

The Corporate Governance Defense

by : Gil Van Over

I am often accused of being slow.

I know I've lost a few steps and don't even try to keep up with the younger crowd on the softball diamond or basketball court anymore.

Family and friends don't understand why I can't seem to remember birthdays even though they occur at the same time each year.

I even had self-lowering toilet seats installed when we built our home a few years ago because after decades of reminders, I still couldn't seem to remember to lower the toilet seat.

It takes me a while to get it.

Unfortunately, at least according to the constant flow of news stories about car dealers, sales managers or controllers running afoul of the law or the banks, it seems as if some car dealers, managers or controllers are a little slow and just don't get it.

A good corporate governance program can be a car dealer's self-lowering toilet seat.

Corporate governance defined

The feds tell us how to set up a compliance program that will pass the smell test for good corporate governance. While you won't necessarily find a statute titled Corporate Governance, a review of some of the federal statutes that regulate our industry provides the direction we need.

Federal Sentencing Guidelines

For example, the Federal Sentencing Guidelines, the Safeguards Rule and the Red Flags Rule all detail the essential elements.

The Federal Sentencing Guidelines permit federal judges to reduce required penalties by up to 95 percent if the business can demonstrate certain elements. The Safeguards Rule and the Red Flags Rule both require that a dealership name a compliance officer and demonstrate certain elements. These elements are:

1. Conducted a risk assessment
2. Developed policies and procedures
3. Provided employee training on the policies and procedures
4. Performed periodic audits
5. Put corrective action in place

Even someone as slow as I am can start to see a common theme. In order to present a stronger defense against litigation or regulatory inquiry, it might help if you can demonstrate that you have a good corporate governance process in place.

Corporate governance essential elements

Let's look at each of the essential elements of a sales and F&I compliance program.

Conduct a risk assessment

The first step is to review your sales and F&I operations from the Dark Side's perspective.

Select five to seven deals from the last month from each F&I manager and flyspeck each piece of paper in the file. Imagine that this is the deal a plaintiff's attorney or the DMV or the bank has a potential issue with. How will the paperwork withstand their scrutiny?

Did the sales manager pack the payment?

Does the menu document the purchase and price of ancillary F&I products?

Were all the essential Truth in Lending or Truth in Leasing requirements met?

Did the customer or someone else sign all of the documents?

Is there evidence of potential bank fraud such as a straw purchase, inflated income, non-existent down payment or power booking?

These are but a few of the risks you should look for.

Develop policies and procedures

Once you understand the risks involved in the sales and F&I processes, and completed your assessment of where you stand in the process, it is time to document your expectations.

You must develop a set of policies and procedures which define for your managers exactly how you expect them to transact business with your customers.

Think of it this way. if you are not at the dealership, and a situation arises, how can you be sure that the manager(s) will make the decision you would make if you don't provide any direction through a set of policies?

Provide employee training

Perhaps most damaging in any defense of litigation or inquiry is to have a policy in place that none of your employees know about.

Imaging that in your deposition you state that you have a set of defined policies that prohibit the actions you are accused of. Yet, none of your employees who are subsequently deposed know of any written or documented policies.

Once you develop your policies, ensure that you provide training on those policies for every applicable employee, document when the training took place and obtain an acknowledgement of the training.

It will be easier to document the training if you subscribe to an online training program, but a manual process can also be documented to a judge's satisfaction.

Perform periodic audits

Now that you have laid out your expectations, and your employees have been trained, you must periodically inspect the work to ensure the employees are performing as expected.

Consider establishing a tertiary level inspection process.

The billing clerk should be looking for certain requirements in each transaction.

The controller or general manager should review a sampling of deals on a monthly basis.

An outside inspection should be undertaken on a quarterly, semi-annual or annual basis.

Document corrective action

You might as well admit it upfront. You will find issues of non-compliance with your policies. It is going to happen.

No one is perfect. No one should be expected to be perfect, especially in a business where the work flows are not as constant as an assembly line. It seems as if most F&I managers go hours without any closes, then a rush hits and there are three customers outside the box anxious to get done and get home.

Your responsibility to yourself and your compliance program is to take and document corrective action when variances to your policies are discovered.

These corrective actions can range depending on the offense.

You may have a discussion with an employee who neglects to provide a customer with your Privacy Notice in one deal.

You might write up an F&I manager who did not use a menu in five of seven deals reviewed.

You should consider terminating any employee who signs a customer's name to any document.

Being able to demonstrate that you have the basics of a corporate governance program as defined by various federal statutes should help in the defense of private action lawsuits or regulatory inquiries.

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