Dealer

F&I Special Section

by Gil Van Over

Adverse Action Notices

A rejection by any other name

Over dinner recently with a friend, a retired FBI agent, the conversation ranged from our kids' sports to auditing procedures to the golf course to what happened to Jack Bauer on 24. Then we started talking about adverse action notices. I know, strange topic to discuss over a tender filet mignon, but the topic surfaced nonetheless.

His response came at me like a foul ball from another field at a Little League baseball park. "You mean adverse actions from an HR perspective?" he asked.

Using my best Socratic selling skills technique, I replied, "Tell me more."

It seems the Bureau (as my friend refers to his former employer) uses the term adverse action to describe the various written disciplinary notices the Bureau uses when employees violate the Bureau's code of conduct.

Then, like the superb investigator that my friend is, he asked what I meant by adverse action notices. Since I am helping with his training as an F&I compliance auditor, we ended up having to order dessert to finish my take on adverse action notices. So get some cheesecake out while I recap our conversation.

The dealer is the creditor

Like it or not, but the decision you made to employ spot delivery as your primary sales methodology means you are now the creditor in the auto sales transaction. You made the decision to deliver the vehicle before third-party approval is obtained; therefore, you are making the credit decision. This is but one of the 29 risks associated with the spot delivery process (the topic of a future article). Numerous court decisions affirm this notion and are one of the driving reasons a dealer has to comply with federal and state regulations that appear to be aimed at banks.

Still in doubt? Take a look at the upper right hand box on a typical Retail Installment Sales Contract. This is the box that has the dealership's name and address. Look at the header in the box. It probably says "Creditor (Seller)."

Under both the Fair Credit Reporting Act (FCRA) and the Equal Credit Opportunity Act (ECOA), adverse action means a denial or revocation of credit. In layman's terms, this means that whenever a credit decision is made that is different from what the customer applied for the creditor has taken an adverse action. The primary difference between the two acts is that the FCRA applies if an adverse credit decision is made partly as a result of

information that is obtained on the consumer's credit bureau report.

To send or not to send
Following are some of the common situations that dealers find themselves faced with, along with recommendations on what a dealership can do to satisfy its requirement under ECOA and FCRA adverse action notification.

Scenario: A consumer completes a credit application and the consumer decides not to pursue the transaction and no further work is performed by the dealer.

- Requirement: The dealer has not made an adverse credit decision therefore, no notice is required.

Scenario: A consumer completes a credit application, the dealer determines that no third-party lender will approve the application; the dealer elects not to send the credit application to any third-party lender and tells the consumer that the dealer cannot get a deal done.

- Requirement: The dealership has made a credit decision that is adverse to the applicant's wishes and is required to send an adverse action notice.

Scenario: A consumer completes a credit application, the dealer determines that no third-party lender would approve the application, but submits the credit application to a third-party lender who rejects the application and the third-party lender tells the dealer it is sending an adverse action notice.

- Requirement: Most industry pundits agree that the adverse action notice sent by the third-party lender suffices in this situation. The dealership should retain a copy of the credit decision fax back from the lender to support its case.

Scenario: Would the scenario above change if the dealer receives a rejection notice from the third-party lender, but is not able to determine from the third-party lender that it actually sent an adverse action notice to the consumer?

- Requirement: The dealership may want to get a blanket confirmation from each of its third-party lenders (part of the preferred lender program?) that they comply with both ECOA and FCRA requirements to send an adverse action notice.

Scenario: A dealer spot delivers a vehicle, was not able to get the consumer financed, the dealer decides to unwind the deal and at least one of the third-party lenders notified the dealer that it was sending out an adverse action notice.

- Requirement: This is the biggest area of risk for the dealership. Most of the cases I read suggest that the third-party lender notice in this situation does not suffice. I would strongly recommend that the dealer send an adverse action notice by certified delivery in every unwind situation as these are the emotional deals that seem to end up at a shark's office. With the small amount of unwinds a typical dealer has, it makes sense to protect the dealership's interest in these cases.

Scenario: Each of the financial institutions that denied credit is required to notify the consumer. Since the dealer is the initial creditor, should the dealer also send out an adverse action notice?

- Requirement: The dealer is only making the initial credit decision if it spot delivers the vehicle. If the dealer does not spot deliver the vehicle and simply passes along

the credit application to a number of third-party lenders, the dealer has not made a credit decision and is not required to send an adverse action notice.

Scenario: Does the fact that a dealer has a rider that states that the dealer has the right to rescind the contract if it is unable to find another lender to assign the contract to, and the fact that the dealer not use the credit bureau information to deny credit, mean that the dealer is not obligated to send out any notice?

- Requirement: The trigger event is spot delivery. The rider may help a dealer rescind the RISC, but does not alleviate the dealership of its responsibility to send an adverse action notice.

Scenario: A dealer spot delivers a vehicle and receives a conditional approval from a third-party lender. Should the dealer send an adverse action notice?

- Requirement: In this scenario, a dealer is safer if it sends a conditional adverse action notice stating that the consumer's credit application was approved on terms different that those applied for. The dealer should send the letter to the consumer after re-contracting with the consumer on the terms approved by the third-party lender.

A recent decision in the Eastern District of Virginia, Padin v. Oyster Point Dodge, may broaden dealers' requirements in sending adverse action notices, particularly in failed spot delivery scenarios. I suggest you have your attorney review this recent case and advise you how it may impact your operations.

Compliant adverse action notices
As the above scenarios suggest, there will be times when a dealer must send an adverse action notice. Unfortunately, it is not just as simple as sending a handwritten note that says "You wuz turned down."

A compliant adverse action notice must:

- Be sent within 30 days of the adverse action
- Notify the consumer that his or her credit application was not approved
- Contain the creditor's (dealer's) name, address, contact name, and phone number
- Disclose the name(s), address and phone number for all credit bureau reports obtained
- Provide safe harbor ECOA disclosure

Side story about governmental language: One of my projects when I was working at a captive was to simplify the Retail Installment Sales Contract (my team's design is still in place 10 years later, I proudly profess). One of our goals was to reduce the legalese and make it easier for the consumer to understand the language. We rewrote everything we could on the RISC and ran the revised text through several ease of reading software programs. We were eventually able to reduce the reading level from an 11th-grade level to a seventh-grade level. The only obstacle to reducing the overall reading level to a fifth-grader's level was the safe harbor language mandated by the government!

However, safe harbor language has an important place in business. The government is telling us that if we use this specific language, we will comply with the notification requirements of the rule.

Here is the safe harbor language for the adverse action notice:

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from

discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is:

Federal Trade Commission
Equal Credit Opportunity Act
Washington, DC 20580

Hope you enjoyed your dessert while reviewing your obligations to send adverse action notices. Until next month

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