

Educational Tools May Bring Regulatory Risk For Fintech Cos.

By **Michelle Rogers, Joshua Kotin and Kathryn Goodman** (July 23, 2020)

Financial services providers are increasingly combining delivery of products and services with advice designed to help consumers make better-informed financial decisions.

Fintech companies, which typically rely upon data and analytics as fundamental components of their business proposition, should be particularly well positioned to aid consumers in their buying decisions.

However, recent complaints and reports are proof that companies must be very careful in how they offer advice, and underscore that a failure to proceed carefully creates a risk of stumbling into claims of unfair, deceptive, or abusive acts or practices.

This risk remains particularly acute as the financial services industry serves consumers in the middle of the COVID-19 pandemic.

Consumer groups are wary of industry-developed financial education tools.

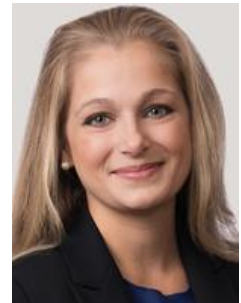
Explaining novel products can be fraught.

In June, the Student Borrower Protection Center and the National Consumer Law Center filed a complaint with the Federal Trade Commission against Vemo Education Inc., a company that develops and administers income share agreements, through which students repay tuition based on a fixed percentage of their future income.

Unlike a student loan, which obligates repayment of principal and interest based on a set schedule, satisfaction of the income share agreement depends entirely upon the student's income, and begins once the consumer begins earning a salary. Because an income share agreement is not a loan, and functions differently than one, the company created a comparison tool to help explain the costs and benefits compared to a traditional loan.

The complaint did not take issue with the terms of the income share agreement, but rather claimed that the marketing and promotion of the product was unfair and deceptive. It alleged that the comparison tool used false assumptions regarding student loan repayment periods and capitalization of interest, which inflated the expected cost of a loan to make it seem less desirable.

The complaint also alleged that the comparison tools used outdated, generalized and inaccurate information about the income of graduates, which understated the actual costs of an income share agreement. The complaint's conclusion was that a tool marketed as a way of helping consumers understand a novel product was in fact a ploy that distorted comparisons of the provider's product with those of its competitors.[1]



Michelle Rogers



Joshua Kotin



Kathryn Goodman

Importantly, this criticism was leveled at the comparison tool despite the fact that it was not used to generate specific quotes or take an application, which themselves would have contained additional disclosures.

Even traditional products with novel features carry risk.

Earlier this year, Consumer Reports Inc. sent a letter to the Consumer Financial Protection Bureau warning that four fintech services it reviewed, all of which claimed to help consumers simplify or automate their financial lives, "could do more harm than good for some users," and that all had "practices that may confuse or mislead consumers."^[2]

While the services advertised that they could provide personalized financial advice, and reduce costs or fees associated with financial services products, Consumer Reports claimed that fine print disclosures on their websites contradicted these representations. Furthermore, Consumer Reports claimed that the automated functions could actually lead to increased fees, or reduced overall savings.

For an act to be unfair, it must be likely to cause substantial injury to consumers, consumers must not be reasonably able to avoid the injury, and the injury must not be outweighed by countervailing benefits to consumers or competition. For an act to be deceptive, the representation must be material, and mislead, or be likely to mislead, a reasonable consumer.

Consumer Reports appears to be suggesting to the CFPB that automated savings technologies may mean the consumer cannot reasonably avoid a harm, and that fine print disclosures are insufficient to mitigate this risk — particularly where the fine print undermines a core benefit of the product.

There are several ways to mitigate the risks.

Fintech companies and other financial services providers may share laudable motivation in undertaking the task of educating consumers, but, nevertheless must consider how skeptical regulators or consumer groups will perceive their products and tools. When rolling out a product meant to be informative, providers should consider the following aspects that influence unfair, deceptive, or abusive acts or practices risk:

Disclosures

The disclosures deployed along with innovative and helpful products are critical, and should clearly and conspicuously outline the underlying assumptions that drive the information presented to the consumer. Broad disclosures and caveats that are typically very attractive to litigation counsel may actually operate to undermine the primary messages conveyed in marketing materials.

The company may be protected from litigation, but left exposed to regulatory risks rooted in federal unfair, deceptive, or abusive acts or practices prohibitions, and state unfair or deceptive acts or practices prohibitions.

Comparison Features

Tools that compare the provider and competitor products should be transparent about information sources, with any calculations well documented. In today's marketplace, base information and assumptions can quickly go stale, so all comparison tools should be

reviewed routinely to ensure that data is still timely, relevant and accurate.

Demonstrated Efficacy

Even where a product is designed to assist consumers with savings and or making financially sound decisions, companies should examine the impact of the product on every aspect of a consumer's financial health. This includes studying whether a product's features could inadvertently result in increased fees or costs to a consumer, or ultimately lead to less savings overall.

These considerations can help shape product disclosures, as well as marketing materials, to ensure that messaging is accurate and fair.

Compliance Management System

Often the best defense to a complaint or enforcement action is a comprehensive compliance management system that includes a documented process for continually evaluating marketing materials and products to ensure compliance with federal and state law. Effective systems help companies address issues before they arise, take corrective measures quickly upon detecting gaps and weaknesses post-implementation, and, when necessary, position them better to scope potential issues in response to a regulatory or enforcement inquiry.

In addition, legal, compliance and business personnel must be actively involved in the development and implementation of a product to ensure that they fully understand the regulatory risks posed and the best and most efficient ways to mitigate them.

Conclusion

Regulators, and in particular the FTC, CFPB and state attorneys general, have long raised concerns about companies fairly comparing their products to those of competitor, and can rely upon a wealth of legal precedent to bring an investigation. As fintech companies develop new products at lightning speed to keep up in the competitive marketplace, companies will be well served to continually consider the regulatory risks associated with each product.

Learning from past and current actions — and integrating risk detection and prevention functions into product development — will help protect fintech companies from regulatory risk and enforcement actions, thus freeing up capital to invest in more products and services.

Michelle Rogers and Joshua Kotin are partners, and Kathryn Goodman is an associate, at Buckley LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] In re Vemo Education, Inc., Complaint ¶ 22, <https://protectborrowers.org/wp-content/uploads/2020/05/Vemo-Complaint.pdf>.

[2] Anna Laitin Letter to Kathy Kraninger, Director, CFPB, March 9, 2020, <https://advocacy.consumerreports.org/wp-content/uploads/2020/03/Final-Savings-Letter-March-9-2020.pdf>.