May 19, 2020

To: State Restaurant Associations

From: Angelo Amador, Executive Director

Subject: Business Interruption Grants under Title V of the CARES Act

Aaron Frazier, Director of Healthcare and Tax Policy at the National Restaurant Association, highlighted for us the Coronavirus Relief Fund (“CRF”) grants available to states and localities under Title V of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or “the Act”). Specifically, CRF provides $150 billion in direct assistance grants to state and local governments to remedy the economic dislocation caused by the COVID-19 pandemic. The eligibility and allocation of these funds depends on the location, level of government, and the use of the funds.

At Mr. Frazier’s suggestion, I asked Gabriel Gillett and Jake Alderdice, attorneys with the law firm of Jenner & Block, LLP, a Restaurant Law Center (RLC) Law Firm Partner, to take a deeper dive and look specifically as to how states and localities could use CRF grant money towards small business interruptions. This memorandum contains Jenner & Block’s analysis.

Although the CARES Act does not specifically allocate any CRF grant money towards small business interruptions, the Treasury Department stated in guidance issued April 22 that the CRF funds may cover “[e]xpenditures related to the provision of grants to small business to reimburse the costs of business interruption caused by required closures.” The Treasury’s Frequently Asked Questions (FAQs) issued May 4 clarified that “required closures” should be interpreted loosely; the funds may benefit businesses that closed “voluntarily to promote social distancing measures or that are affected by decreased customer demand as a result of the COVID-19 public health emergency.” Notably, however, the guidance also states that funds cannot be used for “[d]amages covered by insurance.”

Treasury’s guidance confirms that state and local governments have broad discretion in administering CRF funds and establishing business interruption grant programs. Indeed, some states and localities (but not many) have already taken steps to create such programs. The National Restaurant Association and its state affiliates—as well as their member restaurant and foodservice companies—may thus wish to consider encouraging others to establish programs for distributing Title V funds for business interruption. In light of many restaurants taking the position in ongoing
litigation that some measure of their damages are covered by business interruption insurance, the associations may also wish to consider encouraging states and localities to allow companies to receive grants while such suits are pending, and to return any excess funds should the restaurants ultimately recover.

Below is a summary of the relevant details regarding potential business interruption grants with CRF.

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Allocation of Funds to Governments

Title V of the CARES Act, the Coronavirus Relief Fund (CRF), appropriates $150 billion in direct federal fiscal support to States, Tribal governments, and units of local government with populations over 500,000. Of that $150 billion, the Act allocates $3 billion to U.S. territories (D.C., Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa), and $8 billion to Tribal governments. The other $139 billion is allocated among the 50 States based on their population, with no state receiving less than $1.25 billion. The Act provides that eligible local governments may also submit certifications to the Treasury Departments to receive direct grants based on their population, and, if approved, such grants will be taken from that State’s total share.

Soon after the Act’s passage, the Treasury Department released the breakdown among the 50 states of the maximum amount each state could receive based on its share of the U.S. population. For example, Illinois was eligible for up to $4.9 billion in CRF funds; New York for up to $7.54 billion; and California for up to $15.3 billion. On May 11, 2020, the Treasury Department released data on the payments made to states and local governments.

For example, approximately $5.1 billion was paid directly to New York State, and over $1.4 billion was paid directly to New York City. Approximately $3.5 billion was paid directly to the State of Illinois, and approximately $1.4 billion was divided among Illinois cities and counties; the City of Chicago received $470 million, and Cook County received $429 million. Approximately $9.5 billion was paid directly to the State of California, and approximately $5.8 billion was divided among several California counties and cities; Los Angeles County received over $1.05 billion, Los Angeles city almost $700 million, and San Francisco approximately $154 million.

Use of the Funds and Business Interruption

The CARES Act provides discretion to states and local governments to determine how they will use the funds granted to them, provided they meet certain general requirements. The funds may only be used to cover costs that:
(1) are necessary expenditures incurred due to the public health emergency with respect to COVID-19;
(2) were not accounted for in the state or local government’s budget most recently approved as of March 27, 2020, the CARES Act’s enactment; and
(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

Although the Act itself does not provide further clarification of what constitutes a “necessary expenditure . . . due to” COVID-19, the Treasury issued guidance on April 22 that provides a non-exhaustive list of eligible expenditures. This list specifically mentions grants to small businesses for business interruption resulting from COVID-19. The full non-exhaustive list includes:

1) Medical expenses related to COVID-19, such as hospital costs, testing, and expenses for establishing telemedicine capabilities, among others;
2) Public health expenses related to COVID-19, such as expenses related to communication and enforcement of state public health orders, for disinfection, and for the acquisition and distribution of supplies;
3) Payroll expenses for public safety, public health, health care, or other employees whose services are substantially dedicated to mitigating or responding to the COVID-19 emergency;
4) Expenses for actions to facilitate compliance with COVID-19 related measures, including expenses for food delivery to residents, and expenses to improve telework capability for public employees;
5) Expenses associated with economic support in connection with COVID-19, including “[e]xpenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures”; and
6) A catch-all category consisting of “[a]ny other COVID-19-related expenses reasonably necessary to the function of government that satisfy the Fund’s eligibility criteria.”

While the Treasury’s express approval of business interruption grants is notable, it is also significant that state and local governments appear to have very broad discretion in creating programs through which they may disburse these funds, provided they may be deemed necessary to address the COVID-19 emergency.

On May 4, 2020, the Treasury Department issued a set of FAQs related to the eligible CRF expenditures, in which it elaborated on the use of funds for “grants to small businesses to reimburse the costs of business interruption caused by required closures,” as stated in the guidance. The Treasury affirmed in that context that governments “have discretion to determine what payments are necessary”—declining to offer a definition of “small business”—and stated simply that such a program should simply be “tailored to assist those businesses in need of such assistance.” The Treasury indicated that both administrative costs of such a program and the grants themselves would be covered.
Finally, the Treasury indicated that it was applying a broad reading of the term “required closures”: fund payments may be used even in the absence of a stay-at-home order if the expenditures “are determined by the government to be necessary.” A business interruption grant program may include, for example, “a grant program to benefit small businesses that close voluntarily to promote social distancing measures or that are affected by decreased customer demand as a result of the COVID-19 public health emergency.” This guidance suggests that the Treasury will not be restrictive in approving of government grant programs that provide grants of CRF funds to a wide swath of affected businesses.

**Ineligible Uses**

The April 22 guidance also provides a non-exhaustive list of costs that are specifically deemed ineligible, including:

1) Expenses for the State’s share of Medicaid;
2) Damages covered by insurance;
3) Payroll or benefits expenses for employees whose work duties are not substantially dedicated to responding to the COVID-19 emergency;
4) Expenses that have been or will be reimbursed under any federal program, including reimbursement pursuant to the CARES Act of State unemployment insurance payments;
   a. The FAQs clarify that while states may not use CRF funds for unemployment insurance payments covered by the CARES Act, a state may use CRF funds to contribute to its general unemployment insurance fund in order to maintain its solvency, and a government may use CRF funds for its unemployment insurance costs as an employer.
5) Reimbursement to donors for donated items or services;
6) Workforce bonuses other than hazard pay or overtime;
7) Severance pay; and
8) Legal settlements.

In light of these exclusions, businesses should expect that, in the event their business interruption costs are actually reimbursed by insurance or a federal program, they may be ineligible for such grants. However, there is limited guidance on this area of ineligibility. Neither the April 22 guidance nor the FAQs further define the “damages covered by insurance” category.

For example, should a business prevail in litigation against its insurer related to business interruption coverage related to COVID-19, and eventually receives payment from its insurance company, it is unclear whether that business would have to return its CRF grant money. Similar to how some businesses receiving forgivable loans pursuant to the Paycheck Protection Program (PPP) have returned those funds upon receiving support elsewhere, businesses should expect that they may have to do something similar for CRF grants.

There is also limited guidance provided on how other federal assistance interacts with the provision of CRF funds, other than the unemployment insurance funding pursuant to the CARES Act. For example, the guidance does not state whether other provisions of the CARES Act, such
as PPP, would qualify as covering business interruption expenses. However, because PPP pertains specifically to payroll expenses, instead of business interruption generally, it may be seen as non-duplicative. Nevertheless, state and local governments appear to have discretion—within the bounds of the Act—to set these types of parameters on their own.

The CARES Act provides that the Inspector General of the Treasury will be charged with overseeing governments’ use of the CRF funds, and recouping those funds if they are deemed ineligible. The Act appropriates $35 million to the Inspector General for these activities.

**Developing Business Interruption Grant Programs**

Because CRF funds have only begun to be distributed to state and local governments, it remains to be seen if, how, and when these governments may establish programs for business interruption grants. It appears that a limited number of governments have announced or begun to consider such programs. For example, the City of Memphis, TN, recently announced that of its $113.6 million in CRF funding, it will allocate $10 million to a business interruption grant program. The State of Mississippi is considering legislation to devote $100 million of its CRF funds for grants to small businesses (businesses with no more than 50 employees) that have not been able to receive aid through the PPP.

There appear to be relatively few other examples thus far, and we will monitor as others roll out in the near future. There may be others proposed which we have not yet been able to locate. Given the broad discretion afforded to state and local governments in administering such programs, the RLC should consider proposals for grant programs that would reach a sufficient proportion of its affected members and would fit within the parameters of the CARES Act and Treasury guidance. Moreover, because state and local governments are currently deciding how to use their limited CRF funding—with many competing possible uses—state restaurant association should consider reaching out to state and local governments to advocate for such programs promptly.

I hope you find this memorandum helpful and we are available to assist, as needed, if you decide to reach out to your state and local governments to advocate for such a program.

Once again, I would like to thank Jenner & Block’s team for their assistance in the drafting of this memorandum:

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