

# Consumer Finance Monitor (Season 6, Episode 20): Perspectives on Counseling on the Creation of Consumer Finance Products, with Special Guest Joseph Schuster, Managing Director and Senior Counsel, Goldman Sachs

Speakers: Alan Kaplinsky, Mike Guerrero, and Joseph Schuster

Alan Kaplinsky:

Welcome to our award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm delighted to be moderating today's program. For those of you who want even more information, don't forget about our blog, which also goes by the name of Consumer Finance Monitor. We've hosted the blog since 2011 when the CFPB became operational. There's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry.

So to subscribe to our blog or to get on the list for our webinars, please visit us at [ballardspahr.com](http://ballardspahr.com). And if you'd like our podcast, please let us know about it. Leave us a review on Apple Podcast, Google, Spotify, or wherever you access your podcasts. Also, please let us know if you have ideas for other programs. We're always open to fresh ideas, and if you have ideas for other speakers that we should invite to our program, let us know about that as well. So today we've got a very special program, which I'll describe for you in a moment, but I'm first going to introduce our speakers. I'm joined today by our very special guest and former colleague, Joseph Schuster, and I'm also joined by my colleague and good friend Mike Guerrero.

So let me tell you a little bit about the background of Joseph and then I'll introduce Mike in a few minutes and we'll be off and running. Joseph is a consumer finance attorney with over a decade of experience. Advising clients on creating new consumer and small business finance products and enhancing existing products. In addition, Joseph advises clients on payments and servicing and collection matters that are related to consumer and small business products. Joseph has spent time both in-house at a credit card issuer and in the consumer finance practice group, our group at Ballard Spahr. And currently Joseph is a managing director and senior council at Goldman Sachs where he has been for the past seven years. Joseph regularly speaks about topics including electronic contracting, credit cards, and point of sale financing. Joseph lives in Denver, Colorado with his husband Andrew and their dog. Again, a very warm welcome to you, Joseph.

Joseph Schuster:

Thank you, Alan. I'm delighted to be here. Longtime listener, first time caller, and I have two things I need to mention at the outset. Number one, my comments I share today are my own and do not necessarily represent the views of Goldman Sachs. Secondly, I think it's important for your listeners to be aware, Alan's been a mentor of mine for a very long time, really since I've started in consumer finance. So it's great to be speaking on this program. Thank you, Alan.

Alan Kaplinsky:

Well, thank you Joseph. That is very kind of you. Now let me introduce my colleague, Mike Guerrero. Mike co-leads our firm's FinTech and payment solutions team, and he advises companies across a wide range of industries, consumer protection and consumer financial services issues, including clients offering point of sale and personal property financing and leasing, rent to own products, credit cards and installment loans. He's also spent time in-house at a publicly traded debt buyer where he oversaw licensing and compliance efforts, a startup mortgage lender where he helped acquire and onboard another mortgage company and at an international FinTech holding company where he oversaw the structuring and ramp up of a 50 state buy

now pay later credit sale program. He's advised banks, professional sport teams, FinTech companies, retailers and automotive finance companies. His clients range from startups to Fortune 500 companies. There is literally no part of the consumer finance industry that Mike is not involved in consulting with.

So we've got a really exciting topic to talk about today and a lot different from the typical shows that we do where we talk about a particular development that has occurred such as something has happened at the CFPB and everybody is clamoring to find out what has the CFPB done now. Today is going to be a more practical program. We have had several people comment that they would like us to cover practical aspects of practicing consumer financial services law, and that's what we're doing today. I'm hoping everybody enjoys it. I'm going to kick it off with questions for both, for Joseph and Mike, and we'll take it from there. Joseph, first question for you, and then I'd love to hear what Mike has to say about it. How do you think about the role of a lawyer when it comes to advising on the creation of a new consumer financial services product?

Joseph Schuster:

It's a great question, Alan, and I think it's a great starting point to kind of say what are we doing as lawyers in the consumer finance space? And then I think we're going to get to applying that to when your client actually wants to develop something in this space. As I think about a lawyer in this space, I think you can boil down what we're doing in our role into two main areas. Number one, contract and number two, the regulatory piece. If I'm taking those one by one, first of all, the contract piece, at the end of the day, a consumer finance product is a contract. There may be pretty marketing, a beautiful website, an access device, but the product itself is your client is giving somebody money and they want a promise of repayment of that money. That is a contract, and we need to ensure that that contract accurately represents the product and the commitment between the creditors and the debtors.

We're going to get into this a little bit more later on, but I'll say some of the considerations that go into that contracting piece, you're going to hear from your clients, "Well, why is it so long? Why can't it be a page? Do we really need this sentence? There's too many words. I don't like these words." And knowing the different things that are happening in the consumer finance space to say, "Well, we've added this provision because somebody else ran into a problem by not including it, and here's why." You can help your clients assess, do you want something that's just half a page or something that address addresses the different contractual issues that have been brought up between debtors and creditors over time? The second piece regulation, I would argue that consumer finance is one of the most regulated areas in the United States today.

There's a ton of laws on this space. They're continually evolving, and there have been laws on this topic since 4,000 years ago. It's mentioned in religious texts, consumer finances, it's mentioned all over the place. We have a lot of regulations to help protect consumers and make sure that consumer finance is done in a fair, responsible, in a way that people really understand what the product is that they're getting at. I mean, there's an entire podcasts devoted to this topic. So there's a lot here, certainly. It's our responsibilities in that space as attorneys to know what these regulations are, to know where these regulations are, to be able to find them, because there will be nuances, there will be things that will require research. We have federal regulations, we have state regulations.

They're not necessarily things that we're going to know all of them off the top of our head. Though, our clients will expect that we will, or that we'll have a book that has all of the answers. But we need to know directionally what they are so we can research them and apply them to the product that our clients are developing. So those are the two main things. I'd add that in addition to that, we want to be mindful that we're helping make progress in this space as we're developing new products, we're taking that contractual piece, we're taking that regulatory piece, and we're helping develop new products that are solving consumer pain points, that are making the consumer finance industry better for consumers, making things more seamless. To the extent that we can figure out how to work within there, and we're going to get into this certainly, but I think that's an important piece for us as well.

Alan Kaplinsky:

Yeah, well, a very, very good overview, Joseph. Mike, I mean your role is outside counsel, whereas Joseph is in-house now, but has been on both sides. So how would you answer that question?

Mike Guerrero:

Yeah, no, thank you Alan and Joseph, it's great to be on this podcast with you. So focusing on my role as an outside counsel, I think the obvious role is to be an advisor to the business, but it's important to look at the relationship and we're really coming in as a partner with a common goal, and that's to get this product to the market. We're also here to help the legal department to the extent the company has one, because we do advise clients from very small to large help them alleviate workload, communicate with the business, and really create less work for them. Sometimes our clients are going to have different risk tolerance, and one aspect of the role is to understand the client's risk tolerance and to help them come to creative solutions. They come to us with a product idea and we are tasked with helping them understand the steps that they need to take to get that idea to market. So there are product design considerations, and we will get into a lot of these.

Marketing considerations, licensing, the first thing you need to do to even get your foot in the door sometimes. And then just thinking from a pragmatic perspective, taking a step back, thinking about this from a policy or consumer expectation perspective in helping the business to have expectations when they're going down this path to market. When I was in-house, I was obviously closer to the business's perspective of these considerations because you do, you live them, you breathe them, that's your day to day and you're interacting with these folks every day. Being outside, it's a little bit of a different role. You get a perspective from working with other folks that are trying to do the same thing. So you get to partner with the in-house counsel who are often completely up to speed on the issue and very in tune with the business needs, but might not have thought of something that you've come across or that you've seen a regulator do. But the short answer, Alan, is that the ultimate goal is to help the business produce a compliant and successful product.

Alan Kaplinsky:

Right. All right, we've heard from both of you about what your role is as counsel. Let's assume now your client has decided it would like to launch a new financial product or service, and they've reached out to you. Either you, Joseph as in-house or you, Mike as outside counsel, can you describe your approach?

Joseph Schuster:

So here's where the fund begins, I think, and hopefully for both the attorney and our client, but I'm not sure if the client always sees us this way because the client is going to call and they're going to say, "Hey, Mike, hey Joseph, I've got this great idea." They're going to be so excited. They're going to have solved this consumer pain point that exists in the industry. They're going to revolutionize the consumer finance industry or the payment's industry. Point of sale. They've got a great idea. So they're coming to you to share with you that idea and basically say, "Okay, what do I need to do from here?" Hoping that it's relatively simple and they can launch this product quickly.

And then you start asking questions because you're excited too. I'd say the first piece is understanding that product and that goes to these different questions that you're asking. You're using this to one, understand the product, but two, to be identifying the legal considerations associated with this product. You're going to be asking things like, "Is it open-end, closed end?" Because you're thinking about the disclosures that are going to need to be presented for the consumers as you're building out this product-

Alan Kaplinsky:

Joseph, If I could interrupt you, I guess in some instances there may be an issue as to whether it's a credit product or a non-credit product. Even before you decide is a closed end or open end credit, you have to make a determination, is it credit?

Joseph Schuster:

Absolutely. First of all, yeah, what is it? Is it credit? I mean, there's a lot of other things that are out there too. Could it be a layaway plan? People don't think about layaway plans. There have been a lot of different consumer finance products that have existed over the past many years and you're looking at is it similar to one of those? Is it entirely different? And then how does it fit into this regulatory framework? So absolutely Alan, it's a great point. It's understanding that product is first and foremost so important. And you're going to be asking a lot of questions just like you're getting at Alan, that hopefully your client has

thought about. But it may be a process where you're starting to get them to think about these different questions so that you can then have the information that you need to then go onto the second piece. And that second piece is really looking at what are those legal considerations?

And you can think about this a funnel that you have, everything that could possibly apply all these state regulations, the licensing that Mike was talking about, you have all these federal regulations, you have the Truth and Lending Act, you've got a bunch of them over there and you're kind of narrowing it down and you're saying, "All right, is your client a creditor?" If not, maybe some portions of the Truth and Lending Act can go away. And you're kind of narrowing down to what exactly do they need? And now this will be an iterative process because your client will take questions back, come back to you with it, and at the same time, you're understanding the timeline as well associated with what your client is working on.

How you approach this can be different, you can think about this as either an agile process where your client's saying, "Okay, here's kind of what I'm thinking about. Give me some high level directions," or a waterfall. "I want to create a credit card. Give me all of the laws and regulations applicable to creating a credit card." One's not necessarily better than a different way, but you have different ways and you need to be yourself agile, either for that agile process or that waterfall process to be addressing the questions that your client has and figuring out how you can help them bring that product to market.

Alan Kaplinsky:

Okay. Mike, what about you?

Mike Guerrero:

Yeah, I also view it largely as a scoping exercise. And I love the metaphor, the funnel that Joseph just described. I think that illustrates it really well. So at the outset, it's very high level, what is the client trying to achieve? And there are considerations relating just to how I'm even going to communicate with the client. So is it a startup client or is it an established FinTech market participant that just wants to get into a new vertical? Those conversations look very, very differently. I could be speaking to a legal department with a group of folks that are very well versed in CFS issues, or I could be speaking with founders and COOs that are just learning the landscape. And that's part of the scoping exercise being outside, how is this conversation going to take place? And it helps me to understand how I can help the client more quickly and more efficiently get to market.

I could, for example, be giving a landscape of CFS considerations, or we could be having more narrow, tailored conversations about provisions that we want to include in an agreement. But that's all part of that preliminary scoping. From there, I start to think of this from a product lifecycle perspective. So the first thing is licensing, as we've been talking about. From there, I think about what does it look like when we're just telling the story about this product? What does advertising look like? Websites, claims, lead generation, telemarketing. And when I say telemarketing, folks tend to think of TCPA, we don't do that. But the telemarketing sales role has an incredibly broad reach, both inbound and outbound calls. And one of the focuses is just to make sure that you are informing the consumer of what they're getting into. And I think that's actually kind of underlying a lot of perhaps, if not all of consumer financial services regulation, setting clear expectations.

From there, originations, what is the consumer user experience? We'll look at mock screens, the application process, underwriting considerations, we can get into more detail on adverse actions or how does the consumer execute this agreement? Are they doing it electronically, pen to paper, in front of someone? All different considerations that we can walk through. And then you can't forget about the consumer once you've originated that deal. So you have servicing and collections, what does that relationship evolve into? Call recording considerations, payments, collections, repossessions, modifications, a lot goes into that aspect of the relationship as well. All of these considerations are driven by federal and state law. So we might be talking about just a concept, but in the back of our minds where we have a federal law in mind or a state law that addresses something differently. And it's a lot to be thinking about at once, but it is a scoping exercise. And I think the funnel metaphor is great, because it's a way of putting it all together and thinking about it in a systematic way.

Alan Kaplinsky:

Yeah, yeah. When you mentioned state laws, Mike, I assume that would also encompass in some instances, local laws. For example, if you're doing business in New York City, there is a New York City consumer protection law that might apply. So when you say state, it could be state or local.

Mike Guerrero:

Yeah, absolutely. There's no shortage of regulation.

Alan Kaplinsky:

Yeah. The other thing I would say, when you talked about licensing, that has become a very highly specialized area. And I know in our firm, when somebody comes to me and one of the initial questions is, "Do you need a license to conduct this particular business?" I think of either Lisa Lanham or John Socknat. So now there are the two people who actually focus on licensing of all types, and sometimes there are licensing laws that I didn't even know existed. You need to consult somebody who is a specialist in that area.

Joseph Schuster:

And if I may address something, Alan, that you and Mike were touching on, and I think licensing is a great example and what Mike was touching on is when you're speaking to different clients, what you're presenting to those different clients, and I think this is so important, especially as you're working and developing a new consumer finance product and why that consideration is important is what different stakeholders will want will be so very different. If we go with the licensing example, you reach out to John Socknat, he's going to put together a 50 state survey that has all of the licenses and why you either need them or don't need them. If you are speaking to certain clients, they're going to say, "What licenses do I need?" They want the two that they need.

They don't want, here's the 48 that have licenses. But you don't have to get these for these particular reasons. That analysis is very important and fun and people like us all need to have that. But it's not something that our clients necessarily want. They want to know, "What do I need to do from a practical sense to move this product forward?" So that's kind of, again, to your first question, Alan, I think about what are the legal considerations and then how do we approach actually building that law, but then distilling it in a form that is useful to our clients is so valuable.

Alan Kaplinsky:

Yeah. I'm glad you mentioned that, Joseph, because that's what you call the difference between just somebody who is a good lawyer and somebody who is an effective lawyer. And an effective lawyer is someone who knows how best to communicate with a person who's not a lawyer. With a client who's not in-house lawyer, but is part of the business. And we as lawyers often get very excited about the nuances and intricacies of particular statutes and regulations. But believe me, our clients aren't at all interested in that. They want to get from point A to point B as quickly as they can. And I think of that television show, I'm trying to think of the name of it, where the detective would say, "Just the facts. Just the facts. That's all I want."

Let me ask another question. So you're engaged in this activity and you're having a dialogue with the client, and you've looked at licensing and you've looked at federal and state laws. And by the way, sometimes depending upon who your client is, it might be a national bank and there might be federal preemption of some of these state laws. So that adds another layer of complexity. And then when it comes to interest rates and in particular exporting interest rates on an interstate product, very often for all kinds of banks there is federal preemption. So that's another complication that you need to add into the mix. But let's assume you've done all that and then you've identified an issue, maybe it's a problem, something that you're really troubled about. How do you approach that? Clients don't want to hear about problems. They all they want is to be given the green light to go ahead, but now you've identified a problem, last thing they want to hear about. So Joseph, how do you deal with that?

Joseph Schuster:

Sure, it's a fun question. You're looking to help solve that problem. I've been told before, we don't get credit for solving problems that we've created or found ourselves, but I think we should get a little credit for helping resolve these problems too. I look at it in a couple of different ways. Number one I look at is it a client consideration? Regulations are generally consumer protection in nature. So if the regulation's a problem and you're not able to work within that regulation, maybe there's something inherently wrong with the product and that you need to look at a change with that product. Maybe it's not solving the consumer pain point in the way you thought it was, so looking at revising the product in that particular way. However, if it's just there's a regulation and we have to comply with it, and we weren't planning on complying it with that regulation in the same way that the industry does, that's a little bit different and I think that's easier.

Here, we're identifying what we have to do from a regulatory perspective. And regulations in this space have been around for many, many years. Technology has been changing rapidly. I think this is where we need to be more creative and really recognize our role in helping move the consumer finance industry forward to help find solutions in that space. When you look at a credit card statement, the regulations have a model form that's eight and a half by 14. People are now looking at their credit card statements, not on eight and a half by 14 paper. They're looking at them electronically in these different manners.

You can comply with the regulations and we need to recognize as consumer finance attorneys that we can comply with them. And we're going to do it by looking at the actual reg, maybe not the model form, which we're stepping out of our comfort zone. As attorneys, I think we're inherently risk averse and say, "Well, there's a model form, use that." But recognizing that our clients are really trying to do something when they called you, they're excited they're going to change things. So looking at how you can do that within that regulatory consideration.

Alan Kaplinsky:

Mike, how do you approach it? You've identified an issue or a problem, you're not looking forward to that call with the client, right?

Mike Guerrero:

No, no, exactly. It's the easier part of the job. Although the part that's not fun, as you've noted, is identifying the issues. I think the part that takes a little more heavy lifting is thinking about how that issue truly impacts your client, their vision with the product and how to still pivot and get to the end goal. And my approach for dealing with that is quantifying the risk. So it's one thing to show a statute and say, "You can't do this." But understanding why you can't do it from a policy perspective and also statutory or regulatory or private litigation risk it's helpful for the client to understand that and view that when they're making their decisions. The second part of that is coming with proposed creative solutions. So not just saying, "Here's the risk and this is what the risk means." But thinking about, well, how can I still get from A to B by perhaps taking a different road.

Thinking about a different way of getting to that same goal, but without taking that same path. And that part takes some thinking and really trying to understand where your client is coming from, where their product fits within the market, what other folks in the market are doing. And then just taking it away and synthesizing it and coming up with proposed solutions. And then you have a discussion with the client saying, "Look, this is one way of doing it." And they might say, "You know what, that's great, but I don't like this aspect of it." And it becomes a collaborative process. And again, to kind of circle back to a conversation we were just having, that also can look different depending on who you're having that conversation with internally, you could be arguing over finer points or addressing finer points with a really sophisticated legal group, or you could be having conversations at a higher level with some of the business folks on the team. But at the end of the day, the goal is to quantify the risk, understand the risk, and then have proposed solutions to move forward.

Alan Kaplinsky:

Yeah. Now I'm going to give you an answer as a client, which I've heard, I can't begin to tell you how many times during my career. So all right, you now Joseph or Mike have suggested a change in order to comply with the certain regulation, and I'm the client, I said, "I hear you, but all of my competition is doing it the way I suggested." And I'm going to start rattling off

names. I'm not going to use real names here. A Jones company, Smith Company does it this way. And he comes up with the names of 10 companies. Does that intimidate you, Joseph, what do you do?

Joseph Schuster:

It certainly doesn't intimidate me. It makes me continue to do my research more and try to reverse engineer some of those things to say, "Okay..." It goes back to again what I think we were talking about that we always have to have the analysis for why what we are doing complies with law, or what our arguments are for complying with law. I think that the point that Mike made, it is a really good one about quantifying the risk. In the consumer credit space, there is risk. You're going to have regulatory risk, you're going to have credit risk. Not every possible scenario is contemplated. The only risk-free approach is to not extend any credit at all, but we want to have a product here. So as we're looking at those things, we're saying, is it possible that there's something out there that we could find? And if there is, we should dig and we should try to find that and figure out how maybe somebody else in the industry is able to do this.

Now if we're not, it's possible that somebody didn't get it right and that somebody else copied that. Making sure that you're... But it goes to Alan, I think being incumbent upon us to do as much research and look into this as much as possible, maybe try to figure out if there's some attorney out there who's supported one of these other clients and has creative arguments that you can use and apply in your situation. Figuring out how that entity got to where they did is going to be crucially important for that analysis. And if you're not, at the end of the day you have the analysis that you have.

Alan Kaplinsky:

Yeah. Mike, have you ever face that question?

Mike Guerrero:

Oh, yeah. Very frequently. It's an interesting question and it's the question the business should be asking. We are competing with these folks and why can they do this, but can we not? From my perspective, the first question is this a black and white issue or is this kind of gradient of gray? And seldom is it a black and white issue. It's understanding the risk. And when you get pushback on your identification of the risk perhaps, or just seeing where the market is, it's time to one, take a closer look at what the competitors are doing. Sometimes they have subtle differences in the way they're approaching something that aren't... And this is where the legal nerd aspect of it comes out. But you can appreciate these really subtle differences and explain those to the business and say, "Yes, they are doing that, but we could do that too. But they're doing something a little bit differently and that actually has a really meaningful result."

Sometimes looking to the policy of the original law, that might mean going all the way back to the federal register notices when rules were being promulgated, really understanding what the regulator was trying to address. And does that change the plain language of the regulation? No, but it really helps you to put it into a perspective and understand where the risk might be when you go down that path. And then finally, if it's just blatantly a higher risk prospect providing examples of folks that got in trouble for this. So the business can really have that risk become a bit more concrete.

Alan Kaplinsky:

And sometimes, and of course it varies as each situation is different. I've had situations where I've had to say to the client, "They're all doing it wrong." I mean, with all due respect, who knows who gave them legal advice? Who knows that they asked for legal advice? So often you see documents being copied, somebody creates a new product, someone else wants to get into it, they just use the same form over and over again and they repeat the same mistake over and over again. Let me also ask, not really a related question, but do you ever reach a point where you feel a need to consult with the regulator, let's say either a federal regulator or a state regulator about a certain issue, and do you do that type of thing? How do you handle that type of thing? Usually, I know a lot of clients don't want to stick their neck out or raise their hand with the regulator. Does that ever come up?

Mike Guerrero:

Yeah, there are times, absolutely, to answer your question directly, where you will go to the regulator and ask, "Can we get your take on this? This is what we're thinking about." Typically, on a known end basis. And really trying to just understand where the regulator's coming out on this. I think more often than not, perhaps much more often than not, we don't do that because it's often the case that sometimes the regulator have a very formal process for getting the feedback and you might not have that dialogue that you would like to have. Or there are some regulators that unfortunately you'll reach out to. And the answer is just no, you can't do that. And without really taking time to understand the risk. And that's unfortunate.

We do have regulators out there who are more innovative than others. Some that have sandbox environments perhaps, but it really is a judgment call. And sometimes you do it more on the licensing side, because that's kind of your first point of contact with the regulator and if the regulator's going to take action against you for unlicensed activity, you really want to know that before you go in. But if it's a very nuanced product consideration where you have support from case law and you kind of know where the regulator's going to come out on that then, and maybe it's against you, but you have a really good basis for taking that and that's the business's risk tolerance, then yeah, I think, you don't do that.

Alan Kaplinsky:

Yeah. I tend to agree with you, Mike, that I think I've reached out to regulators or asked a colleague at our firm to reach out to a regulator if there's a licensing uncertainty. I mean, that's like a threshold issue that you got to get resolved before you launch the product. And if something is in a gray area and the penalty for engaging in unlicensed activity is rather draconian, you don't want to screw up on something like that. And even though you might have an argument as to why something doesn't require licensure, if the regulator who does the licensing disagrees with you, whose opinion's going to count more?

So that's different. If you get into other non licensing questions, I also agree with you, I tend not to reach out to a regulator. First of all, you are usually not going to have the time to get something in writing. Very often, they won't put something in writing even if you had the time to do it. And very often you're going to get an answer you're not going to like. And even if they tell you they agree with your position, it's worth the paper it's written on. That is, there is no paper, it's just a telephone conversation. Anyway, all right. We're beyond the step we've identified this problem or issue and now we've got beyond that the business decides to move forward with the plan or the product. What are the next steps from a legal support perspective, Joseph?

Joseph Schuster:

Sure. Well, first of all, it goes back to one of those legal considerations that I identified earlier in the show, and that's the credit agreement to the contract piece. You now have an understanding of what the product is, you need to memorialize that into the credit agreement and then you will work. It's an iterative process with your clients to say, "Did I capture this all correctly? Am I missing anything?" And again, it's an iterative process there to make sure that what is in that ultimate credit agreement, which is the product that you are launching, is what your client wants. And then the second piece, again, going back to what we discussed earlier, the regulation. Defining the applicable regulation given what the product is, what you have to do.

Again, we have all of our legal background and now we're saying we have to have these types of letters. We have to have these types of disclosures. Providing the actual requirements for how we're doing disclosures, what we're doing in terms of substantive provisions, what the pricing looks like, things of that nature. And you continue to work back and forth with them and figure out do you have everything in the credit agreement and are you complying with all of those regulations that you've identified for your client? That's the essence of what you do at that point.

Mike Guerrero:

Yeah, and this looks a lot different for different clients, but if I was say, advising a startup client or someone that's launching a really sophisticated product that is innovative and has a lot of considerations, what I like to do, or at least think about it this way, is create kind of a go-to market memo or a kickoff memo where it's a scoping exercise where again, I'm thinking about federal and state law and then the product cycle. So everything from licensing to product, federal laws, what's the regulatory environment that's going to color some of this specific state concerns. A memo and it's a high level memo, but that really sets



the expectation for the kind of life of this project. To Joseph's point, drafting the agreement is essential and it's incredibly important to get that right, because folks don't think about it this way.

You're providing a service, but your contract is your product. It is memorializing the service you're providing. It's the agreement. And that is core to your entire business. Your whole business is revolving around this one document. And sometimes you get folks that say, "Hey, give me a template that's just off the shelf or I copied this person's contract." But you're doing yourself a huge disservice by doing that because this is literally the product you're in the market with and it memorializes everything. So spend time, get that right. From that, we're looking at marketing materials, user experience flows. It's a lot of fun when we get the opportunity to sit down with the business and click through mock up screens and talk about where disclosure might go or what a user experience might look like. And from there it's supporting the team going forward kind of on an as needed basis.

Alan Kaplinsky:

Yeah. One of the things that I've noted over my career in drafting contracts, and particularly it comes up in connection with open-end credit and that is I worry a lot about whether the contract is describing exactly what the computer is doing. And when you're trying to figure out each month, how does interest get calculated or the finance charge? What's the average daily balance? How's this grace period going to work? There are all kinds of permutations and combinations. And very often I've noted, and this is a kind of consultation you can't do just with the in-house lawyer at the client. You've got to get the computer geek at the client on the conference call. The person who programmed it or who knows exactly how things get calculated. Having that kind of a conversation isn't the most joyful conversation to have with a client, but let me tell you, it's damn important, because if you get that wrong and somebody finds out about it, either a regulator or a plaintiff's class action lawyer that the computer is doing one thing and the contract says you're doing something else, you got a real problem on your hands.

Joseph Schuster:

Absolutely. I would say to that, Alan, one of the things that we can do as attorneys is identify in the credit contract all of the pieces that relate to calculations that should be tested in the system. So highlighting for whomever you're working with, and they might be working with a consulting agency to do this testing, here are the different calculations that we've particularly and explicitly described in the credit agreement and you should test each of these. You should test that average daily bounds. You should test that the late fee is being calculated according to how you're saying it's being calculated. So your client should be familiar with every aspect of the contract. But for this testing phase, if you're able to go through and highlight those particular areas that relate to computer transactions that need to be done in a particular manner, I think it can really help the people who are doing the testing to make sure that everything's built as it should be.

Alan Kaplinsky:

I agree, I think your idea is a great one, Joseph, to identify where all the mathematical calculations go going to be utilized and make sure the contract is in sync with the computer. But of course it can also apply to all kinds of federal and state laws. You don't want to say something in your contract where you purport to bind the consumer to something that you legally can't bind him or her too. I know a lot of people over the years have used the crutch of putting in language, like to the extent permitted by applicable, because you're doing a document that you hope is going to work in all 50 states, and you don't want to have a separate document for all 50 states in which you operate. At least you usually don't want to do that, but a lot of times something is permitted in some states but not permitted in another state, and you got to figure out how do you deal with that issue.

Anyway, I've got a final question before we wrap our program up. And now your product has been launched, you've reached the point where it's on the shelf and people are getting the product. What's next, Joseph, from your standpoint? First as an in-house council, and then Mike from your standpoint as outside council?

Joseph Schuster:

Yeah, I'll say there's many things, but I'm going to narrow it down to three. Number one, gauging interest. Do consumers understand the product? Are there tweaks that need to be made as a result of what you are hearing and feedback from

consumers? As much as you try to plan for every eventuality until people start using the product, you really won't know how people understand the work that you've done essentially.

Alan Kaplinsky:

So I take it you would look at people who've complained about something, Joseph?

Joseph Schuster:

Complaints, Alan, compliments. Either way, but complain complaints are continually, for us as attorneys, a great source of identifying where there are potential regulatory problems and where there are issues potentially with disclosures, with how things are described to figure out can we tweak it, can we reduce those complaints? So absolutely. Complaints are a very important piece of what we're doing and they're an important piece of a compliance management system as well. The second piece I'd say is incremental change is, Alan, you had mentioned that your client wants to get from point A to point B as quickly as they can. They'll call that the MVP, the minimal viable product, but it's likely that they have ambitions to go beyond that MVP product.

So you're going to help them expanding that product, making changes to it. And this is something that you should be talking to your client about early on in the process because you need to be aware of that full roadmap, there might be things that you want to build into the credit contract earlier on to support product enhancements that are coming down the line. You're going to be working on that iterative process. And then the third thing that I'd say is problems do arise. Things are rarely perfect. And as you launch things, identifying the problems that happen and figuring out how you can support and resolve those problems is a key part of this process.

Alan Kaplinsky:

Right. Now, Mike, as outside counsel, I assume the role's a little bit different unless you're dealing with a smaller client where they don't have in-house lawyers who are interacting with the business people all the time. Am I right?

Mike Guerrero:

Yeah, I think that's right. Probably where the role of in-house and outside counsel differs the most as it relates to the product aspect, it would be here. We enjoy building the product and getting it to market. And one of the things that I miss from being in-house is kind of seeing it launch and seeing what it looks like and kind of evolving. When you have that good relationship with the client, you do get to continue to support them, but it does become a bit more of an ad hoc process. What we're doing at Ballard right now that I think is innovative and that helps to maintain the relationship and support the client after the launch is we've been focusing on value add services. So we have different platforms like the licensing or Ballard 360 platform. Where clients can load their research and we can create searchable databases of research or navigate and track licensing, renewals, updates, reports, and they can come to our website. And for most of our clients, or if not all, that's a value add prospect that it's just provided to them.

We have a team that creates this technology and supports them in that way. From there, the way I view our role is to continue to provide updates. So alerts, podcasts, like this is one of the more fun ones, perhaps a little bit less technical, but still very technical in a different way. Webinars, just keeping clients current on upcoming events. And then the last step there would be thought leadership. And again, that's what I really like about being at Ballard. We have clients coming to us with legislation that's being proposed or regulations that are being proposed and saying, "How is this going to impact what we're doing? Do we comment on this?" And helping the client to understand that.

Alan Kaplinsky:

Yeah, or I guess sometimes I've had this happen where I know I'm talking to a new client, let's say, and that client makes me aware that a regulator in a particular state is on the war path and they're hung up on a particular issue. And that could be tremendously valuable to several of your other clients. I think it's important that part of being in the industry and being immersed in the industry like you are, Mike, where you're dealing with all kinds of different clients, a whole range of different

laws, you're finding out about things that a lawyer, some other area would never know about. And you can really provide value by going to your client and saying, "Hey, did you know that in the state of New York, something's going on right now that I think could impact your business?" That type of thing.

Let me ask one final question before we wrap it up and I'm going to ask it to you, Joseph, and that, is there anything I forgot to ask you today that I should have asked? To complete the picture of what I guess you could say, we've talked about the anatomy of a consumer financial services product from head to toe and how you go about launching a product.

Joseph Schuster:

I think you've covered everything, Alan. The one thing that I would add, I guess is just a general recognition that we are gatekeepers for a lot of what can happen in the consumer finance space. I approach this recognizing that consumer finance is very valuable and can have a great impact on people's lives. It can allow people to go to school, to buy homes. It brings future wealth and money for people into the present. So it can be great in that sense and recognizing that we need to work to find solutions with our business clients as much as we possibly can to help move the industry forward. It's a very valuable recognition. We are recognizing risks, but we are also helping move this industry forward as best we can.

Alan Kaplinsky:

Well, with that, I want to thank you again, Joseph, for taking the time to be and to be on our program today and to talk about a topic that, as I mentioned the outset of the program, this is unique. We typically don't do these practical kinds of programs, but this is the kind of program that I think I've had several listeners to our podcast say, "We'd like to hear more about the practical things that could be of help to a startup company or a company launching a new product. And we'd like to hear it from the lawyer's perspective." Very often get this from non-lawyers. So I think hopefully we accomplish that objective today. I think we did. And Joseph, thanks again for being on the program. And Mike, I thank you as well for taking the time. I think it was a very interesting program and I thought the perspective that you've had of being in-house and outside council, and same thing with you, Joseph, you've done it both. It really is very helpful.

Joseph Schuster:

Thank you for having me, Alan.

Alan Kaplinsky:

Yeah, a pleasure, really. So to make sure you don't miss any of our future episodes, subscribe to our show on your favorite podcast platform, be it Apple Podcast, Google, Spotify, wherever you listen. Don't forget to check out our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com) for daily insights on the consumer finance industry. Literally last year, I think I got the statistic recently, we had somewhere between 500 and 600 blog articles that were written in one year. That is quite amazing. Also, if you have any quick questions or suggestions for our show, please email them to us at [podcast@ballardspahr.com](mailto:podcast@ballardspahr.com). And stay tuned each Thursday for a new episode of our show. And my thanks to all of our listeners today, and I hope you have a great day.