

"Clearly and Prominently:" Consumer Debt Settlement Disclosures in Wake of CFPB v. Freedom Debt Relief

July 31, 2019 | [Catherine M. "Cathy" Brennan](#)

The debt settlement industry received some "regulation by enforcement" in the wake of a settlement of the lawsuit filed by the Consumer Financial Protection Bureau ("CFPB") against Freedom Debt Relief, LLC ("FDR").^[1] The lawsuit raised four counts: two for deception under the Consumer Financial Protection Act of 2010 ("Dodd-Frank"),^[2] one for a violation of the Telemarketing Sales Rule ("TSR"),^[3] and one under the "abusive" authority created by Dodd-Frank.^[4] The two deception claims stem from an alleged failure to disclose that some creditors would not negotiate with FDR and a misrepresentation regarding when FDR would impose a fee for its services.^[5] The TSR claim alleged that the agreement with the debt settlement client failed to clearly and conspicuously disclose that the client could cancel the agreement and could obtain a refund, less the earned fees.^[6] The last claim, the abusive claim, alleged that FDR "abusively" required consumers to negotiate debts on their own.^[7] The CFPB asserted that FDR's practice of occasionally securing consumer involvement in the settlement process and then collecting its fee when the consumer assists in, or secures, the settlement is an unfair and deceptive business practice because it deprives consumers of the "benefit of the bargain." The CFPB contended that the consumer's expectation is that the fee paid to FDR is in exchange for FDR doing the settlement work and, when the consumer becomes involved, there should be no fee. These instances of consumer involvement allegedly arose as a consequence of FDR failing to disclose that there are certain creditors who, allegedly, will not negotiate with the company.

The parties settled the lawsuit on July 9, 2019.^[8] In addition to the financial and other relief, FDR agreed to several substantive provisions that require the attention of all debt settlement companies.

Prohibition on Deceptive Practices

FDR cannot mispresent, or assist others in misrepresenting, expressly or impliedly, the following:

- whether any present creditor will negotiate debt settlements directly with FDR;
- FDR's present ability to negotiate or settle an enrolled debt; and
- the circumstances in which FDR charges fees.

Prohibition on Charging Fees for "Non-Settlement Outcomes"

A "non-settlement outcome" means an outcome involving an enrolled debt that does not include a settlement with the creditor but that FDR considers to be a resolution. The joint stipulated judgment prohibits FDR from requesting or receiving a fee, or from assisting others in requesting or receiving a fee, in consideration for or in connection with a non-settlement outcome.

Required Disclosures Relating to Settlement Accounts

FDR must, before enrollment, clearly and conspicuously, as defined in the TSR,^[9] disclose to each consumer that if the consumer withdraws from FDR's debt-relief program, the consumer is entitled to receive all funds in the settlement account other than funds earned by FDR.

Required Disclosures Relating to Consumer Involvement in Settlements

FRD agreed to "clearly and prominently" disclose to consumers before enrollment in a debt settlement plan:

- that in some instances, FDR may request that the consumer negotiate directly with the creditor; and
- that if FDR requests that the consumer negotiate directly with the creditor, the consumer may decline to negotiate with the creditor and either request that FDR continue attempts to negotiate a settlement of the enrolled debt with the creditor or withdraw the enrolled debt without charge or penalty at any time before it is settled.

This section of the joint stipulated judgment did not refer to coached settlements, although the joint stipulated judgment defined coaching for purposes of the compliance relief. "Coach" or "coaching" means any instruction, guidance, or advice to consumers provided by FDR in connection with consumers' direct negotiations with creditors.

In the FDR settlement, "clearly and prominently" means:

- in textual communications (e.g., printed publications or words displayed on the screen of an electronic device), the disclosure must be of a type point or pixel size, location, and format sufficiently noticeable for an ordinary consumer to read and comprehend it across all screen sizes, in print that contrasts with the background on which it appears;

- in communications disseminated orally or through audible means (e.g., radio or streaming audio), the disclosure must be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;
- in communications disseminated through video means (e.g., television or streaming video), the disclosure must be in writing in a form consistent with #1 above, and must appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it;
- in communications made through interactive media such as the internet, online services, and software, the disclosure must be unavoidable (which is not the case if the consumer must take any action—such as clicking on a hyperlink or hovering over an icon—to see it) and presented in a form consistent with subsection (a), and remain on the screen for a duration sufficient for a consumer to read and comprehend it; and when scrolling is necessary to view the disclosure, text or visual cues must be present to encourage consumers to scroll to view the disclosure, and the disclosure must be unavoidable—that is, consumers must not be able to proceed further with a transaction (e.g., click forward) without scrolling through the disclosure;
- in communications that contain both audio and visual portions, the disclosure must be presented simultaneously in both the audio and visual portions of the communication; and
- in all instances, the disclosure must be presented before the consumer incurs any financial obligation, in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication with the consumer.

"Clearly and prominently" exceeds the "clearly and conspicuously" standard we typically see in other consumer financial protection laws, although the CFPB and the Federal Trade Commission have negotiated for this disclosure standard in other settlements.^[10] The standard is also referred to but not defined in federal regulation in connection with environmental marketing claims.^[11] Additionally, a number of states use this standard - again, without defining it - in connection with insurance disclosures.^[12] Debt settlement companies would be wise to give the FDR settlement a close read to ensure that its coached settlement disclosures meet this standard.

[1] *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC & Andrew Housser*, Case No. 3:17-cv-06484 (N.D. Cal. November 8, 2017).

[2] 12 U.S.C. 5531, 5536(a), 5564, 5565.

[3] 16 C.F.R. Part 310, *see also* the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102(c), 6105(d).

[4] 12 U.S.C. 5531, 5536(a), 5564, 5565.

[5] *Consumer Financial Protection Bureau v. Freedom Debt Relief, LLC & Andrew Housser*, Case No. 3:17-cv-06484 (N.D. Cal. November 8, 2017), at page 9, paragraphs 42 through 51 and at page 11, paragraphs 52 through 59.

[6] *Id.*, at page 14, paragraphs 72 through 83.

[7] *Id.*, at page 12, paragraphs 60 through 71.

[8] Joint Stipulation for Entry of Stipulated Final judgment and Order (N.D. Ca. July 9, 2019). Housser was dismissed with prejudice from the lawsuit.

[9] 16 C.F.R. § 310.3.

[10] See, e.g., CFPB Press Release, "Bureau of Consumer Financial Protection Settles with Santander Consumer USA Inc.," (November 20, 2018), available at <https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-settles-santander-consumer-usa-inc/>. The FTC sought this standard in a diet pill lawsuit (*FTC v. USA Pharmacal Sales Inc.*, FTC File No., 012-3099 (M.D. Fla. July 1, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/07/usapharmacalstip.pdf>) and a lawsuit against a computer software company (*In the Matter of Compuserve, Inc.*, FTC File No. 962-3096 (1997), available at <https://www.ftc.gov/system/files/documents/cases/970501compuseragree.pdf>).

[11] 16 C.F.R. § 260.7.

[12] North Carolina (N.C. Stat. §758-60-100) and Oregon (Or. Admin. Code 836-051-0036).

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