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A Seat at the Table:

Restaurants to Receive Long-Awaited Stimulus Funds under the American Rescue Plan



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 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.

CARES Act Team

Co-chairs



Jeffrey A. Horwitz
Partner
+1.212.969.3229
jhorwitz@proskauer.com



Andrew Bettwy
Partner
+1.212.969.3180
abettwy@proskauer.com



Yuval Tal
Partner
+1.212.969.3018
ytal@proskauer.com



Lauren K. Boglivi
Partner
+1.212.969.3082
lboglivi@proskauer.com



Karen J. Garnett
Partner
+1.202.416.6850
kgarnett@proskauer.com



Camille Higonnet
Partner
+1.617.526.9738
chigonnet@proskauer.com



Vincent Indelicato
Partner
+1.212.969.4248
vindelicato@proskauer.com



Patrick D. Walling
Partner
+1.617.526.9732
pwalling@proskauer.com



Grant R. Darwin
Associate
+1.212.969.3306
gdarwin@proskauer.com



Lara B. Miller
Associate
+1.212.969.3546
lmiller@proskauer.com



Seok Whee (Jason) Nam
Associate
+1.212.969.3887
snam@proskauer.com



Perry A. Laub
Law Clerk
+1.212.969.3173
plaub@proskauer.com

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The restaurant industry has been among the hardest hit by the COVID-19 pandemic. The National Restaurant Association reported in its 2021 State of the Restaurant Industry that, as of December 1, 2020, more than 110,000 eating and drinking places had closed for business either temporarily or permanently since the pandemic's start.ⁱ Industry-wide, 2020 saw a decline of \$240 billion in total sales relative to pre-COVID-19 pandemic forecasts and a decline in nearly 2.5 million jobs from pre-COVID-19 pandemic levels. In New York alone, a survey conducted by the New York State Restaurant Association in early December 2020 revealed that 54% of New York restaurateurs predicted that they would be forced to shutter in the next six months absent additional federal relief.ⁱⁱ

On March 11, 2021, President Biden signed the [American Rescue Plan Act](#) (the "[ARPA](#)") into law. Section 5003 (*Support for Restaurants*) of the ARPA appropriates \$28.6 billion for a new Restaurant Revitalization Fund from which the Small Business Administration (the "[SBA](#)") will oversee grants to eligible food service providers. This program is aimed at providing critical additional support to the nation's restaurants and other food service providers to give them a chance to survive the remainder of the pandemic. This alert describes the key terms of the Restaurant Revitalization Grant Program established by the ARPA. As with all other SBA administered COVID-19 relief programs, many of the details of this new program's launch and administration are expected to be dealt with through SBA rule-making processes.

This alert will be updated to reflect any changes in the key terms of the Restaurant Revitalization Grant Program resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed below the principal terms of the program and will endeavor to update this alert regularly, this alert may not cover all of the rules and guidance published by the SBA. THIS ALERT IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

I. **Restaurant Revitalization Fund.** The ARPA establishes a Restaurant Revitalization Fund, from which the SBA can draw funds to make grants to eligible entities (discussed below). Of the \$28.6 billion fund, \$5 billion is set aside for the first 60 days of the program (or such other period of time as the SBA may determine) for grants to be made to eligible entities with gross receipts during 2019 of not more than \$500,000. The remaining \$23.6 billion (*plus* any portion of the \$5 billion reserved during such period that remains unused after the period expires) will be used to fund grants to eligible entities generally.

II. **Eligible Entities.**

A. **What is an "eligible entity"?** The scope of "eligible entities" that may receive Restaurant Revitalization Grants extends beyond traditional restaurants. Under the ARPA, any of the following are businesses that are expressly grant eligible:

- Restaurants;
- Food stands;
- Food trucks;
- Food carts;
- Caterers;

- Saloons;
- Inns;
- Taverns;
- Bars;
- Lounges;
- Brewpubs;
- Tasting Rooms;
- Taprooms;
- Any licensed facility or premise of a beverage alcohol producer where the public may taste, sample, or purchase products; or
- Any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink.

The ARPA also expressly includes as eligible any (otherwise eligible) entity that is located in an airport terminal or that is a Tribally-owned business concern.

While the final catch-all category should provide comfort to any eating or drinking establishment that is not expressly delineated above, for businesses that are on the margins (for example, a venue or stadium that has food stands within it or social/golf clubs with on-site restaurants), how the SBA defines “primary purpose” will be of critical importance in assessing eligibility. Note that in an FAQ published on February 28, 2021, the SBA indicated how it will identify an applicant’s “principal business activity” for purposes of the Shuttered Venue Operators (“SVO”) grant program, which may be instructive in this instance. In that context, the SBA stated that it 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 the 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.

B. **What entities are expressly excluded from being an “eligible entity”?** The ARPA expressly excludes from grant eligibility the following:

1. ***Owner (Together with Affiliated Business) of More than 20 Locations.*** Any entity that as of March 13, 2020 owns or operates together with any affiliated business more than 20 locations, regardless of whether those locations do business under the same or multiple names. For this purpose, “**affiliated business**” means a business in which: (i) an eligible entity has an equity or right to profit distributions of not less than 50%; or (ii) an eligible entity has the contractual authority to control the direction of the business. The determination of whether a business is an “affiliated business” is based upon any arrangements or agreements in existence as of March 13, 2020. As drafted this definition focuses on ownership or management *by an eligible entity*, which is a less common construct than common ownership or control by a parent entity (which is unlikely to be an eligible entity itself) or management company. As drafted, two entities with common ownership or under common management are *not* considered affiliates. Consequently, it is reasonable to expect that the SBA will refine this affiliation construct.

2. ***Government-Operated Businesses.*** Any entity that is a state or local government-operated businesses.

3. **Applicant/Recipient of a Shuttered Venue Operators Grant.** Any entity that has a pending application for or has received a SVO grant (under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act). For more information on the SVO grant program, see our client alert: [Front and Center: SVO Grants through the SBA](#).

4. **Publicly-Traded Companies.** Any “publicly traded company”, which is defined as any entity that is majority owned or controlled by an entity that is an issuer, the securities of which are listed on a national securities exchange. The definition of publicly traded company does not presently include the eligible issuer *itself*. While this may have been Congress’s intent – as it is unlikely that are many publicly traded companies that are eligible entities – it is also possible that this is a gap that the SBA will address through rules governing the program.

It merits noting that the final version of the APRA approved by the Senate and signed into law does not include the limitations contained in the version of the bill approved by the House of Representatives on eligible entities that are owned by a private fund (which limitations included, among others, the payment of distributions/dividends, advisory fees and consulting fees in excess of 10% of the entity’s profits for the duration of the covered period of the Restaurant Revitalization Grant Program).

III. **How is the Amount of a Restaurant Revitalization Grant Determined?** The amount of an eligible entity’s Restaurant Revitalization Grant is equal to its “**pandemic-related revenue loss**”. An entity’s pandemic-related revenue loss is subject to an overall cap of \$10 million and a per physical location cap of \$5 million.

A. **General Rule.** The general rule is that **pandemic-related revenue loss is equal to 2019 gross receipts minus 2020 gross receipts, if greater than zero**. The ARPA does not supply a definition for “gross receipts”. However, the SBA did recently define “gross receipts” in an Interim Final Rule effective on January 19, 2021 with respect to the Second Draw Paycheck Protection Program. It is possible (but not certain) that the SBA will apply the same definition in this instance. In that context, the SBA specified that with respect to for-profit businesses “gross receipts” are defined as all revenue in whatever form received or accrued from whatever source (including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions), reduced by returns and allowances but excluding net capital gains and losses. In addition, the SBA specified that gross receipts do not include the following: (i) taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers; (ii) proceeds from transactions between a concern and its domestic or foreign affiliates; and (iii) amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. Alternatively, the SBA may instead borrow from the definitions of “gross earned revenue” or “earned revenue” utilized for the SVO grant program, which each functionally mean the total of earned revenue (in accordance with common principles of accrual method accounting) from various sales of goods or services.

B. **Special Rules.** Beyond the general rule, the ARPA specifies calculation methods for certain categories of eligible entities. In each case, the ARPA also provides that the SBA has discretion to establish an alternative formula.

1. **Eligible Entity Not in Operation for the Entirety of 2019 (i.e., did not operate for some part of 2019).** For any eligible entity that was not in operation for the entirety of 2019 (i.e., did not operate for some part of 2019), pandemic-related revenue loss is equal to (i) the

average monthly gross receipts in 2019 *multiplied by 12 minus* (ii) average monthly gross receipts in 2020 *multiplied by 12*.

2. **Eligible Entity Opened on or after Jan. 1, 2020 and Before March 10, 2021.** For an eligible entity that opened during the period beginning on January 1, 2020 and ending on the day before the date of enactment of the ARPA (March 10, 2021), pandemic-related revenue loss is equal to (i) the total payroll costs (discussed below) that were incurred during such period *minus* (ii) any gross receipts received.

3. **Eligible Entity has Not Yet Opened as of a Grant Application Date, but has Incurred Payroll Costs as the Enactment Date.** For an eligible entity that has not yet opened as of the date it applies for a Restaurant Revitalization Grant, but has incurred payroll costs as of March 11, 2021, pandemic-related revenue loss is equal to the amount of such payroll costs (discussed below).

C. **Reduction for Paycheck Protection Program Loan Amounts.** The amount of an eligible entity's pandemic-related revenue loss is reduced by any amount received from a First Draw or Second Draw Paycheck Protection Program loan in 2020 or 2021. For more on the Paycheck Protection Program, including the latest changes under the ARPA, see our comprehensive client alert: [Paycheck Protection Program – Where are We Now?](#)

IV. **What are the Allowable Expenses for which a Restaurant Revitalization Grant can be used?** Restaurant Revitalization Grant proceeds can be used for the below listed allowable expenses during the covered period. The “covered period” begins on February 15, 2020 and ends on December 31, 2021 (or such other date as determined by the SBA, but not later than March 11, 2023). The implication of the covered period's start being retroactive to the onset of the COVID-19 pandemic is that grant proceeds can be utilized to reimburse eligible entities for expenses already incurred. Many of the allowable expenses are the same as the forgiveness-eligible uses of a PPP loan or permitted uses of a SVO grant.

A. **Payroll Costs** (the definition of which the ARPA borrows from the Paycheck Protection Programⁱⁱⁱ).

1. **Employees.** With respect to employees (and not any independent contractors) whose principal place of residence is in the US, payroll costs means the sum of payments of any compensation that is a: (i) salary, wage, commission, or similar compensation; (ii) payment of cash tip or equivalent; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowance for dismissal or separation; (v) payment required for the provisions of group health care or group life, disability, vision or dental insurance benefits, including insurance premiums; (vi) payment of any retirement benefit; or (vii) payment of State or local tax assessed on the compensation of employees. The (cash) compensation to each individual employee is capped at \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payment is incurred.

2. **Sole Proprietor/Independent Contractor.** With respect to a sole proprietor or independent contractor, payroll costs is the sum of payments of any compensation to or income of such person that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 on an annualized basis,

as prorated for the period during which the payments are made or the obligation to make the payments is incurred.

3. **Excluded Costs.** Under the Small Business Act, the following costs cannot be included in the calculation of payroll costs: (i) as noted above, cash compensation (i.e., gross amount before deductions for taxes, employee benefits payments, and similar payments) of any individual employee in excess of an annual salary of \$100,000, as prorated for the period during which the payments are made or the obligation to make the payments is incurred; (ii) federal income taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period (including income taxes required to be withheld from employees); and (iii) qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.

In addition, the ARPA adds two express additional exclusions from payroll costs: (i) “qualified wages” taken into account in determining an eligible entity’s Employee Retention Tax Credit; and (ii) premiums taken into account in determining an eligible entity’s COBRA Premium Assistance tax credit (section 6432 of the Internal Revenue Code, as implemented by the ARPA) (i.e., the highly publicized “COBRA subsidy”). Under the ARPA, this second category is now also an excluded “payroll cost” under the Paycheck Protection Program. For more on the ARPA COBRA premium subsidy please see the latest post on Proskauer’s Employee Benefits and Executive Compensation blog: [The COBRA Premium Subsidy Law: Understanding Your Compliance Obligations.](#)

- B. **Payments of principal or interest on any mortgage obligation** (but not prepayment of principal on a mortgage obligation);
- C. **Rent payments, including rent under a lease agreement** (but not any prepayment of rent);
- D. **Utilities;**
- E. **Maintenance expenses** (including – but not expressly limited to – (i) construction to accommodate outdoor seating and (ii) walls, floors, deck surfaces, furniture, fixtures, and equipment);
- F. **Supplies;**
- G. **Food and beverage expenses that are within the scope of the normal business practice of the eligible entity before the covered period;**
- H. **Covered supplier costs** (the definition of which the ARPA also borrows from the Paycheck Protection Program^{iv} and which means expenditures made by an eligible entity to a supplier of goods that (A) are essential to the operations of the entity at the time at which the expenditure is made; and (B) are made pursuant to a contract, order, or purchase order (i) in effect at any time before the covered period; or (ii) with respect to perishable goods, in effect before or at any time during the covered period).
- I. **Operational expenses;**
- J. **Paid sick leave; or**
- K. **Any other expenses that the SBA determines to be essential to maintaining the eligible entity.**

V. **Restaurant Revitalization Grant Priority.**

A. **2019 Gross Receipts of \$500,000 or Less.** As noted above, the ARPA contemplates a 60 day (or other duration as determined by the SBA) set-aside period during which \$5 billion of the Restaurant Revitalization Fund is allocated only to eligible entities with gross receipts in 2019 of \$500,000 or less. After such initial period, if anything remains of the \$5 billion set-aside amount it becomes part of the general pool of funds available for Restaurant Revitalization Grants for all eligible entities. Note that as currently drafted the \$500,000 is not expressly annualized, consequently an eligible entity that was only in operation for a portion of 2019 (e.g. operated only in December 2019 and earned \$400,000 in one month) would technically be eligible for funds out of the set-aside portion.

B. **Historically Disadvantaged Groups.** The ARPA also requires that the SBA prioritize awarding grants to eligible entities that are in one of the below described categories during the initial 21-day period of the program (*i.e.*, once the SBA starts awarding grants). An applicant will be required to self-certify as to eligibility for priority by virtue of satisfying the criteria for one or more of such categories.^v

1. **Women-Owned Small Business Concerns.** Under section 3(n) of the [Small Business Act](#) (15 U.S.C. 632(n)), a small business concern is owned and controlled by women if (i) at least 51% of the small business concern is owned by one or more women and (ii) the management and daily operations of the business are controlled by one or more women.

2. **Veteran-Owned Small Business Concerns.** Under section 3(q) of the [Small Business Act](#) 15 U.S.C. 632(q)), a small business concern is owned and controlled by veterans if (i) at least 51% of the small business concern is owned by one or more veterans and (ii) the management and daily operations of the business are controlled by one or more veterans.

3. **Socially and Economically Disadvantaged Small Business Concerns.** Under section 8(a)(4)(A) of the [Small Business Act](#) (15 U.S.C. 637(a)(4)(A)) a small business concern qualifies as “socially and economically disadvantaged” if (X) (i) it is at least 51% unconditionally owned by (i) one or more socially and economically disadvantaged individuals, (ii) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) or (iii) an economically disadvantaged Native Hawaiian organization, and (Y) the management and daily business operations of the business are controlled by one or more individuals who are (i) socially and economically disadvantaged, (ii) members of an economically disadvantaged Indian tribe or (iii) member of a Native Hawaiian organization. The Small Business Act further defines “socially disadvantaged individuals” as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities, and “economically disadvantaged individuals” as those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.^{vi}

VI. **Grant Application and Certifications.** Other than the priorities described above, the SBA is required to award Restaurant Revitalization Grants in the order that grant applications are received. Consequently, it is imperative that eligible entities submit their applications as rapidly as possible once the SBA releases the application form and launches an application portal (or otherwise specifies the application process). Each grant applicant is required to certify (as has become standard procedure for COVID-19 era SBA funding programs) that “the uncertainty of current economic conditions makes

necessary the grant request to support the ongoing operations of the eligible entity.” In addition, an applicant must certify that it has neither applied for nor received a SVO grant.

VII. **Returning Funds.** The ARPA expressly provides that if an eligible entity either fails to use the entirety of a Restaurant Revitalization Grant or permanently ceases operations on or before the last day of the covered period (currently December 31, 2021), that eligible entity is required to remit the unused funds (*i.e.*, funds not used for allowable expenses) to the Treasury Department.

VIII. **Tax Treatment.** Section 9673 of the ARPA expressly provides that Restaurant Revitalization Grants are not taxable. Further, recipients are not denied any tax deduction, their tax attributes are not reduced, and they are not denied any tax basis increase as a result of the tax-free nature of the grant. Simply put, not only are the grants tax-free but no adverse tax consequence (or quid pro quo) arises by reason of the grant being tax-free. Finally, APRA provides that the grant is treated as tax-exempt income for S corporations (unless the Treasury Department or the IRS provides otherwise), and directs Treasury and the IRS to write rules to determine the portion of any grant allocable to a partner.

It remains to be seen how soon the SBA will launch and begin accepting applications for the Restaurant Revitalization Grant Program. The fact that the SBA is still not yet processing applications for the SVO grant program, which was created nearly three months ago on December 27, 2020, suggests that the implementation of the Restaurant Revitalization Grant Program may be slow. Be sure to check back here for further updates on the Restaurant Revitalization Grant Program, including any application forms, FAQs or Interim Final Rules.

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ⁱ See National Restaurant Assoc., *State of the Restaurant Industry Report Measures Virus' Impact on Business* (Jan. 25, 2021), <https://restaurant.org/articles/news/new-report-measures-pandemics-effect-on-business>.

ⁱⁱ See Erika Adams, *More Than Half of New York's Restaurants Are in Danger of Closing: Survey*, N.Y. TIMES (Dec. 11, 2020), <https://ny.eater.com/2020/12/11/22166728/new-york-restaurant-closing-survey-pandemic>.

ⁱⁱⁱ 7(a)(36) of the Small Business Act (as implemented by the CARES Act, and as modified and amended by each of the Paycheck Protection Program And Health Care Enhancement Act, Paycheck Protection Program Flexibility Act Of 2020, the Economic Aid To Hard-Hit Small Businesses, Nonprofits, And Venues Act and the American Rescue Plan Act).

^{iv} 7A(a) of the Small Business Act (as implemented by the CARES Act, and as modified and amended by each of the Paycheck Protection Program And Health Care Enhancement Act, Paycheck Protection Program Flexibility Act Of 2020, the Economic Aid To Hard-Hit Small Businesses, Nonprofits, And Venues Act and the American Rescue Plan Act).

^v Note that the each of the definitions referenced below in the Small Business Act also expressly address where the applicable small business concern is a “publicly owned business”. Given the general exclusion of public companies from eligibility for Restaurant Revitalization Grants, the portion of each definition has been omitted here for simplification purposes. See 15 U.S.C. 632(n), 632(q) and 637(a)(6)(A), respectively.

^{vi} Under the Small Business Act, in determining the degree of diminished credit and capital opportunities the SBA is required to consider (among other things) the assets and net worth of such socially disadvantaged individual. In determining the

economic disadvantage of an Indian tribe, the SBA is required to consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets. *See* 15 U.S.C. 637(a)(6)(A).

