

SBA Serves Up Guidance for Restaurant Revitalization Fund Grants

More than a year into the COVID-19 pandemic, the first form of federal relief prepared specifically for restaurants is likely to be delivered soon. Many restaurants have benefited from Paycheck Protection Program (PPP) loans, economic injury disaster loans (EIDLs), and forgivable EIDL grants, and some may have applied for Shuttered Venue Operators (SVO) grants. However, the Restaurant Revitalization Fund (RRF) is the first federal relief specifically designed for restaurants.

The American Rescue Plan Act (ARPA) was signed into law on March 11, 2021, and authorized, among other things, up to \$28.6 billion in RRF grants. Since then, restaurant owners and their landlords and other creditors have been waiting for this federal funding to become available. A [sample application](#) form (SBA Form 3172) for RRF grants was recently made publicly available, and on April 17, 2021, the Small Business Administration (SBA) provided 21 pages of [guidance](#) that could signal they are about to open the door for these federal grants. In addition to signaling the SBA's readiness to provide funding, the sample application form and the new guidance provide important clarifications regarding eligibility for grants, calculation of grant amounts, and how eligible businesses can use the RRF grants. Although no specific launch date has been provided, based on earlier statements from the SBA that RRF grants will start being made two weeks after applications and guidance have been made available, it is possible that the launch could be as soon as May 1, 2021 (two weeks after the April 17 guidance).

Key terms of RRF grants and takeaways from the sample application form and new guidance are summarized below.

Key Terms of RRF Grants

Eligibility

- The ARPA defined an *eligible entity* as a restaurant, food stand, food truck, caterer, saloon, inn, tavern, bar, lounge, brewpub, tasting room, taproom, licensed facility, or premise of a beverage alcohol producer where the public may taste, sample, or purchase products, or other similar places of business in which the public or patrons assemble for the *primary purpose* of being served food or drink. This includes such entities located in airport terminals or that are tribally owned concerns.
- The sample application form follows these classifications of businesses but allows applicants to check all of the categories that apply. This suggests that the SBA recognizes that these classifications are not always clear-cut.
- The new guidance and sample application form provide that the SBA will apply a requirement for at least 33% of the applicant's gross receipts to be derived from *on-site sales* for brewpubs, tasting rooms, taprooms, inns, bakeries, breweries, microbreweries, wineries, and distilleries, and a requirement that at least 33% of gross receipts for inns be derived from *on-site sales* of food and beverages. This narrows the applicants that could otherwise be considered eligible entities. However, *on-site sales* are defined to include food or beverages purchased for takeout at the applicant's premise, purchased online and picked

- up, or were delivered directly to a consumer. It is likely that this 33% threshold was included to address the ARPA's language requiring that applicants have the *primary purpose* of serving food and beverages.
- Specifically excluded from eligibility for RRF grants are (1) state or local government-operated businesses, (2) entities that as of March 13, 2020, owned or operated (*alone or together with affiliated businesses*) more than 20 locations, regardless of whether those locations do business under the same or multiple names, (3) entities with pending applications for, or who have received, an SVO grant, or (4) publicly traded companies.
 - The new guidance defines *physical location* for caterers or businesses with multiple food stands, trucks, or carts to be the physical location where the business is headquartered.
 - When assessing *affiliation* to determine whether the 20-location limit has been exceeded, entities should include any business in which the eligible entity has an equity or right to profit distributions of not less than 50%, or in which the eligible entity has the contractual authority to control the direction of the business, based on arrangements or agreements in existence as of March 13, 2020.
 - The SBA has indicated through the new guidance that additional applicants will be considered to be ineligible. Specifically, nonprofit organizations, applicants with an expired EIN, SSN, or ITIN, establishments that are permanently closed, and applicants who have filed for bankruptcy under Chapter 7 or are liquidating under Chapter 11, or filed for bankruptcy under Chapter 11, 12, or 13 *and do not yet have an approved plan for reorganization*, will not be eligible for an RRF grant. Applicants *operating under an approved (confirmed) plan of reorganization* under a Chapter 11, Chapter 12, or Chapter 13 bankruptcy will be eligible for an RRF grant.

For entities familiar with PPP loans, there are some notable differences. For example, nonprofit organizations were eligible for PPP loans, and applying for an SVO grant would not preclude a borrower from obtaining a PPP loan. On the other hand, applicants in bankruptcy are precluded from obtaining a PPP loan, whereas the status of a plan of reorganization is determinative of whether an applicant is eligible for an RRF grant.

When considering the 20-location limit and affiliation, the applicable test slightly differs from the affiliation tests applied by the SBA when determining eligibility for PPP loans. For example, the affiliation waivers provided for PPP loans to franchises, NAICS category 72 businesses with no more than 500 employees per physical location, and entities receiving SBIC financial assistance, do not expressly apply with respect to RRF grants. However, in its new guidance, the SBA indicated that applicants operating under a franchise or similar agreement that meets the Federal Trade Commission's (FTC) definition of a franchise may be eligible, provided that the franchise is listed on the SBA's Franchise Directory with a franchise identifier code that ensures the franchise is eligible under the SBA's other eligibility criteria. The details of the new affiliation tests for RRF grants remain to be fleshed out by the SBA.

Unlike PPP loans, which are available only to *small business concerns* that generally have fewer than 500 employees, there is no limit on employees for businesses that receive RRF grants. Instead, one of the primary limitations on RRF grants is the number of locations that the business had as of March 13, 2020. However, as noted below, priority will be given to certain small business concerns.

Applicants considering applying for an RRF grant should pay special attention to the table summarizing eligible and ineligible entities that appears on pages 4-6 of the new guidance, as this seems to alter and supplement the eligibility criteria set forth in the ARPA in many meaningful ways.

Applicant Certifications

- In applying for an RRF grant, applicants must certify in good faith that the uncertainty of current economic conditions makes necessary the grant request to support the ongoing operations of the eligible entity. The wording of this certification is consistent with the certification required for PPP loans;

however, the SBA's interpretation of this certification in the summer of 2020 caused much consternation since it seemed to change over time. Please see a [description](#) of the SBA's latest position on this point.

- In addition, the applicant must certify that the eligible entity has not received and does not have a pending application for an SVO grant. This means that applicants that have applied for but did not receive and have not yet been denied an SVO grant would be precluded from applying for an RRF grant.

As with certifications made to obtain PPP loans, certifications made in an application for an RRF grant should be taken seriously since they constitute representations made to the U.S. government to obtain funding. Applicants that provide false certifications could be referred to the U.S. Department of Justice for investigation and potential federal False Claim Act charges (alleging a knowingly false or fraudulent claim for payment from the U.S. government).

Grant Amounts

- The maximum grant amount available for each eligible entity (and affiliated entities) is \$10 million, or \$5 million per physical location.
- Specific grant amounts are to be based on the pandemic-related loss of the entity, which is calculated by subtracting (1) the gross receipts of the entity in 2020 from (2) the gross receipts of the entity in 2019. The new guidance clarifies that *gross receipts* generally means all revenue in whatever form received or accrued (in accordance with the applicant's accounting method, i.e., accrual or cash) 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. The guidance also directs applicants to the lines on the applicable IRS tax forms to use in calculating gross receipts.
- For businesses that were not open for all of 2019, the grant amount would be calculated by prorating based on average monthly receipts in 2019 (multiplied by 12) compared to average monthly receipts in 2020 (multiplied by 12).
- For businesses that were not open for all of 2020 or that opened as late as March 10, 2021, the grant amount would be calculated based on the entity's eligible expenses (see below) minus any gross receipts received in 2020 and through March 11, 2021. For businesses that were not open as of the date they apply for the grant but have incurred eligible expenses, the grant amount would be the amount of those expenses.
- Regardless of when the eligible entity opened, to the extent they received a PPP loan, the RRF grant amount is to be reduced by the amount of the PPP loan received. The new guidance applies a similar subtraction for EIDLs, EIDL advances, state and local small business grants, SBA Section 1112 payments, taxes collected and remitted to a taxing authority (e.g., sales tax), proceeds from related party transactions, and certain other payments.
- The new guidance provides that the SBA will apply a minimum RRF grant amount of \$1,000.

The new guidance includes step-by-step instructions for the calculation of grant amounts for each category of applicant (applicants in operation prior to or on January 1, 2019, applicants that began operations partially through 2019, and applicants that began operations on or between January 1, 2020, and March 10, 2021, or who have not yet opened for sales but as of March 11, 2021, had incurred eligible expenses).

Notably, the PPP-based reduction to the RRF grant amount is the full amount of the PPP loan(s) received, regardless of whether the PPP loan is eligible for forgiveness or has been forgiven. This could reduce the RRF grant amount and negatively affect restaurants that were not able to spend PPP loan proceeds as required to qualify for full loan forgiveness due to closures or compliance with government orders related to COVID-19. However, the sample application form suggests that applicants who received PPP loans may be able to exclude portions repaid on or before May 18, 2020, when calculating the reduction to their RRF grant amount.

Use of Grant Proceeds: Covered Period

- RRF grant proceeds can be used to pay any of the following costs during the covered period to the extent incurred as a direct result of, or during, the COVID-19 pandemic:
 - Payroll costs, defined consistently with how this term is used in PPP loans (for example, excluding payments to independent contractors and qualified wages taken into account in determining the employee retention credit (ERC)).
 - The principal or interest on any mortgage obligations, excluding prepayment of principal (note that PPP loans could be used for interest only).
 - Rent payments, excluding prepayment of rent.
 - Maintenance expenses, including construction to accommodate outdoor seating, and walls, floors, deck surfaces, furniture, fixtures, and equipment.
 - Supplies, including protective equipment and cleaning materials.
 - Food and beverage expenses within the normal scope of the entity's business, as measured prior to the covered period.
 - Covered supplier costs, which are broadly defined to cover essential payments to suppliers of goods pursuant to a contract, order, or purchase order that was in effect before the covered period or in effect at any time prior to the end of the covered period if pertaining to perishable goods.
 - Operational expenses, which are not defined.
 - Paid sick leave.
 - Other expenses as the SBA determines to be essential to maintaining the eligible entity.
- The *covered period* for an RRF grant is the period from February 15, 2020, to December 31, 2021, which may be extended until as late as March 11, 2023, with SBA approval. The recent guidance and sample application form suggest that the SBA will be extending this period through March 11, 2023.

In many ways, the scope of permitted uses of RRF grants is broader than the scope of permitted uses of PPP loans. In addition, the "covered period" for PPP loans is only an 8-to-24-week period after the borrower received the first disbursement of their PPP loan. This difference in covered periods could allow RRF recipients to apply their grant proceeds to eligible expenses that were incurred and paid well before the receipt of their RRF grant, making it easier for the recipient to confirm full use of the RRF grant during the RRF covered period.

Repayment of Unused Proceeds: Reporting

- Unlike PPP loans, RRF grants are not forgivable loans but are treated as government grants.
- To the extent RRF grant proceeds are unused during the covered period, or if the entity ceases operations on or before the last day of the covered period, the remaining RRF grant proceeds are to be returned.
- By December 31, 2021, all applicants will be required to report their spending. If the applicant has spent their grant amount by then, they will be asked to certify that the proceeds have been used on eligible expenses. If they have not yet fully spent their grant, they will need to complete annual reporting submissions until the proceeds are fully spent or until March 11, 2023.
- The SBA has indicated that they reserve the right to request supplemental documentation needed to validate the applicant's certifications as to the use of grant proceeds.

When and Where to Apply

- The final application form for RRF grants is not yet officially available, and there is still no specified release date for the final RRF grant applications.
- Refuting earlier rumors, the SBA has clarified that applicants will not need to register through SAM.gov or obtain a DUNS number.
- The SBA has reportedly advised the National Restaurant Association that RRF grants will start being made two weeks after applications and the requirements for supplemental materials are made available.

That would suggest a launch date of May 1, 2021, since the new guidance was made available on April 17, 2021.

- The SBA has indicated that, when they open the application portal, applications for RRF grants can be submitted directly to the SBA [here](#), telephonically at 844.279.8898, or through point of sale (POS) systems used by restaurants, such as Square, Clover, Aloha, and Toast. Unlike PPP loans, which were processed through SBA-approved lenders, RRF grants are to be administered directly by the SBA.
- In its new guidance, the SBA indicated they would accept applications for 21 days from all eligible applicants. During this initial period, the SBA will distribute funds only for approved applicants who have self-certified that they meet the eligibility requirements for a small business concern that is at least 51% owned by women, veterans, and/or socially and economically disadvantaged individuals.
- After the initial 21-day period, the SBA intends to accept applications from all eligible applicants and distribute funds in the order in which applications are approved by the SBA.
- In addition to the points noted above, the sample application form (which is not yet approved for use) suggests the following:
 - Applicants will be required to disclose all owners of 20% or more of the applicant, like what was required for PPP loan applicants. This will require listing the owners' Employer Identification Number (EIN), Social Security Number (SSN), or Individual Taxpayer Identification Number (ITAN). If an owner of 20% or more of the business does not have an SSN or ITIN, the business will not be eligible for an RRF grant.
 - Applicants will be required to submit an IRS Form 4506-T, plus documentation regarding gross receipts, which may include any of the following: business tax returns (IRS Form 1120 or Form 1120-S); IRS Form 1040 Schedule C; IRS Form 1040 Schedule F; IRS Form 1065 (including K-1s); bank statements; externally or internally prepared financial statements (such as income statements or profit and loss statements); or point of sale (POS) reports, including IRS Form 1099-K.
 - In addition, for inns, brewpubs, tasting rooms, taprooms, breweries, wineries, distilleries, and bakeries, documentation will be required demonstrating that at least 33% of gross receipts are derived from on-site sales of food and beverages. These may include 2019 Tax and Trade Bureau (TTB) Forms filed, state or local government forms filed, or internally created reports from inventory management, sales reporting, or accounting software.

It is anticipated that businesses will apply for more RRF grants than would be allowed under the current funding. As a result, businesses interested in applying for an RRF grant should pay close attention to announcements regarding the application process. In addition, the ARPA calls for \$5 billion to be set aside for applicants with 2019 gross receipts of not more than \$500,000 and \$500 million to be set aside for applicants with gross receipts of not more than \$50,000.

Importantly, applicants should keep in mind that RRFs are to be processed through the SBA, which has already experienced significant backlogs and technological difficulties with other relief programs it has been asked to administer, including PPP loans. In connection with the initial rollout of PPP loans in 2020, the SBA began accepting loan applications just days after issuing regulatory guidance and making loan applications publicly available, but SBA lenders took days or weeks to open their portals for PPP loan applicants. Similarly, the recent rollout of SVO grants has been rocky. The SBA opened the SVO grant portal on April 8, 2021, and had to shut it down that same day because of technical problems. The exact timeline for RRF grants remains to be seen, and applicants should expect there to be delays along the way.

Although there is room for skepticism regarding the rollout of the RRF grant program, the SBA has established a call center hotline at 844.279.8898 to offer support and answer questions. In addition, they have offered support through the SBA's network of district offices for tailored regional SBA support.

Lingering Questions

The new rulemaking provides some helpful clarifications with respect to RRF grants, but there remain several questions that were not answered in the sample application form or the SBA guidance. These include the following:

- Will the SBA apply affiliation rules to RRF grants in the same way they were applied for PPP loans?
- Will an individual that owns a business that is part of a franchised business be precluded from obtaining an RRF grant because the franchise has more than 20 locations? In other words, if an individual owns three McDonald's, will that individual be eligible based on the fact that it only owns three locations?
- If an applicant's business serves many purposes, such as a hotel with an in-hotel restaurant or a casino with on-site bars and restaurants, how will it demonstrate eligibility for an RRF grant? Will the test requiring 33% of gross receipts to be derived from on-site sales of food and beverages apply to the entire enterprise, or will the applicant be able to break up their operations along the categories specified in the ARPA?
- How quickly will POS vendors open their platforms to process RRF applications after the SBA opens their portal? Will there be POS vendors that do not participate?
- Will establishments subject to the 33% on-site sales requirement be able to reasonably produce sufficient documentation to demonstrate their satisfaction of this requirement?
- How long will the \$28.6 billion in funding last, and will the program be replenished if it is fully used?

Hopefully, the SBA will provide additional guidance to help answer some of these and other questions before the application system for RRF grant applicants opens. Otherwise, the uncertainty and confusion that surrounded the rollout of PPP loans may be repeated.

Resources

- American Rescue Plan Act of 2021—Section 5003 addresses RRF grants.
- [Sample Restaurant Revitalization Funding Application \(SBA Form 3172\)](#)—sample application form that has not yet been released as final.
- [Restaurant Revitalization Funding Program Guide](#)—initially issued as of April 17, 2021, and updated on April 20, 2021.

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