

Solar Energy and Consumer Financial Protections

March 17, 2017

Claudia Callaway

Christina Grigorian

Genus Heidary

Katten Muchin Rosenman LLP
Washington, DC
+1.202.625.3500



Katten

Katten Muchin Rosenman LLP



Claudia Callaway

Partner

+1.202.625.3590 | claudia.callaway@kattenlaw.com

Claudia Callaway leads the firm's newly formed Platform Lending Initiative. In this role, she focuses on defending clients against state and federal class actions regarding consumer protection and consumer finance laws, representing clients before the Consumer Financial Protection Board (CFPB), the Federal Trade Commission (FTC) and state banking agencies, and assisting clients in adhering to the dynamic landscape of platform and peer-to-peer (P2P) lending.

CLEAN ENERGY

Claudia has deep experience representing Clean Energy providers, installers, lenders and their investors. She regularly teams with her colleagues in Katten's Structured Finance group to provide multi-disciplined representation for the firm's Clean Energy clients.

CFPB

Having represented clients before the CFPB since its inception, Claudia understands the varying perspectives of key stakeholders, and helps clients navigate the hurdles and opportunities available to parties under the CFPB's jurisdiction. Working with banks, credit unions, platform lenders and other financial services clients, Claudia provides pragmatic advice on state and federal banking and consumer protection matters, including privacy, collections, credit reporting and usury issues as well as enforcement of arbitration provisions and class action waivers.

PLATFORM AND P2P LENDING

Claudia is recognized as a veteran in the platform lending space, which enables her to provide her clients with real-time updates and developments in this ever-changing landscape.

REGULATORY DILIGENCE EXPERIENCE

Claudia represents a bevy of financial services clients, including installment lenders, collection agencies, money transmitters, state and federally chartered banks, mortgage servicers, credit card issuers, and credit reporting agencies in a broad range of state, federal and self-regulatory organizations (SROs) based issues nationwide.

LITIGATION EXPERIENCE

Claudia represents consumer lenders, third-party debt collectors and other consumer financial services clients in class action suits and litigation around the country. She frequently handles cases involving the Dodd-Frank Act, the Truth in Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA), the Gramm-Leach-Bliley Act and the Federal Trade Commission Act. She advises on state unfair and deceptive trade practices laws, and removal of class actions to federal court.

Katten

Katten Muchin Rosenman LLP



Christina J. Grigorian

Special Counsel

+1.202.625.3541 | christina.grigorian@kattenlaw.com

Christina J. Grigorian works with clients in all matters related to banks, bank holding companies, and state-licensed consumer and commercial lenders. She counsels the firm's financial institution clients concerning structural and operational issues, including legislative developments impacting such operations, and has worked with companies and individuals in the establishment of de novo entities, such as national banks, federal savings banks and state-chartered institutions, as well as state-licensed lenders.

Christina guides clients with respect to state licensing regulations and applications. She is experienced in electronic payment networks, network processing and network participation agreements, and innovative uses of electronic funds transfers in areas such as state-funded childcare provider reimbursements. Christina also advises numerous clients in the area of credit card operations, including private-label card agreements and consumer documentation, and has extensive experience with issues related to Internet commerce, addressing Internet lending and sales. In addition, Christina audits third-party consumer and commercial lenders on behalf of capital sources, providing counsel as to the regulatory posture of the target.

Christina counsels clients on issues related to compliance with the USA Patriot Act, the Bank Secrecy Act and the regulations set forth by the US Office of Foreign Assets Control. She has advised clients with respect to regulatory review of financial institutions and has counseled numerous financial entities on compliance issues raised during and after supervisory agency review.

In addition, Christina also works with lead generators (marketers), installers, and solar companies in connection with the compliant offering of solar products directly to consumers. Related to this, Christina has reviewed contractual agreements between commercial entities related to the provision of such products and services as well as lease and purchase agreements provided directly to consumers.

While attending law school, Christina served as the editor in chief of *The Business Lawyer*, a joint publication of the University of Maryland School of Law and the American Bar Association Section of Business Law. She was also a quarterfinalist in the Morris B. Myerowitz Moot Court Competition in 1996.

Katten

Katten Muchin Rosenman LLP



Genus Heidary

Associate

+1.202.625.3577 | genus.heidary@kattenlaw.com

Genus Heidary is an experienced litigator and regulatory attorney, helping energy, technology and consumer finance industry clients, among others, resolve their most pressing issues.

Devoting much of her time to environmental and white collar law, Genus frequently navigates internal investigations and civil and criminal enforcement matters, including those implicating fraud and abuse, consumer finance, the Clean Air Act, clean technologies and the Occupational Safety and Health Act.

As a member of Katten's Consumer Finance practice, Genus also concentrates on class action and multidistrict litigation. She focuses her practice on defending clients against state and federal class actions, with particular emphasis on consumer protection and consumer finance laws.

With significant life sciences experience, Genus works with Katten's Food Outbreak and Product Recall team. Prior to entering the field of law, Genus worked in the public health policy arena in numerous capacities at both the local and federal levels, including serving under the San Mateo County Director of Health Services and as a Congressional Fellow in the Office of Congresswoman Hilda L. Solis.

At the University of California, Los Angeles, Genus was the Ann G. Quealy Memorial Fellowship recipient for "Outstanding Graduate." While in law school, she externed for the Honorable Consuelo M. Callahan, US Court of Appeals for the Ninth Circuit, and for the Honorable Otis D. Wright II, US District Court, Central District of California. During this time, she also was a law clerk at the Los Angeles County Public Defender's Office, an editor of the *Pepperdine Dispute Resolution Law Journal* and a member of the Moot Court team, for which she finished as a finalist in both domestic and international competitions.

Katten

Katten Muchin Rosenman LLP

Agenda

- ABC's of Consumer Regulatory Considerations Related to Solar and Case Studies
- State Licensing
- Lead Generation
- Compliance Management



ABC'S OF CONSUMER REGULATORY CONSIDERATIONS RELATED TO SOLAR AND CASE STUDIES

What is credit?

- Federal law defines credit in [Truth In Lending Act](#)
 - If a consumer debt that is payable in more than 4 installments, “credit” is likely in issue
 - Commercial debts are not covered by federal lending law
 - Imposition of a fee for financing is not necessary
 - ❖ E.g., 0% products are covered if they are financed in more than 4 installments

ABC's of Consumer Regulatory Considerations Related to Solar

- [Regulation Z \(Truth in Lending Act\)](#)
- Requires presentation of certain disclosures and calculation methodologies
 - Presentation must be “substantially similar” to model forms
 - Definition of “finance charge” and calculation of APR is different from “interest rate”
 - No interest? Still applies if payable in more than 4 installments

May 2013: Truth in Lending Act (TILA)

In May 2013, plaintiffs brought suit in federal court in Salt Lake City, UT, against a solar installation company raising the following claims of action:

- Alleged violations of the [Truth in Lending Act](#) and [Regulation Z](#).
 - Failure to provide statutorily required disclosures to plaintiffs prior to entering into a solar equipment finance agreement.
 - Failure to adequately disclose cost of loan and other required lending information.

May 2013: Truth in Lending Act (TILA)

- Alleged violations of TILA and the Federal Trade Commission Act, “Rules Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations.”
 - Failure to provide disclosure of plaintiffs’ statutory rights to rescind contract.
- Alleged violations of Utah Consumer Sales Practices Act and Utah Consumer Credit Transaction Act, which incorporated the above and alleged deceptive acts and additional state based requirements for disclosure.
- The parties settled the case.

ABC's of Consumer Regulatory Considerations Related to Solar

- [Regulation M \(Consumer Leasing Act\)](#)
 - Related to leasing of consumer goods valued at \$54,600 or less
 - Initial lease term must be longer than 4 months
 - Implicates leasing of consumer solar panels

February 2014: Class Action, Consumer Leasing Act and Regulation M

In February 2014, plaintiffs brought a class action suit against solar panel installers in federal court in New Orleans, LA, seeking \$ 5 million in damages and alleging:

- “through advertising and other avenues, [defendants] inflate the amount of energy that their systems are expected to produce, thereby inflating the potential cost savings to consumers”; and
- defendants “are not forthcoming about the costs associated with the purported lease/purchase of the systems, thereby overselling the potential cost savings to customers, and in violation of state and federal laws.”

February 2014: Class Action, Consumer Leasing Act and Regulation M

The following claims of action were alleged:

- Violations of the federal [Consumer Leasing Act](#) and [Regulation M](#).
- Violations of the Louisiana Unfair Trade Practices and Consumer Protections Law.
- Unfair Enrichment (related to a claim of having to pay above market rates for solar equipment without receiving tax credits).

The case was stayed in August 2016 pending a determination by an Arbitrator that the parties' agreement provides for class-wide arbitration.

ABC's of Consumer Regulatory Considerations Related to Solar

- [Regulation B \(Equal Credit Opportunity Act\)](#)
- No discrimination
 - Impacts both consumer and commercial credit
 - Applies not only at origination but also to account servicing

ABC's of Consumer Regulatory Considerations Related to Solar

- [Fair Credit Reporting Act](#)
 - Use of consumer reports
 - Reporting customer account performance to consumer reporting agencies
- Financial Crimes Enforcement Network and money transmission
 - Acceptance of payments for transmittal to creditor
 - Examples: Square (FL DOB)
- [Federal Fair Debt Collection Practices Act](#)
 - Implicates 1st party collection efforts and specifically regulates third party collection efforts
- [Telemarketing and Consumer Fraud and Abuse Prevention Act \(the “Telemarketing Act”\) and the Telemarketing Sales Rule](#)
 - Implicates telemarketing fraud and consumer privacy, requiring disclosures of specific information and prohibitions on misrepresentations

September 2014: Class Action, Fair Credit Reporting Act (FCRA)

In September 2014, plaintiffs brought a class action suit in federal court in San Diego, CA, against solar panel installers alleging, among other things:

- Defendants unlawfully obtained consumer credit reports on potential customers, without knowledge or consent of the potential customers in violation of the [Fair Credit Reporting Act](#).
 - Further, Defendants did not obtain the credit reports of potential customers, including plaintiffs, for the purposes of offering a “firm offer of credit or insurance,” in violation of FCRA.
 - Case was voluntarily dismissed by plaintiffs.

March 2016: Telemarketing Act and Telemarketing Sales Rule

In March 2016, the Consumer Protection Branch of the United States Department of Justice, on behalf of the Federal Trade Commission, brought claims in federal court in Los Angeles, CA, against several solar industry telemarketing lead generators raising the following claims of action:

- Alleged violations of provisions of the [Telemarketing and Consumer Fraud and Abuse Prevention Act \(the “Telemarketing Act”\)](#), [Telemarketing Sales Rule](#) and the [National Do Not Call Registry](#).
- Defendants, among other things, allegedly made 1.3 million outbound telemarketing calls to induce the purchase of solar panels and installation services directed to phone numbers on the Do Not Call Registry.
- Case pending.

ABC's of Consumer Regulatory Considerations Related to Solar

- [Section 5 of the Federal Trade Commission Act](#)
 - Applies to all transactions even if Dodd-Frank does not
 - “Unfair” and “deceptive”
- UDAAP (Unfair, Deceptive and **Abusive** Acts and Practices)
- Unfair
 - Test = What does “reasonable person” expect?
- Deceptive
- Abusive
 - CFPB only
 - Statutory definition in Dodd-Frank but no regulatory clarification
- Most states have parallel state law

ABC's of Consumer Regulatory Considerations Related to Solar

- Regulation E (Electronic Funds Transfer Act)
 - Related to use of ACH Authorizations
 - Permitted to incentivize but not penalize

ABC's of Consumer Regulatory Considerations Related to Solar

- [Regulation P \(Privacy\)](#)
- “Financial Institutions” must present privacy policy to consumers
- Limits sharing of non-public personal information
- Certain exemptions permitted
 - Customer permission
 - To effect the consumer's transaction

ABC's of Consumer Regulatory Considerations Related to Solar

- Safeguards Program
 - Required by all “financial institutions” as defined under [Gramm-Leach-Bliley Act](#) that possess consumer non-public personal information
 - Requirements range from employee hiring to password usage to data breach policies and procedures
 - No template – must be modeled to specific company's risks



STATE LICENSING

State Licensing

- Licensure for lending
 - Consumer lending will require licensure in nearly every state
 - Robust information request
 - Bonding
 - Background checks/fingerprinting for principals
 - Penalty
- Interest rate and other state-specific limitations

State Licensing

- Licensure for Brokering
 - Need to determine whether installers and other involved in customer-acquisition process are engaged in “brokering”
 - State-specific compliance obligations
 - Want reps and warranties for compliance with applicable law
 - Exemptions = ?
 - Creditor is responsible for parties in “customer acquisition” chain

State Licensing

- Licensure for Collecting
 - 3rd party consideration
 - Not normally a 1st party issue
 - Need to examine laws to determine whether activities related to collection fall under scope of consumer “collection agency” provisions
 - Depending upon scope of performance, could also be a consumer “debt collector”



LEAD GENERATION

Lead Generation

- How are customers acquired?
 - Organic acquisition – low cost of acquisition/delayed consumer “touch”
 - 3rd party assistance – high cost of acquisition/immediate consumer “touch”
 - Contract with lead generator/marketer must be vetted
 - State licensing
 - Vendor diligence



COMPLIANCE MANAGEMENT

Compliance Management

- Policies and procedures must exist
 - “off the shelf” documentation that has not been reviewed by management and approved by executive staff = trouble
 - Periodic legal and management review is necessary
 - CFPB: Board-level knowledge and approval
 - Vendor management/audit is key

DISCUSSION

Katten Muchin Rosenman LLP Locations

AUSTIN

111 Congress Avenue
Suite 1000
Austin, TX 78701-4073
+1.512.691.4000 tel
+1.512.691.4001 fax

HOUSTON

1301 McKinney Street
Suite 3000
Houston, TX 77010-3033
+1.713.270.3400 tel
+1.713.270.3401 fax

LOS ANGELES – CENTURY CITY

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
+1.310.788.4400 tel
+1.310.788.4471 fax

ORANGE COUNTY

100 Spectrum Center Drive
Suite 1050
Irvine, CA 92618-4960
+1.714.966.6819 tel
+1.714.966.6821 fax

WASHINGTON, DC

2900 K Street NW
North Tower - Suite 200
Washington, DC 20007-5118
+1.202.625.3500 tel
+1.202.298.7570 fax

CHARLOTTE

550 South Tryon Street
Suite 2900
Charlotte, NC 28202-4213
+1.704.444.2000 tel
+1.704.444.2050 fax

IRVING

545 East John Carpenter Freeway
Suite 300
Irving, TX 75062-3964
+1.972.587.4100 tel
+1.972.587.4109 fax

LOS ANGELES – DOWNTOWN

515 South Flower Street
Suite 1000
Los Angeles, CA 90071-2212
+1.213.443.9000 tel
+1.213.443.9001 fax

SAN FRANCISCO BAY AREA

1999 Harrison Street
Suite 700
Oakland, CA 94612-4704
+1.415.293.5800 tel
+1.415.293.5801 fax

CHICAGO

525 West Monroe Street
Chicago, IL 60661-3693
+1.312.902.5200 tel
+1.312.902.1061 fax

LONDON

Paternoster House
65 St Paul's Churchyard
London EC4M 8AB United Kingdom
+44.0.20.7776.7620 tel
+44.0.20.7776.7621 fax

NEW YORK

575 Madison Avenue
New York, NY 10022-2585
+1.212.940.8800 tel
+1.212.940.8776 fax

SHANGHAI

Suite 4906 Wheelock Square
1717 Nanjing Road West
Shanghai 200040 P.R. China
+86.21.6039.3222 tel
+86.21.6039.3223 fax

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at kattenlaw.com/disclaimer.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com