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What Compliance Looks Like: Fair Credit Reporting Act

by Gil Van Over

The Acts conclude today. Since the start of the year we have covered the Gramm-Leach-Bliley Act, the FACT Act, the Equal Credit Opportunity Act, the Truth in Lending Act and the Consumer Leasing Act. This week we review the Fair Credit Reporting Act, or FCRA.

The FCRA, originally enacted in 1970, is designed to promote accuracy and ensure the privacy of information used in credit reports.

The 1996 amendments to the Act expand a consumer's rights and place new responsibilities on businesses that use credit reports.

The 2003 amendments to the Act are commonly known as the Fair and Accurate Credit Transactions Act, or FACT Act.

Basic Dealer Responsibilities Under FCRA

Three basic responsibilities are imposed on dealers because of FCRA:

- **Permissible Purpose** - Under the regulation, a dealer certifies to the credit-reporting agency (CRA) that reports will only be requested for a permissible purpose as defined under the statute.
- **Authorization** - Additionally, dealers may face lawsuits from consumers who claim they did not authorize the dealership to obtain their credit reports. The FACT Act now provides a five year statute of limitation for these private lawsuits.
- **Adverse Action** - In 1996, amendments to FCRA imposed "adverse action" requirements on dealers when taking an action based on the information contained in the credit report.

Dealers must have a permissible purpose to obtain a credit report

All dealers must have a permissible purpose under the FCRA for obtaining a credit report. Any of the following are permissible business purposes for which a dealership, in the normal course of business, may obtain credit reports:

- When the consumer has given written permission;
- When there is a legitimate business need, in connection with a business transaction that is initiated by the consumer;
- For employment purposes, including hiring and promoting decisions, when the consumer has given written permission;
- For the extension of credit as a result of an application filled out by the consumer;
- Pulling a credit report on yourself to find out your credit score is not a permissible purpose.

Dealers should have written authorization to obtain a credit report

FCRA does not require that a consumer sign a credit application in order for a dealer to obtain a credit report. However, without the signed credit application, the burden of proof becomes much higher for a dealer to prove it had permission to pull a credit report without a signed credit application. A best practice to provide a higher level of protection for the dealership and its owners is to require a signed credit application before any credit report is obtained and to retain those credit applications for five years. Of course, make sure the appropriate safeguards are in place.

The FTC's policy is "that a dealer does not have the right to obtain a credit report simply because the consumer visits the dealer's business and interacts with a salesperson – there has to be more." It is always permissible to obtain a consumer's credit report if the consumer has specifically provided the dealer with signed permission to obtain a credit report.

Adverse Action – The Debate Continues

The term "adverse action" is defined very broadly by the FCRA. Adverse actions include all credit actions affecting consumers that can be considered to have a negative impact, including the declination or modification of requested credit.

Potential examples of an adverse credit action:

- When a dealer submits the credit application to only subprime companies based on a low credit score. If the dealer fails to submit the application to a mix of lending institutions, then the dealer could be considered to take an adverse action based on the credit report;
- The dealership does not submit the credit application to any financial institution;
- When all financial institutions that the dealership submits the credit application decline the credit request;
- When a dealer unwinds a spot delivery.

If a dealer takes any type of adverse action that is based on at least in part on information contained in a credit report, the dealer is required to notify the consumer that includes certain required disclosures.

Failure to comply with the FCRA can result in state or federal enforcement actions, as well as private lawsuits. Furthermore, anyone who knowingly and willfully obtains a credit report under false pretenses may face criminal prosecution.

Gil Van Over is the President and founder of gvo3 & Associates (www.gvo3.com).

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