Dealer

F&I

Debunking F&I Myths

Or how to avoid having your bank account swept clean

By Gil Van Over

To paraphrase a well-worn commentary on life: myths are like opinions - everyone has one and they all stink.

Many myths surround the F&I office, and believing them can end up clearing out your reinsurance account in the Caymans. Here are some of the myths that are currently making the rounds - and a dose of reality.

Myth - I advertise "Se habla Espanol" in my print ads just to generate traffic. Since my state doesn't require me to have a customer sign a Spanish translation contract when I negotiate a sale in Spanish, I've covered all my bases.

Reality - The FTC Used Car Rule specifically states that a transaction negotiated in Spanish requires that a Spanish translation Used Car Guide be displayed on the vehicle before it is offered for sale. Unless your used car sales manager moonlights at the circus with tarot cards and can predict which car a Spanish-speaking customer is going to purchase, you'd better have an English and a Spanish version of the Used Car Guide prominently displayed in the window of every used car offered for sale on your lot.

Myth - The FTC hasn't imposed the USA Patriot Act requirements on auto dealers. There is no need to check the government's list of suspected terrorists, drug traffickers and money launderers on every cash and credit transaction.

Reality - OFAC (Office of Foreign Asset Controls) is a governmental agency that has been around in one form or another since Abe Lincoln presided over half a country. Its primary mission in life is to block the assets of suspected terrorists, drug traffickers and money launderers. OFAC maintains a list of suspected terrorists, drug traffickers and money launderers that is periodically updated.

A dealer is not obligated to check OFAC because of the USA Patriot Act; A dealer is required to check OFAC because of OFAC requirements that were formalized in 1950.

Many dealers know that the USA Patriot Act has not yet been imposed on dealers and use it as an excuse to not check OFAC.

It is an OFAC regulation that every US person must check this list before entering into any financial transaction to ensure the other party is not on the list. This regulation is frequently mistaken as a requirement under the USA Patriot Act, which has not yet been imposed on auto dealers. The requirement to check the OFAC list is not a requirement under the USA Patriot Act, and is in effect now.

Dealers can check this list through a variety of sources, including the government's web site,

www.ustreas.gov/ofac, the three major credit bureaus or independent sources such as www.patriotdealer.com.

Myth - I only own one store. The FTC is not going to bother to check my dealership to make sure I have a Safeguards Program in place.

Reality - The FTC has already sent inquiries to several dealers asking for a lengthy list of documentation that the dealer has a Safeguards Program (which dealers were to have implemented by May 23, 2003). These inquiries appear to be randomly selected and do not take size into account. The letter I saw (from a single-point dealer) asked the dealer to provide:

- · A description of the dealer's corporate structure.
- · A list of each type of information from or about its customers that is collected or maintained by the dealer and a copy of each form used to collect or maintain the information.
- · A copy of the dealer's written information security program and to certify the time period during which the program was written and implemented.
- · Documentation of the security risks identified during the risk assessment process and how the dealer's plan addresses each of these risks.
- · The name and title of the employee responsible for coordinating the information security program and all documents that provide the employee with direction in coordinating the program.
- · Documentation of any testing, monitoring or evaluations put into place.
- · Identify the name, address and phone number of each service provider that has access to the dealer's customer information and copies of each service provider's contract that requires them to implement and maintain security safeguards.
- · Copies of the dealer's privacy notice, privacy policy and opt-out notices provided to consumers.

How prepared are you to respond to this inquiry (or to write a check payable to the FTC for potential penalties of $11,000 per day for non-compliance)?

Myth - Dealers everywhere use tactics such as straw purchases and power booking to get deals done with lenders. The worst that can happen if I get caught is that I may have to buy the deal back.

Reality - US Code 18 has a provision that deals with fraudulent credit applications submitted to federally insured institutions (FDIC insured, credit unions, etc). These institutions are also required to submit a Suspicious Activity Report (SAR) to the Justice Department every time it is presented with a fraudulent contract.

Straw purchases, borrowed down payments, power booking, misstating time at residence or job or inflating monthly income to fit lenders' underwriting criteria are some of the primary examples of fraudulent credit applications.

Many lenders would overlook such transgressions as the cost of doing business in the past during a dealer's choice lending environment. In today's market, with many lenders having left the market over the last five years, some lenders are beginning to look for ways to pursue civilly and criminally those dealers that are perpetrating fraud. These methods include leveraging US Title 18, RICO statutes and filing lawsuits for actual damages.

Myth - There is no need for my finance or sales manager to countersign the buyer's order and retail or lease contract at the time the customer signs the agreement.

Reality - Some states have taken the position that it is a deceptive practice when the dealer (or his agent) does not sign the buyer's order, RISC or lease agreement at the same time the

customer signs the agreement. Their logic is that by not accepting the offer at the same time the customer signs the offer, the dealer is leaving his rescission rights in place, while the customer has given up his rescission rights. This uneven playing field is often considered a deceptive practice the dark side has labeled "Yo-Yo Transactions."

Further, Regulation Z now requires that the seller sign the contract at the same time as the customer in order to consummate the transaction. This means the F&I manager must sign as the seller on the contract before giving the customer his copy. The office manager can, and should, still assign the contract to the lender in a separate area of the contract.

Myth - The only paperwork I need to complete when I unwind a deal is to put the vehicle back into inventory.

Reality - The dealer is a creditor in this transaction (look at most retail contracts. The box with the dealer's name and address often is labeled "Creditor"). Furthermore, it is just common sense that a dealer who decides to spot deliver a vehicle is making a credit decision as the very definition of a spot delivery is to put the customer out in the vehicle before obtaining a third-party lender's approval. Since the dealer is a creditor, it is obligated to provide its customers with an adverse action notice when the customer's credit cannot be approved as applied for. Conventional wisdom holds that the vast majority of the dealer's required adverse action notifications are satisfied when the dealer submits an application to a third-party lender that regularly sends ECOA condition or reject letters if the dealer has not spot delivered the vehicle.

Conventional wisdom also differentiates the casual credit application submission from an unwind. When a dealer unwinds a deal, the consumer is not likely to complete any customer satisfaction survey as a completely satisfied customer. This person now has the motivation to seek out a lawyer to right a perceived wrong. The lawyer will likely file a lawsuit alleging, among other issues, violations of ECOA and FCRA. The dealer is best served to have a copy of an adverse action notice, along with a certified mail receipt, to show that the dealer complied with this ECOA and FCRA requirement.

Myth - There is no need to make sure my software is programmed to properly disclose all ancillary F&I products on all the different contracts.

Reality - Improperly disclosed F&I products on line four is a TILA violation. If there are programmed TILA violations, a potentially huge class is created to sue the dealer in a class-action lawsuit. TILA's statute of limitation is one year, so all financed customers over the last year are potential class members. The penalties are up to $1,000 statutory fine per violation, the finance charges on the face of the contract and reasonable attorneys' fees. Add it up: Monthly sales times 12, at 75 percent finance penetration, average finance charge of $3,000 and 30 percent attorneys' fees. You will likely exceed the donation required to get the alma mater to name the library after you.

Myth - Negative equity is a fact of life. I just roll it into line one as always.

Reality - Some states now consider this a deceptive practice and plaintiffs' attorneys are attacking this previously common industry practice under TILA. The contracts in many states now provide for a "prior loan or lease balance" as a part of line four where the amount of negative equity is to be stated.

Myth - I use an arbitration agreement to help minimize class-action lawsuits. So what if my golf buddy did not sign one.

Reality - If you have an arbitration agreement in place, a separate class is potentially created if even one person is not required to sign an arbitration agreement in conjunction with the sale of a vehicle, cash or credit. Even winning the Nassau against your buddy won't cover the cost of a class-action lawsuit.

Myth - If my customer will buy a $2,000 warranty if I reduce her rate by 50 basis points, I'm making more money and will always take the cash.

Reality - The old trading-rate-for-product scenario. The Sherman Anti-Trust Act prohibits the tying of price of one product to the purchase of a second product. By reducing the interest rate (the price of one product) to the purchase of a second product (any F&I product), a dealer is setting itself up for charges of anti-trust violations.

Once the APR has been negotiated and agreed to, it must stay the same, with two possible exceptions (that must be documented in the file). One, the customer opts for a factory-sponsored APR instead of a rebate. Two, the dealer spots the customer as a level three and gets a level one approval after the fact. The rate the customer is spotted at exceeds the lender's finance reserve cap and the dealer has to recontract at a lower rate. A new menu must be completed and executed in both instances to document the change.

Myth - I don't have to worry about a privacy notice for those people that don't buy a car from me.

Reality - The trigger event for providing a customer with a copy of the dealer's privacy notice is when the customer's nonpublic, personal information is first obtained, not when a credit application is taken or a credit bureau pulled. Most often, this means when the customer hands over her driver's license to go on a test drive. Salespeople should immediately have the customer sign a two-ply privacy notice, give the original to the customer and attach the copy to the photocopy of the driver's license.

While there is not a requirement to retain a copy of the privacy notice, most dealers are more comfortable with having one in file as proof.

Don't make the mistake of buying into these myths as the consequences of such could really...stink.

If you wish to discuss this article with other dealers, or with the author, please go to the "Discussion Forums" at www.DEALER-magazine.com and enter the "F&I" forum.

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