

The 500 Employee Size Limit in the Small Business Loan Section of the CARES Act: How Does It Apply To Dealers?

Disclaimer

NADA believes that the following analysis will be correct, but no implementing guidance has yet been issued by the Small Business Administration (SBA). Accordingly, this analysis may change over time with new information and developments. Until guidance confirming this analysis is forthcoming from the SBA, no definitive conclusions may be drawn.

*Furthermore, this analysis does not provide, and is not intended to constitute, legal advice. All content and materials are for general informational purposes only. **Important:** as necessary, dealers should consult an attorney familiar with the federal, state and/or local laws at issue and with dealership operations to obtain specific advice with respect to any specific legal matters.*

Important Distinction

NOTE: The 500 employee provision that is discussed here is **NOT** the same as the 500 employee requirement present in the recently enacted Families First Coronavirus Response Act (FFCRA), which provides for paid sick and FMLA leave. Accordingly, none of the analysis that follows applies to the FFCRA.

Background

One key part of the \$2.2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act enacted today is the creation of a new federally guaranteed loan program. And a key provision of that program is that only employers who have 500 or fewer employees are eligible to apply for covered loans. This raises the question of how that 500 employee limit will apply to a multi-store dealer that operates (and employs its staff through) a set of separately-organized, but commonly-controlled business concerns (stores). Will that dealer be required to aggregate all of the employees in those separate stores for purposes of determining whether the dealer meets the limit? Or will that dealer be able to treat those separate stores individually?

Existing law/SBA “Affiliation” Rules

Under existing law (prior to the enactment of the CARES Act), the SBA’s primary program for providing financial assistance to small businesses (including franchised new car dealers) is what is known as the Section 7(a) loan program. (In fact, for ease of enactment, the CARES Act is simply amending the current Section 7(a) law.) Under the pre-CARES Act regime, the SBA has a complicated set of “affiliation” rules that require an entity to aggregate its separately-organized, commonly-controlled business concerns when calculating, among other things, how many employees that entity has for purposes of Section 7(a) loan consideration. Those complex rules are described in the SBA publication available [here](#).

CARES Act Treatment of Existing Affiliation Rules

As a general matter, it appears that the SBA’s existing affiliation rules will apply to potential loan applicants under the CARES Act. **However, for franchised car and truck dealers, there is an important provision in the CARES Act that should provide substantial relief.** Specifically, section 1102(a)(2) of the Act provides, in relevant part, that the SBA’s normal affiliation rules will **not** apply to:

any business concern operating as a franchise that is assigned a franchise identifier code by the [SBA].

Franchise Identifier Code

So, what is a “franchise identifier code”? A franchise identifier code is issued by the SBA with respect to specific name brands and is used under the existing Section 7(a) loan program in connection with loan applications by franchisees, including new car and truck dealers. Franchisors (OEMs) need to take a series of steps to receive a franchise code from SBA. In particular, to obtain an code for a given brand, an OEM/franchisor must submit to the SBA (at franchise@sba.gov) its sales and service agreement, a Franchise Disclosure Document (FDD) (if applicable), and all other documents the franchisor requires the franchisee to sign. OEMs/franchisors must also execute an SBA Addendum to Franchise Agreement. That latter form may be found [here](#). SBA has created an SBA Franchise Directory of all franchises reviewed by the SBA that have been issued franchise identifier codes. The current Directory may be found [here](#).

Current Status of OEM Franchise Identifier Codes and Related Industry Advocacy

Currently, new car and truck OEMs fall into two categories relative to the issuance of franchise identifier codes: those that have them and those that do not. As of March 27, 2020, the listing of OEM brand statuses is as follows:

OEM brands with franchise identifier codes. Dealers of these brands should not have a problem avoiding the normal affiliation rules.

Chrysler, Dodge, Jeep, Ram
Kia
Ford, Lincoln
Mazda
Mitsubishi
Subaru
Volvo
Cummins
Mack
Peterbilt

OEM brands without franchise identifier codes. NADA already has aggressively reached out to these brands and asked them to apply for codes, and those efforts continue. Most of these OEMs have advised that they are applying to the SBA. NADA’s goal is to have as many OEMs as possible file by the time dealers file loan applications. (Although very streamlined, the new loan program will take a little time to become operational because the SBA will need to quickly stand it up and lenders will then need to digest and process its terms and provisions.)

General Motors
Toyota, Lexus
Nissan, Infiniti
Volkswagen, Audi
Jaguar, Land Rover
Honda, Acura

Hyundai, Genesis
Fiat
Porsche
BMW, MINI
Ferrari
Mercedes
Bentley
Aston Martin
Lamborghini
Rolls Royce
Kenworth
International

Impact on Dealer SBA Applications

NADA is encouraging SBA to expedite its consideration of the franchise code applications from the OEMs who are currently applying. Once a dealer's franchisor has obtained a franchise identifier code, the dealer's business concerns (stores) of that brand should be able to determine their employee count eligibility without applying the normally applicable affiliation rules.

This outcome can be illustrated by the following example. Assume that a dealer group has 3 commonly-controlled but separately-organized business concerns, each operating a store with 200 employees. If the affiliation rules apply, that organization would be deemed to have 600 employees and would not be eligible for a loan under the CARES Act. But if the three stores were all Ford stores then, because Ford has a franchise identifier code, the affiliation rules would not apply and each of the three stores could apply separately for a loan. And, it may even be true that if only one of the stores is a Ford store, the other two together could be eligible as the affiliation rules would apply, but they would together only have 400 employees combined.

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