

You Are The Creditor

In a typical vehicle sale today, the dealer enters into a sale and finance agreement with the customer. The dealer sells the vehicle and makes the credit decision to put the customer out on the street on a Retail Installment Sales Contract or a Lease Agreement before receiving an approval from a third party lender. In other words, the dealer is making a credit decision.

As the dealer is making the credit decision to put the customer on the street in a vehicle, it now must follow all of the rules any other creditor must follow: Equal Credit Opportunity Act and FACTA primary among them.

Here's a primer on the obligations you take on because you spot deliver cars.

Credit application retention

The ECOA requires that creditors retain credit applications for 25 months. This means every credit application taken, whether taken by a sales person or the service writer. Whether by phone, fax, in person or via the internet.

Two common problems occur in the credit application retention process. The most glaring issue is when a sales person takes a credit application, the customer walks on the deal before it gets very far down the line and the sales person never submits the credit application to the F&I Department for consideration.

The other issue is when a service writer is taking credit applications in conjunction with a manufacturer service initiative for 90 day same as cash service work. The credit application likely is sitting in the Service Manager's office in a desk drawer or simply thrown in the trash.

Further complicating the credit application retention issue is the recent extension to the Fair Credit Reporting Act, now known as FACTA. This revision does not have a credit application retention requirement in place, but does provide a 60 month statute of limitation for consumers to sue a creditor for improperly pulling a credit bureau report. If a consumer can come back up to five years from now alleging that you did not have permission to pull her credit bureau report, it seems to make sense to have the credit applications on file for five years to prove you had permission.

The recommendations are three fold:

1. Have a retention procedure clearly documented and communicated to your staff
2. Include credit applications taken from every source in your dealership
3. Retain them for five years

Pulling credit bureau reports

FACTA retained the FCRA requirement that two conditions be precedent to pulling a credit bureau report:

1. There must be a legitimate business purpose
2. There must be express consent given by the consumer

The legitimate business need requirement is met if a consumer is in your dealership to purchase a vehicle. It is not a legitimate business need if the F&I Manager's bowling buddy wants to know his credit score and signs a credit application so the F&I Manager can pull his credit report.

The requirement for express consent is met once a consumer signs a completed credit application granting approval. This is one of the reasons I discourage the acceptance of credit applications over the phone. Where is your written proof that the customer agreed to have her credit bureau report pulled? This tactic is also a favorite one of identity thieves, that is, to call in the information on someone's identity to see how the credit looks. You will never see that person, yet your inquiry will be the one on the credit report.

To comply with this regulation, you should:

1. Never accept a phone in credit application
2. Require that credit bureau reports only be pulled after obtaining the customer's signature on a credit application
3. Limit the number of people in your dealership that can pull credit bureau reports

Adverse action notification

Both ECOA and FACTA require that creditors provide consumers with a statement when the creditor takes an adverse action on a credit application. Again, since dealers are making credit decisions, they must comply with this requirement.

Numerous court decisions have seemingly limited a dealer's requirement to send an adverse action notice on a deal that was not spot delivered as long as the consumer received a notice from at least one source.

Where you are at risk is on the credit applications that you do not submit to a third party lender for consideration and on unwound spot deliveries.

To cover your backside on the adverse action requirement, you should:

1. Submit every credit application to at least one third party lender, even if you know the customer will not be approved. This way, you have proof that someone else made the credit decision, not you.
2. Sent an adverse action letter by certified mail on every unwind, even if you know the customer received an adverse action letter from a third party lender. Most of

the lawsuits alleging the dealer did not comply with the adverse action requirement are associated with unwound spot deliveries.

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