

Avoid Getting Burned By Agencies' Solar Financing Spotlight

By **Mercedes Tunstall** (September 20, 2024)

On Aug. 7, at the height of a summer that was the hottest in recorded history, federal regulators addressed the consumer solar financing market by issuing reports, as well as consumer and business advisories.

Industry participants are well advised to take into account all the concerns and consumer advice the regulators highlighted, and to structure their marketing, programs and processes in a manner that will avoid consumer harm.



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The actions by these three regulators — the U.S. Department of the Treasury, the Consumer Financial Protection Bureau and the Federal Trade Commission — were coordinated to maximize the spotlight on this burgeoning field of consumer lending. While this article summarizes below the primary pitfalls regulators have observed, it is first necessary to corral the cabal of parties involved.

Know Who You're Working With and Have Good Agreements in Place

To start, solar and clean energy financing usually requires a unique combination of parties to work together — salespeople, installers, equipment manufacturers and lenders.

This means that the number one step lenders should take is to fully vet the other parties with whom they are working. Formal due diligence and approval should be undertaken including a full check of credit, licensing and corporate registration structure, as well as a review of all consumer complaints available publicly and communicated by the party.

The next step is to ensure that there is a means by which the lender can contractually prescribe parameters and practices to these parties, ensuring that the message consumers receive about the solar or clean energy project and the financing of it is consistent and truthful.

Often, lenders may have a contractual relationship with only one of the other parties. For example, the lender may be one of several lenders working with an individual installation company. The installation company will then have separate relationships with the original equipment manufacturers and with salespeople, many of whom are not employees of the installation company, but who are independent contractors.

In this situation, it is imperative that lenders include a contractual provision in the agreement that the installation company must ensure that their agreements with the other parties impose the same parameters and practices that the lender has required of the installer. After all, as lenders know only too well, the CFPB has the authority to hold the lender responsible for the missteps of these others.

Nevertheless, lenders may be concerned that the party they are contracting with will balk at these measures. In fact, responsible parties will be used to these requirements and will already have agreements in place with the other parties to facilitate acceptance of the lender's parameters and practices; it is a sign that the party is unsophisticated, inexperienced or a scamster if they do push back.

The final step lenders should take to set the stage for putting responsible solar and clean energy financing in motion is to have a training module prepared that will acquaint at least the installers and the salespeople with the lender's products and their prescribed parameters and practices. It may not be necessary for original equipment manufacturers to participate in the training.

Once again, it is recommended that the contract the lender puts into place requires that each consumer-facing person, whether employee or independent contractor, has participated in the training before they are allowed to offer the lender's financing solutions to a consumer.

Key Elements of Compliant and Responsible Solar and Clean Energy Financing

When federal regulatory agencies get together to address an industry issue, the timing marks an inflection point wherein the relevant industry sector really begins to expand and grow.

Accordingly, the solar industry, armed with news of tax credits, improved solar technology and support from power utilities, and bolstered by an increasingly eco-conscious consumer base, has begun to expand in the residential solar space.

And while the technology has improved and some economic setoffs can be available to consumers, the cost of installing and maintaining a solar system on a residential home often requires financing. And, that means that consumers need to better understand how solar financing works.

Here are the elements lenders should consider to ensure that consumers are protected and fully informed of their options and rights:

Right of Rescission

As the CFPB's Office of Markets explained in their issue spotlight on solar financing:[1]

Solar salespeople commonly make their first contact with potential customers via a door-to-door introduction. The solar salespeople and installers often have agreements between each other, as well as agreements with one or more solar-specific lenders that enable instantaneous loan offers with the installation contract via a digital tablet.

Consumer protection concerns related to door-to-door sales is a centuries-old problem, and the traditional means to protect against high-pressure sales tactics at the home is to give consumers the right to cool off[2] and have a right to rescind the transaction within three days following the sale.

Accordingly, even if there is not an explicit requirement to offer a right to rescind, e.g., because the consumer is leasing a solar system, instead of buying it,[3] an important hallmark of a responsible lender's financing solutions for consumers is including a right to rescission in the contract.

Avoid Hidden Markups and Fees

In its issue spotlight, the CFPB specifically calls out dealer fees as being often baked into the

principal amount of the financing. They define "dealer fees" as being "a markup from the total cash price that consumers pay for the system installation."

To this end, lenders should take care to substantiate the purpose of a dealer fee and to either ensure that the fee is applied regardless of whether the consumer finances the solar or clean energy project or pays cash for the project, or the dealer fee should be calculated into the annual percentage rate of the financing and be properly disclosed pursuant to the Truth In Lending Act and Regulation Z.

Protect Against Misrepresentations Regarding Tax Credits or Incentives

In the Aug. 7 actions taken by the CFPB, FTC and Treasury, all three agencies emphasized that statements made to consumers regarding tax credits or incentives should always be put into context for the consumer.

For example, the CFPB specifically highlighted being concerned about marketing materials that deduct the presumed tax credit from sample loan costs and then present a net cost for the system.

Further, the Treasury advised consumers to "be wary of anyone who says you can use tax credits to reduce the cost of the panels without confirming your eligibility."^[4]

Lenders should be clear that marketing regarding tax credits or incentives being available to consumers for solar or clean energy financing, is never guaranteed.

It is not guaranteed because it depends on a variety of factors including: (1) the consumer's overall tax liability, i.e., low-income consumers are less likely to receive a tax credit; (2) the kind of solar financing received, i.e., only consumers buying a solar system are eligible, those leasing the system or signing a "power purchase agreement" or "community solar subscription" are not eligible; and (3) whether the consumer's current mortgage allows a solar financing lien to be placed on the property.

Protect Against Misrepresentations Regarding Other Financial Benefits

"Households can generate substantial savings from solar energy installation," the CFPB's issue spotlight acknowledges, but they emphasize that any such statements should be properly substantiated and include clear and conspicuous warnings that a variety of factors may lead to significant variations in actual savings.

Likewise, the Treasury instructs homeowners to understand how many kilowatt hours per month the system will produce on average and how that compares to their current energy usage, and to consider whether there are ways "to save money on utilities and make energy-efficient improvements" on their own.

They also identify two other statements consumers may hear and warn against allowing them to influence or scare them into a purchase: (1) future energy costs will skyrocket and (2) the federal government pays for solar power.^[5]

Accordingly, an important part of the prescribed parameters, processes and training that lenders provide to the other parties should address all of these points and, to the extent possible, restrict, limit or forbid certain statements regarding savings from being made to consumers at all. Also recommended for the training is a basic review of when advertising and sales practices can be deceptive or unfair.

For Solar Loans, Be Clear About Prepayment Requirements

The CFPB's issue spotlight also observed that many solar loans are structured such that borrowers have to pay a large share of the loan principal — 30% is referenced — by a certain time, regardless of their minimum monthly payment amounts, to avoid having the monthly payment amount increase.

To the extent solar loans are structured in this manner, lenders should be very careful to make sure that consumers understand the timing of the monthly payment increase and the circumstances under which the monthly payment may not increase, e.g., because the required amount of principal has been paid or due to setoffs from tax credits.

This can be accomplished by providing consumers at the time of sale with payment schedules that clearly show not only what the payments will be if the prepayment is made timely, but also an example of what the payments would be if the prepayment is not made timely, along with a method consumers can use to estimate payments after the initial period, if they have only partially prepaid.

Lenders should also consider including information regarding projected payment schedules with each periodic statement, based upon the amount the consumer has prepaid to date.

Special Cautions About Residential Property Assessed Clean Energy Loans

The Treasury, in its consumer advisory regarding purchasing solar panels, emphasizes that consumers who participate in property assessed clean energy or residential property assessed clean energy loan programs through their county or state should understand that the loan amount is added to their property taxes, so tax bills increase a lot.

Because consumers do not have to pay the full amount at once, a property tax lien is instead placed on the consumer's home, which is repaid over time by the consumer paying an extra amount every time they pay their property tax bill. The tax property lien takes priority over the mortgage on the home and may make it difficult for the consumer to sell the home.

To this end, lenders working within the context of PACE or R-PACE loan programs should be very careful about making sure that consumers understand the immediate, i.e., higher tax bills and tax lien, implications of the financing, as well as the longer-term, i.e., must be addressed if they want to sell their home, implications.

In addition, the CFPB proposed rules in summer 2023 to rein in abuses on PACE/R-PACE loans and is still working on finalizing them.[6] Even though they have not finalized the rule, lenders are advised to consider including some of the elements of the proposed rule in their practices today, especially the additional disclosures and changes related to tax escrow accounts.

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[1] Issue spotlight: Solar Financing, Consumer Financial Protection Bureau, Office of Markets, Aug. 7, 2024, available at: https://files.consumerfinance.gov/f/documents/cfpb_solar-financing-issue-spotlight_2024-08.pdf.

[2] See, RULE CONCERNING COOLING-OFF PERIOD FOR SALES MADE AT HOMES OR AT CERTAIN OTHER LOCATIONS, 16 C.F.R. Part 429, available at: <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-D/part-429>.

[3] 15 U.S.C. §1635, as well as 12 C.F.R. §1026.15 and §1026.23.

[4] Before You Purchase and Finance Solar Panels, Consumer Advisory, U.S. Department of the Treasury, available at: <https://home.treasury.gov/system/files/136/Guide-Before-You-Buy-Solar-Panels-eng.pdf>.

[5] Before You Sign a Solar Lease Agreement, Consumer Advisory, U.S. Department of the Treasury, available at: <https://home.treasury.gov/system/files/136/Guide-Before-You-Sign-a-Solar-Lease-eng.pdf>; see also, Before You Sign a Power Purchase Agreement, available at: <https://home.treasury.gov/system/files/136/Guide-Before-You-Sign-a-Power-Purchase-Agreement-eng.pdf> and Before You Sign a Community Solar Subscription Contract, available at: <https://home.treasury.gov/system/files/136/Guide-Before-You-Sign-a-Community-Solar-Subscription-eng.pdf>.

[6] Proposed Rule, Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. 30388, May 11, 2023, available at: <https://www.govinfo.gov/content/pkg/FR-2023-05-11/pdf/2023-09468.pdf>.