mobile entities without defined performance and audience spaces are not eligible to apply, but a mobile, portable or touring facility that *does* meet all the space-related requirements of the Economic Aid Act (e.g., defined performance and audience spaces, lighting rig, etc.) will be eligible. In the FAQs [Eligibility – Live Venue Operator or Promoter #1], the SBA also said a wedding or event venue would likely be ineligible because it would likely fail to meet multiple requirements, including defined performance and audience spaces, sale of tickets, marketing of events to the public, lighting rig, mixing equipment and employment of sound engineers, stage managers, box office managers, etc.
- In the FAQs [Eligibility – Live Venue Operator or Promoter #2-4; Eligibility – All Applicants #17], the SBA stated that venues whose broader business operations include hosting live performing arts events or concerts, such as sports stadiums or venues, restaurants that feature live music, agricultural fairs, party boats or pleasure cruises, are not eligible to apply for an SVO Grant because the principal business activity of an eligible entity must be the organization, promotion, management or hosting of live concerts, comedy shows, theatrical productions or other events by performing artists. While most restaurants are not eligible, a dinner theatre may be eligible to apply for an SVO Grant if its principal business is the organization, management or hosting of live concerts, comedy shows, theatrical productions or other events by performing artists.

- In the FAQs [Eligibility – Live Venue Operator or Promoter #6], the SBA confirmed that a company that uses independent contractors instead of employees is eligible to apply (and that payments made to independent contractors (as reported on an entity’s Form-1099) are an allowable use of grant funds).
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #8], the SBA stated that a “theatrical production management business with revenue generated by the production management” may be eligible to apply as a talent representative, and that a theatrical producer may be eligible to apply even if less than 70% of its revenue came from cover charges or ticket sales if, as its principal business activity, it has production tickets available for public purchase an average of at least 60 days before the performance date.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #9], the SBA clarified that a talent agency that books actors at live venues, but does not operate a live venue, may be eligible to apply if 70% of its operations is managing, booking or representing performers who appear primarily at live venues.
  - In the FAQs [Eligibility – Museum or Movie Theatre Operator #1], the SBA clarified that the “fixed seating” requirement for museums and motion picture theatre operators does not apply to other types of eligible entities.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #10], the SBA clarified that a ticket broker or reseller does not qualify as a live venue operator or promoter. The SBA said that while a ticket broker or reseller may sell tickets to performing arts events 60 days in advance, performers are not paid from such transactions, so the second prong of the Economic Aid Act’s live venue operator or promoter definition is not met. Further, the SBA says that ticket brokers or resellers are in the business of reselling tickets, not selling tickets, as required by the Economic Aid Act.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #13], the SBA clarified that a venue with a box office staffed by volunteers is not precluded from applying for an SVO Grant if it meets all of the eligibility requirements.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #14], the SBA clarified that a theatrical producer that stages performances in multiple venues that each meet the qualifications listed in the Economic Aid Act is eligible to apply for an SVO Grant, and there is no limit upon the number of venues at which a producer may stage performances.
- 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).

- In the FAQs [Definitions #3, 6; Eligibility – Museum or Movie Theatre Operator #1], the SBA defined “fixed seating,” a requirement for both museums and motion picture theatres, per the Economic Aid Act, as seating permanently fixed to the floor or ground or which is so heavy or cumbersome as to make removing it impractical. This would include heavy bleachers pushed back against a wall when not in use but never removed from a theatre because the bleachers are cumbersome and not easily or regularly removed from the theatre. The SBA specifically stated that a museum or motion picture theatre with a multipurpose room with movable seating is not eligible to apply for an SVO Grant because the Economic Aid Act specifically requires fixed seating and does not allow for temporary, removable, modular, convertible or other non-fixed seating arrangements. The SBA clarified in the 2/12/21 FAQs that where fixed seating is required for a museum or movie theatre, a majority of the seating provided in that space must meet the definition of fixed seating.
- In the FAQs [Eligibility – Museum or Movie Theatre Operator #2, 4], the SBA clarified that a museum or motion picture theatre with outdoor fixed seating is eligible to apply for an SVO Grant as long as it meets all other eligibility requirements, but a drive-in motion picture theatre with no fixed audience seating is not eligible.
- In the FAQs [Eligibility – Museum or Movie Theatre Operator #7; Subsidiaries & Affiliates #10], the SBA clarified that if a motion picture theatre is owned by one entity but operated or managed by another, both the owner and the operator are considered eligible for SVO Grants. In cases where both the owner and the operator are awarded SVO Grants, each should base its calculation of earned revenue upon its share of payments received in its ownership or operation of the motion picture theatre as allocated by contract, lease or other formal agreement. To avoid overlap or double-counting, all earned revenues and claimed grant expenses must be tracked and accounted for separately. If the owner and operator’s revenues have never been separately allocated, then the separate entities should come up with a reasonable and well-documented method of dividing revenue between the two entities.
- In the FAQs [Eligibility – Museum or Movie Theatre Operator #8], the SBA clarified that a landlord who owns a shopping center that includes a motion picture theatre is most likely not eligible to apply for an SVO Grant because a shopping center owner’s principal business activity is most likely operating a shopping center, not owning or operating a motion picture theatre.

- In the FAQs [Eligibility – Museum or Movie Theatre Operator #9], the SBA clarified that a new theatre owner or operator of a theatre previously owned or operated by an ineligible company (e.g. a company listed on a stock exchange) would be eligible for an SVO Grant if the sale of the theatre(s) to the new owner or operator was executed on or before February 29, 2020. The new theatre owner or operator may use the previous owner or operator’s financials to determine revenue loss.
- for **relevant museum operators**, a relevant museum operator must have: (i) been serving as a relevant museum operator 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.
  - In the FAQs [Definitions #5], the SBA stated that the definition of “regular programming” may vary depending on the circumstances, but it is generally defining “regular programming” as programming provided on an ongoing and near-continuous basis of an average of at least four times a month over the course of a year in its qualifying theatre, lecture hall or similar venue.
    - In the FAQs [Eligibility – Museum or Movie Theatre Operator #5], the SBA stated that a museum with a seasonally-operated outdoor amphitheatre can qualify for an SVO Grant if the outdoor amphitheatre meets the standard of hosting an average of at least four events per month over the course of a year. This appears to mean that if a museum with an outdoor amphitheatre hosts 48 or more total events per year, no matter the length of the season, it would qualify for an SVO Grant because it would meet the average of at least four events per month threshold for “regular programming.”
    - In the FAQs [Eligibility – Museum or Movie Theatre Operator #6], the SBA clarified that a museum with multiple qualified auditoriums, theatres or lecture halls may aggregate programming across all such spaces for purposes of meeting the regular programming requirement. That is, the museum as a whole, not each qualified space within the museum, must host an average of at least four events per month over the course of a year.
    - In the FAQs [Eligibility – Museum or Movie Theatre Operator #11], the SBA clarified that events held in a museum’s theatre or lecture hall do not need to be ticketed or open to all museum attendees to qualify as regular programming.

- In the FAQs [Eligibility – Museum or Movie Theatre Operator #3], the SBA confirmed that the receipt of funding from a state government does not affect a museum’s eligibility for SVO Grants.
- ***Certification of Need*** – must make a certification that the uncertainty of current economic conditions makes necessary the SVO 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 an SVO 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. (See our publication [Paycheck Protection Program, Where Are We Now](#) for a discussion of the necessity certification in that context.)
- Section 324(b)(4) of Title III of the Economic Aid Act states that an eligible mid-sized business (defined as having between 500 and 10,000 employees) applying for an SVO Grant shall make a good-faith certification that the recipient of that grant (i) “will not abrogate existing collective bargaining agreements for the term of the loan and for two years after completing repayment of the loan” and (ii) “will remain neutral in an union organizing effort for the term of the loan.” These requirements, cross-referenced from the CARES Act, Title IV, are confusing because SVO Grants are not loans, so they do not have a “term.” The FAQs issued by the SBA do not provide guidance about how to interpret these requirements.
- **[UPDATE – 3/12/21 FAQs]** In the FAQs, the SBA confirmed that entities located in any state, the District of Columbia, the Commonwealth of Puerto Rico and any other territory or possession of the United States (e.g., Guam, American Samoa, the U.S. Virgin Islands) may apply for an SVO Grant.

### **III. Affiliation.**

Recognizing the manner in which separate venues or productions may be organized, the Economic Aid 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. In the FAQs [Subsidiaries & Affiliates #3], the SBA clarified that a maximum of five business entities (for example, one parent firm and four subsidiaries) related via affiliation under the SBA’s (very broad) affiliation rules may receive SVO Grants. (See our publication [Paycheck Protection Program, Where Are We Now](#) for a description of those affiliation rules). This means that an eligible person or entity, together with four of its affiliates (as defined under the SBA affiliation rules), may receive a total of five SVO 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.

- **[UPDATE – 3/12/21]** In the FAQs [Subsidiaries & Affiliates #12], the SBA clarified that only five affiliated eligible entities may have active SVO Grant applications pending before the SBA at any one time to reduce the potential for erroneous SVO Grant awards. Any applications received above the limit of five affiliated entities will be rejected without being evaluated. However, if one affiliate’s application is rejected, another affiliated eligible

entity could apply. The limit on five active SVO Grant applications from affiliated entities also applies to entities owned by state or local governments.

- In the FAQs [Subsidiaries & Affiliates #6], the SBA provided more guidance on affiliation. The SBA relied on the principles of 13 CFR Sec. 121.301(f) to determine affiliation and said affiliation occurs when one firm has the power to control another firm, or a single person or entity has the power to control both and typically arises due to common ownership, management or legal arrangement.
- In the FAQs [Subsidiaries & Affiliates #11], the SBA defined “subsidiary business” as an entity that is either wholly or majority-owned and controlled by another entity.
- According to the FAQs [Subsidiaries & Affiliates #7], the SBA will use affiliation in two ways in administering the SVO Grant program:
  - (1) when applying provisions of the Economic Aid Act that specifically reference affiliation. The two provisions referencing affiliation are (i) the provision stating that affiliates may apply for their own SVO Grants if they meet eligibility requirements and (ii) the limit on five affiliates (including subsidiaries) that may receive SVO Grants; and
  - (2) to determine if an entity is eligible for the \$2 billion in SVO Grants set-aside for small employers. To determine how many employees an entity has, the SBA will look at the total number of full-time employees of the entity *and all of its affiliates* to determine whether the entity qualifies for the small employer set-aside. If the total number of full-time employees across all affiliates exceeds 50, then the entity is not eligible for the small employer set-aside. This is to ensure that a firm which appears small but is actually controlled by a large firm does not benefit from the money set aside program for small businesses.
- In the FAQs [Subsidiaries & Affiliates #1], the SBA stated that subsidiaries of an eligible parent entity do not need to meet the eligibility criteria independently unless the subsidiary wants to apply for an SVO Grant in its own name. The SBA also stated that per the Economic Aid Act, for purposes of meeting eligibility criteria (i.e., calculating loss of revenues or employee numbers), a subsidiary entity that qualifies for an SVO Grant will not be treated as an affiliate of its parent entity or other subsidiary entities of such parent entity. This does not appear to affect the rule that grants can only be provided to a maximum of five affiliated entities.
- In the FAQs [Subsidiaries & Affiliates #2], the SBA explained that an entity that shares costs with its subsidiaries should keep records to show that all expenses claimed under the SVO Grant served grant purposes. If a subsidiary is eligible for and applies for its own SVO Grant, only the portion of the shared cost that the subsidiary pays can be paid for by the SVO Grant.
- In the FAQs [Subsidiaries & Affiliates #4], the SBA clarified that even if a parent company is ineligible for an SVO Grant, one or more of its subsidiaries could still be eligible if they meet the eligibility requirements in their own right. The SBA noted that a subsidiary is not



eligible where it is majority owned and controlled by a parent entity that is (i) listed on the stock market or (ii) owns or operates eligible in (1) more than one country, (2) more than ten states *and* (3) has more than 500 employees.

- In the FAQs [Subsidiaries & Affiliates #5], the SBA clarified that a parent company may submit an application that includes some or all of its subsidiaries because subsidiaries may apply for SVO Grants on their own but are not required to do so.
- In the FAQs [Subsidiaries & Affiliates #9], the SBA stated that a theatre circuit with five theatres, each a separate legal entity, but filed with a consolidated tax return should be considered five entities.
- In the FAQs [Eligibility – Museum or Movie Theatre Operator #10], the SBA stated that a company that operated multiple movie theatres with the same Employer Identification Number (“EIN”) as of February 29, 2020, may not obtain separate EINs for each movie theatre after that date in order to consider each of those theatres as a separate entity. Under the Economic Aid Act, an entity must have been eligible as of February 29, 2020 to qualify for an SVO Grant.
- **[UPDATE – 3/12/21 FAQs]** In the FAQs [Subsidiaries & Affiliates #15], the SBA clarified that two affiliated entities may not both use the EIN of their parent company. Only one SVO Grant application and award will be allowed per EIN. Further, where a parent entity’s EIN is used, the parent entity must meet the statutory definition of an eligible entity, rather than its subsidiaries.

#### **IV. Ineligible Entities and Persons.**

**[UPDATE – American Rescue Plan Act]** The American Rescue Plan Act changes the requirement for PPP loan applicants and recipients. Entities that have applied for or received a PPP loan on or after December 27, 2020, are no longer ineligible to receive an SVO Grant.

The following categories of individuals or entities are ineligible to receive an SVO 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;
  - In the FAQs [Definitions #2], the SBA defined “majority owned or controlled” to mean at least 51% of the ownership interests in an entity (regardless of its legal structure) are held by a single individual or entity. Apparently this means that no further investigation of “control” is needed.
- ***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);
  - In the FAQs [Revenue #8], the SBA clarified that the 10% maximum includes all Federal grants and funding regardless of the use, excluding disaster assistance.

- In the FAQs [Application #6], the SBA clarified that it will use capital funds, restricted grants and investment income to determine whether an applicant meets the requirement that no more than 10% of its 2019 gross revenue came from Federal funding, excluding disaster assistance, or to determine whether it can demonstrate sufficient gross revenue loss to qualify for a priority period, but that currently such financial resources would not otherwise affect an application.
  - In the FAQs [Eligibility – All Applicants #11], the SBA stated that the 10% of gross revenue from Federal funding limit does not apply to eligible entities owned by state or local governments, including entities owned by public colleges and universities. Instead, the Economic Aid Act establishes an alternate eligibility restriction for state-owned entities, which is that state-owned entities cannot contain any other state-owned entities apart from the live venue operator or promoter, live performing arts organization operator, museum operator, movie theatre operator or talent representative.
  - In the FAQs [Eligibility – All Applicants #12], the SBA clarified that the 10% Federal funding barrier includes financial aid, such as Pell grants, awarded to students.
- **Large Operator** – if it *or* if it is majority owned or controlled by another entity with each of the following qualities:
  - owns or operates locations in more than one country;
  - owns or operates locations in more than ten States; and
  - employed more than 500 full-time employees as of February 29, 2020.
  - In the FAQs [Eligibility – Live Venue Operator or Promoter #16], the SBA clarified that an otherwise eligible entity with a *minority* investor that meets the “large operator” criteria is still eligible for an SVO Grant.
- **Foreign Entity** – if it does not have a place of business in the United States, does not operate primarily in the United States, and does not make a significant contribution to the United States economy through payment of taxes or use of American products, materials or labor. The standard to make a “significant contribution” to the U.S. economy is not set forth;
- **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 or services, or the presentation of any depictions or displays, of a prurient sexual nature; or
- **Bankruptcy** – an entity undergoing a *liquidation* form of bankruptcy (such as Chapter 7) is not eligible. However, an otherwise eligible entity undergoing a *reorganization* form of bankruptcy (such as Chapter 11 or Chapter 13) may apply for an SVO Grant, but, in SBA’s discretion, any SVO Grant may be subject to special restrictions or requirements designed to reduce the risk of loss of taxpayer funds.

## **V. Size of SVO Grants.**

The total amount of SVO 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** (or \$50 million, if the limit is for 5 and not 6 affiliates) (see “Affiliation” above) in SVO Grants.

- **Initial Grants** – Subject to the \$10 million cap noted above, initial SVO 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, equal to 6x the average monthly gross earned revenue for each full month of 2019 that the eligible person was in operation. The rules do not specify how the initial grant would be calculated for an entity that was not in business during 2019 but was by the February 29, 2020, eligibility date.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Application #16], the SBA clarified that an award for an entity that has no 2019 revenues will be calculated by multiplying the average monthly earned revenue for each full month it was in business in 2020 multiplied by 6, up to the maximum grant amount of \$10 million.
- **Supplemental Grants** – Individuals or entities that receive an initial SVO 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. Although not specified, “revenue” for the purposes of determining eligibility for a supplemental grant likely is “gross earned revenue” to stay consistent with the eligibility requirements for an initial grant. A supplemental grant will be equal to **50%** of an initial grant (subject to the total \$10 million cap on all SVO 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 rules do not specify how a supplemental grant would be calculated for an entity that was not in business during 2019 but was by the February 29, 2020, eligibility date.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Application #5], the SBA clarified that if all SVO Grant program funds are distributed during the initial phase or funds run out before the SBA can make fully funded supplemental awards to all eligible entities, the SBA intends to issue zero dollar “placeholder” supplemental awards that could later be modified if additional funding becomes available. An entity that received a zero dollar placeholder grant would be still entitled to the six-month extension afforded to recipients of supplemental awards. It is not clear what the criteria would be for issuing these zero dollar grants.
  - In the FAQs [Subsidiaries & Affiliates #13], the SBA stated that a seasonal entity may compare its second quarter earnings in 2021 to its second quarter earnings in

2019 to demonstrate whether it has experienced the 70% earned revenue loss required for a supplemental grant.

- **[UPDATE – American Rescue Plan Act] Entities that Received PPP Loans** – Per the American Rescue Plan Act, the size of SVO Grant for which a person or entity is eligible will be reduced by the total amount of loans received by that person or entity through the PPP loan program on or after December 27, 2020. If a person or entity received a PPP loan before December 27, 2020, that PPP loan amount will not be deducted from any subsequent SVO Grant.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Eligibility – All Applicants #21], the SBA gave an example of an SVO Grant reduction for an entity that received a PPP loan after December 27, 2020. If a jazz club received a PPP loan for \$10,000 on February 1, 2021, and then applied for and received an SVO Grant which, based on the amount of its earned revenue loss, would have been \$100,000, the jazz club’s SVO Grant will be reduced by \$10,000 and the club will receive a \$90,000 SVO Grant.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Eligibility – All Applicants #22], the SBA clarified that the full amount of any PPP loan received on or after December 27, 2020, will be deducted from an entity’s SVO Grant, even if only a portion of that PPP loan was forgiven.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Eligibility – All Applicants #3], the SBA clarified that while a PPP loan recipient may later receive an SVO Grant, any entity that receives an SVO Grant shall be ineligible for a PPP loan *after* it has received an SVO Grant.
- In the FAQs [Revenue #7], the SBA stated that a business that provides talent representation and financial services for athletes and entertainers should use its total gross earned revenue from *all* sources to calculate the amount of the SVO Grant for which it may apply, but the business would still need to satisfy the requirement that its principal line of business is talent representation, not financial services. This suggests that if an entity is eligible, it can count all its revenues, not just those that come from the principal line of business.
- **[UPDATE – 3/12/21 FAQs]** In the FAQs [Revenue #13], the SBA stated that an applicant may choose to use its fiscal year 2019 or calendar year 2019 earned revenues to determine the award amount for both the Initial Phase and the Supplemental Phase SVO Grants. Whichever option the applicant chooses will apply to the Initial Phase and Supplemental Phase.

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.

**[UPDATE – 3/12/21 FAQs]** In the FAQs [Use of Funds #15], the SBA explained that SVO Grants will be disbursed either in one lump sum or in multiple payments depending on the size of the



award and other risk factors. In general, most SVO Grants under \$1 million will be disbursed in one or two installments because they are deemed to pose a low risk, but awards for larger amounts are deemed to be higher risk and will be disbursed in two to four installments. If the award is paid in installments, the schedule of payments will depend upon the grantee's submission of documentation of the use of the initial fund disbursement and 2020 Federal tax return. The SBA acknowledged that not all entities will file 2020 Federal tax returns at the same time and said it would "collect documents accordingly." There will not be a specified calendar for installment payments to be made, and each grantee's disbursement will depend on how quickly the grantee can provide the required documentation.

## **VI. Priority of Disbursement of SVO Grants.**

SVO Grants are to be allocated in an order of priority laid out in the Economic Aid Act. Up to **80% (\$12 billion)** of the funds appropriated for the SVO 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, or, for entities that were not "in business" in 2019, for any of the second, third or fourth quarter of 2020, not more than 10% of such applicant's revenue during the first quarter of 2020.
- ***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, or, for entities that were not "in business" in 2019, for any of the second, third or fourth quarter of 2020, not more than 30% of such applicant's revenue during the first quarter of 2020.
- 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. It appears that for these calculations, employees working fewer than 10 hours per week are not counted.

- In the FAQs [Business Size/Employees #1, 4], the SBA clarified that it is using the Economic Aid Act's specific provisions regarding the calculation of employees and SBA size regulations (13 CFR Sec. 121.106). A firm must calculate its average number of full-

time employees for the prior year by calculating the number of full-time employees it had in each individual pay period, adding those numbers together and dividing the total by the number of pay periods over the 12-month period from **March 1, 2019**, to **February 29, 2020**. If an entity's payroll schedule doesn't match neatly with the date range, the entity's number of full-time employees will be determined with reference to each pay period that falls in whole *or in part* within the 12-month timeframe stipulated by the Economic Aid Act.

- In the FAQs [Business Size/Employees #5], the SBA clarified that when calculating the number of full-time employees, entities will use a weekly average of the employees' total hours over each pay period. For example, if an entity has a biweekly pay period, and an employee works 10 hours the first week and 30 hours the second week, that employee's average number of hours is 20 hours per week.
- In the FAQs [Business Size/Employees #2], the SBA clarified that there is no priority based on number of employees in the application process. The \$2 billion of appropriate funds for small employers is a separate aspect of the awarding process than the priority periods.
- In the FAQs [Application #7], the SBA clarified that it will allocate funds set aside for small employers throughout all stages of the Initial Grant phase. For example, when an eligible entity qualifies for the First Priority Period and qualifies as a small employer, the SBA will fund that entity's grant with money drawn from the \$2 billion set aside for small employers. The SBA also said that it is considering using its authority under the Economic Aid Act to set aside more than the \$2 billion minimum for small employers.
- In the FAQs [Application #9-10], the SBA clarified that Congress intended "revenue" and not "earned revenue" be used for determining eligibility for priority periods. The SBA will use gross revenues to determine whether or not an entity qualifies for one of the priority periods.

## **VII. Permitted Uses of SVO Grant Funds.**

**[UPDATE – 3/12/21 FAQs]** In the FAQs [Use of Funds #13, #16], the SBA clarified that the time period in which SVO Grant recipients may incur allowable costs is different from the time period in which they must expend their awards. Initial grants may be used for costs *incurred* between **March 1, 2020** and **December 31, 2021**, and supplemental grants may be used for costs *incurred* through **June 30, 2022**. However, an SVO Grant recipient has **one year** from disbursement to *expend* (on allowable expenses) any initial grant proceeds and **18 months** from disbursement to *expend* any supplemental grant proceeds. Any grant proceeds not spent within the allowed time period must be returned to the SBA. Note that this is different than a PPP loan where all expenses paid or incurred during the relevant period are counted for forgiveness purposes.

SVO 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) (note that the definition follows

that the definition included in the PPP rules, but we understand that rather than prorating, an SVO Grant would just cover any payroll costs incurred during the relevant period)

- salary, wages, commissions, 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;
  - In the FAQs [Use of Funds #8], the SBA clarified that an eligible entity that received an employee retention tax credit (ERTC) may use SVO Grant funds to pay the *uncredited* portion of the employee's salary. SVO Grant funds cannot be used to pay the portion of an employee's salary covered by an ERTC.
- 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;
  - Payroll costs exclude (i) taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered applicable period; (ii) qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116–127); or (iii) qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116–127).
- **covered rent obligations** (as defined in the PPP, any rent obligation under an 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);

- **scheduled payments of principal or interest on mortgages incurred prior to February 15, 2020** (but no prepayment of principal);
- **scheduled payments of principal or interest on any indebtedness or debt instrument incurred in the ordinary course of business that is a liability of the SVO Grant recipient and was incurred prior to February 15, 2020** (but no prepayment of principal);
  - In the FAQs [Use of Funds #5], the SBA stated that payments toward debts recorded before February 15, 2020, represent an allowable expense even if the debt was refinanced or consolidated with other debts that existed *prior to* February 15, 2020. Any otherwise allowable debt consolidated with a debt that was *not* recorded prior to February 15, 2020, would be an allowable expense only to the extent of the original qualifying debt, and any additional amount of indebtedness following the consolidation that is attributable to the nonqualifying loan would not be an allowable expense. The SBA also stated that payments on lines of credit or revolving loan funds recorded prior to February 15, 2020, would be an allowable expense even if not drawn until after that date, provided that the amount of the line of credit or revolving loan fund was not increased after February 15, 2020.
  - **[UPDATE – 3/12/21 FAQs]** In the FAQs [Use of Funds #17], the SBA clarified that this category of allowable expenses includes payments on other SBA-backed loans.
- **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;
  - [Use of Funds #14] payments of artist deposits and guarantees;
  - State and local taxes and fees;
    - In the FAQs [Use of Funds #6], the SBA clarified that “state and local taxes” includes real estate taxes and personal property taxes on buildings and equipment where such buildings and equipment are directly related to eligible SVO Grant program operations. An eligible entity may not use the SVO Grant to pay taxes on property and equipment not directly related to its SVO Grant program operations.
  - operating leases in effect as of February 15, 2020;
  - required payments under 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 an SVO Grant **cannot be** primarily for such production-related expenditures.

- In the FAQs [Use of Funds #1], the SBA stated that SVO Grant funds may be used to refund customers still holding tickets for cancelled performances, as a necessary and ordinary business expense.
- In the FAQs [Use of Funds #3], the SBA stated that owner compensation, including distributions and dividends, should also be considered an ordinary business expense payable using SVO Grant funds to the extent that the total amounts involved do not exceed what an owner received in compensation in 2019.
- In the FAQs [Use of Funds #4], the SBA stated that it believes a grantee may use SVO Grant funds to reimburse itself for allowable expenses already paid dating back to March 1, 2020.
- In the FAQs [Use of Funds #12], the SBA defined “ordinary and necessary expenses” using the IRS definition. “An ordinary expense is one that is common and accepted in your trade or business. A necessary expense is one that is helpful and appropriate for your trade or business. An expense does not have to be indispensable to be considered necessary.”
- In the FAQs [Use of Funds #11], the SBA said depreciation is an allowable expense under the Economic Aid Act.
- Entities may not use funds to purchase real estate, to pay interest or principal on loans originated after February 15, 2020, to invest or re-lend, for political contributions, or for another use prohibited by the program administrator.
- **[UPDATE – 3/12/21 FAQs]** In the FAQs [Use of Funds #2], the SBA changed its position that SVO Grants could only reimburse an owner for loans made to the business before February 15, 2020. Per the 3/12/21 FAQs, SVO Grant funds may be used to reimburse an owner who used personal funds to keep an entity in operation between March 1, 2020, and December 31, 2021 (or June 30, 2022, if the entity receives a supplemental phase award), if there is sufficient documentation of the transfer and expenditure of such funds. Without sufficient documentation, reimbursements claimed by the owner will be treated as compensation or distribution of profits, subject to a cap of what that owner received in compensation in 2019.
- In the FAQs [Use of Funds #7], the SBA clarified that using an interest-bearing bank account to hold SVO Grant funds would be proper and would not constitute an impermissible investment.
- In the FAQs [Use of Funds #9-10], the SBA clarified that SVO Grant awards will count toward an entity’s requirement to comply with the Single Audit Act if that entity receives \$750,000 or more in Federal grant funding during a fiscal year. If an SVO Grant recipient is covered by the Single Audit Act, it may charge a reasonably proportionate share of the costs of audits required by the Single Audit Act to its SVO Grant. Audit expenses will generally not be

considered an allowable grant expense for SVO Grant recipients not covered by the Single Audit Act.

- In the FAQs [Eligibility – All Applicants #14], the SBA stated that an eligible entity must ensure it does not claim any costs or expenses under its SVO Grant that it has already received reimbursement or payment for under another grant, loan, or funding from a state or local government pandemic-relief program.

### **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](mailto:disastercustomerservice@sba.gov).

The SBA will provide increased oversight of eligible persons/entities receiving SVO 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. SVO Grants may be audited, and in the case of fraud, will require repayment of misspent funds or result in legal action to collect.

**[UPDATE – 3/12/21 FAQs]** The SBA stated that it is working expeditiously to open SVO Grant applications in early April. The SBA encourages applicants to stay up to date by frequently visiting [www.sba.gov/svogrant](http://www.sba.gov/svogrant) for information.

**[UPDATE – 3/11/21 Preliminary Application Checklist]** The SBA published a [Preliminary Application Checklist](#) (the “[Checklist](#)”) to assist applicants in preparing their applications. The Checklist includes:

- **Background documents** – including a written statement of need and a list of all full- and part-time employees with job titles and employee status.
- **Financial documents** – including tax return(s), a Single Audit Act audit or an audited financial statement for that fiscal year if the entity expended \$750,000 or more in Federal grant funds in one fiscal year, and an indirect cost rate agreement (if applicable).
  - If an entity has an indirect cost rate agreement, it should submit the approved rate with its application. If an entity has never negotiated an indirect cost rate agreement, a 10% de minimis rate shall be used.
  - *Note:* An entity that receives \$750,000 or more through the SVO Grant program may have to provide a Single Audit Act audit after receipt of the award, but this is not clear from the current language in the Checklist and FAQs.
- **Standard forms** – the Checklist provides links to the four standard government forms that applicants will need to complete and submit with their application.

- The Standard Form 424B requires applicants to certify that they will have sufficient funds to pay the non-Federal share of project costs to ensure the project is completed and that applicants “will initiate and complete the work within the applicable time frame.” The definition of “complete the work” is not clear from this Form 424B.
- ***Applicant-specific documents*** – each applicant will need to provide specific documents to prove it meets the specific eligibility criteria.

In the FAQs, the SBA provided more details about the application process:

- In the FAQs [Application #1], the SBA recommended that as it builds the application platform, applicants register for a DUNS number so they can then register at SAM.gov. The SBA also recommended applicants gather documents that demonstrate the number of full-time employees and monthly revenues, calculate the average number of qualifying employees over the prior twelve months, and determine the extent of gross earned revenue loss.
  - **[UPDATE]** The SBA published a [video on its YouTube channel](#) which provides step by step guidance on registering entities in the System for Award Management (SAM.gov). In the video, the SBA notes that it can take 7-10 days for new registrations to process, so, as noted below, SVO Grant applicants should begin this process as soon as possible.
  - In the FAQs [Application #12], the SBA clarified that affiliated entities may not use the same SAM registration to apply for up to five SVO Grants. Each eligible entity applying for an SVO Grant should use its own SAM registration.
- In the FAQs [Application #2], the SBA said SVO Grant applicants must register at [www.SAM.gov](http://www.SAM.gov) to apply and cannot use an Individual Taxpayer Identification Number, Employer Identification Number or other means of identification or registration. Once an applicant has a DUNS number, they should immediately register in SAM.gov because the SAM registration can take up to two weeks once submitted.
- In the FAQs [Application #4], the SBA stated that an eligible entity that is a hybrid non/profit governmental entity should apply under the nonprofit’s name and submit documentation demonstrating the public/private partnership aspect of its structure.
- In the FAQs [Application #8], the SBA stated that when the ownership of an eligible entity was transferred, the new owner may use the prior owner’s revenues as its own if the transferred entity was operational on February 29, 2020, regardless of the date of the transferred, unless the new owner has any of the qualities of an ineligible entity specifically enumerated in the Economic Aid Act.
- In the FAQs [Application #11], the SBA stated that if an entity’s SVO Grant application is declined, the applicant will not be able to appeal that decision. The SBA never offers appeals for denied grant applicants in any other program, and the demand for SVO Grants is likely to outpace supply, so the SBA has decided not to institute an appeal process.

- In the FAQs [Application #13], the SBA stated that if an entity is disregarded for tax purposes and doesn't file its own tax returns, either that entity or the entity that files tax returns may apply for the SVO Grant, assuming both entities have their own separate legal existence and each meets the eligibility requirements.
- In the FAQs [Application #14], the SBA clarified that an entity which submits an honest, good faith application but is denied funding for failure to meet one or more of the eligibility requirements will face no penalty and will be free to apply for other programs for which it is eligible. However, if an entity makes material misrepresentations in its application for an SVO Grant, the entity will have committed an act of perjury and be subject to various civil and criminal penalties.
- In the FAQs [Application #15], the SBA stated that an application will be rejected where an entity:
  - submits an incomplete application;
  - is attempting to commit fraud against the Federal government;
  - fails to meet the definition of an eligible entity;
  - lacks the required level of revenue loss;
  - possesses one or more of the disqualifying conditions;
  - is part of a group of affiliated entities that currently has 5 active SVO Grant applications pending; or
  - all available SVO Grant funding has been exhausted.

[The City of New York announced a free application assistance program](#) (“Curtains Up NYC”) for New York City business and nonprofits connected to live performance. The Curtains Up NYC program will offer free webinars and one-on-one counseling to NYC entities applying for SVO Grants.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, the American Rescue Plan Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

