Corporate Articles

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Medical Loss Rebates—Fiduciary and Tax Implications

by Jon W. Breyfogle, Elizabeth T. Dold, Christine L. Keller, and Mark C. Nielson

This past summer, health insurers issued rebate checks in ac cordance with the medical loss ratio (MLR) rules under the Patient Protection and Affordable Care Act (ACA). Those receiving rebates has many questions regarding those rebates, such as what the money can be used for, and whether it is taxable. Fortunately, Department of Labor (DOL) and Internal Revenue Service (IRS) guidance addresses many of these questions. That guidance is summarized briefly, below.

Background

The ACA establishes a MLR requirement that applies to health insurers. Generally, the MLR rule requires an insurer to provide policyholders with "rebates" if the insurer's MLR ratio exceeds 85 percent for the large group market, and 80 percent for the small group and individual market. The MLR is calculated based on the ratio of the insurer's (a) claims and quality improvement expenses to (2) total premium dollars earned (minus federal and state taxes and licensing and regulatory fees). In 2010, HHS released an interim final rule (IFR) that governed the manner in which insurers must calculate and report MLR, and how any MLR rebates must be distributed. *See* 75 Fed. Reg. 74865, 74866 (Dec. 1, 2010).

The IFR provided that insurers in the large and small group markets must allocate any MLR rebates between the policyholder (usually the employer) and each enrollee covered by the policy at issue (i.e., employees) "in amounts proportionate to the amount of premium paid." This requirement caused difficulties for insurers and employers, however, given that insurers generally do not have information about the employer/employee split of premium costs, and would have required employers to provide insurers with significant information about the premium split and factors that could cause an employee's share of the premium to vary during the course of a year (e.g., a change in job classification, participation in a wellness program, etc.).

Responding to insurer and employer concerns about the rebate allocation rules, HHS significantly revised the IFR. *See* 76 Fed. Reg. 76574 (Dec. 7, 2011), 76 Fed. Reg. 76596 (Dec. 7, 2011). Rather than requiring insurers to allocate rebates between group policyholders and enrollees, HHS's final regulation now directs insurers to remit the entirety of any MLR rebate directly to the group policyholder (e.g., the employer). 45 CFR § 158.242(b). A separate regulation also provides guidance as to how such rebates must be used by non-Employee Retirement Income Security Act (ERISA) plans, such as plans sponsored by state and local governments, and church plans. *See* 76 Fed. Reg. 76596 (Dec. 7, 2011). On the

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Message from the Chair

by John Okray

We are very pleased to reintroduce a substantive legal newsletter to the members of the Corporate & Association Counsel Division. We hope that you will consider submitting an article for publication. Submissions can include legal articles, practice tips for in-house counsel, or other subjects of interest to members.

The division recently co-sponsored a webinar with the FBA Younger Lawyers Division on transitioning to the role of in-house counsel and best practices. We hope members who participated found the discussion insightful. We will be sponsoring a number of other programs, including the Biannual Labor & Employment Conference with the FBA Labor & Employment Law Section in New Orleans in May 2013. Watch your email for other programs in the months ahead.

Thank you for your continued support of the FBA and CACD. ■

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same date, the DOL issued Technical Release 2011-4, which provides guidance regarding how such rebates must be used by the sponsors of ERISA-covered plans.

On April 2, 2012 (and revised on April 19), the IRS issued FAQ's that provide information on the federal tax consequences to the health insurance issuer that pays a MLR rebate and the employee or individual policyholder that receives the MLR rebate. *See* www.irs.gov/newsroom/article/0,,id=256167,00.html. These FAQs are divided into four sections—Insurance Company, Policies Purchased on the Individual Market, Group Policies Paid with After-Tax Employee Premiums, and Group Policies Paid with Pre-Tax Employee Premiums.

How Can the Sponsor of an ERISA Group Health Plan Use the Rebate?

A threshold issue for ERISA plans is whether MLR rebates are "plan assets" that are subject to ERISA's strict rules of fiduciary conduct. The Technical Release provides that MLR rebates are considered "plan assets" under ERISA if "under ordinary notions of property rights … a plan has a beneficial interest in the distribution." The guidance then discusses DOL's views as to how to determine whether an MLR rebate is a plan asset, which requires close attention to the terms of the insurance contract and governing plan documents. The Technical Release provides that where the plan itself (or its trust, such as VEBA) is the policyholder, any rebates attributable to such policy will be considered "plan assets," in the absence of any plan or policy language to the contrary. Where, however, the employer is the policyholder, and the insurance policy, together with other instruments governing the plan, can fairly be ready to provide that some part or all of the MLR rebate belongs to the employer, then that language will generally govern, and the employer may retain the rebate.

In the absence of direct evidence as to whether the plan or the employer has a beneficial interest in the MLR rebate, the DOL will look to the source of premium payments for the policy:

- If the premium is paid entirely out of trust assets, DOL views "the entire amount received from the insurer" as a plan asset;
- If participants paid the entire cost of plan premiums, the entire amount of the MLR rebate is considered a plan asset;
- If the employer pays the entire cost of insurance coverage, then the rebate is not considered a plan asset, and may be retained by the employer;
- If the employer and enrollees contribute a percentage of the premium, the MLR rebate is a plan asset to the extent attributable of participant contributions and the balance is not a plan asset and may be retained by the employer.

The DOL's Technical Release goes on to provide that where MLR rebates are considered plan assets, the plan fiduciary generally must:

- Distribute rebate amounts to participants;
- Enhance benefits; or
- Reduce future participant premiums.

In deciding on how to apply the rebates, the DOL guidance notes that a plan "may properly weigh the costs to the plan and the ultimate plan benefit as well as the competing interests of participants or classes of participants provided such method is reasonable, fair and objective." The guidance goes on to provide some helpful examples of reasonable methods for allocating MLR rebates that are plan assets, which plans and their sponsors should consult in deciding how to allocate and apply MLR rebates that are plan assets.

For plans that are exempt from ERISA's trust and annual audit rules (i.e., unfunded group health plans that are insured), DOL allows such plans to receive MLR rebates and remain exempt from ERISA's trust, annual audit and reporting requirements, but only if certain conditions are satisfied. Specifically, to remain exempt from ERISA's trust, auditing, and reporting requirements, the policyholder receiving an MLR rebate that is a plan asset must—within 3 months of receiving the rebate:

- Distribute the rebate amounts to participants, or
- Reduce the participants' share of premiums.

It is not clear from the guidance whether a plan fiduciary could apply such amounts to the subsequent year's premium, if the next year's premium is paid after the 3-month period.

How Can the Sponsor of a Non-Federal Governmental Plan Use the Rebate?

Health and Human Services (HHS) also released an interim final rule addressing the use of MLR rebates in connection with non-federal governmental plans (e.g., plans sponsored by state or municipal governments for their employees). *See* 76 Fed. Reg. 76596 (Dec. 7, 2011). This interim final rule requires that the portion of any MLR rebates attributable to participant contributions be used to:

- Reduce the participants' portion of the annual premium for the subsequent policy year for participants in any group health policy offered by the plan;
- Reduce the enrollees' portion of the annual premium for the subsequent policy year for participants covered by the group health policy for which the rebate was based; or
- Be distributed as a cash refund to participants that were covered by the group health policy for which the refund was based.

How Can the Sponsor of a non-ERISA, non-governmental plans, such as a "Church Plan" use the rebate?

With respect to non-ERISA and non-governmental plans, such as "church plans," the HHS guidance provides MLR rebates may be paid directly to the group policyholder, but only if the insurer receives written assurance from the policyholder that the rebate will be used for the benefit of current subscribers using one of the three non-federal governmental plans options listed above. Otherwise, the rebate must be paid directly to the policyholder's subscribers.

Are Insurers Required to Send a Notice Regarding the Rebate?

Yes. The HHS final rule imposes a new notice requirement upon insurers. Specifically, insurers that distribute MLR rebates must provide written notices to group policyholders—and their subscribers—regarding the rebate. The notice must include information regarding:

- The purpose of the MLR requirement imposed by the ACA;
- The applicable MLR standard;
- The issuer's actual MLR for the reporting year at issue and its adjusted aggregate premium revenue;
- The rebate being provided; and
- If applicable, an explanation that the rebate is being provided to the policyholder. For ERISA plans, this explanation must state that policyholders may have obligations under ERISA with respect to the handling of the rebate amount, and the contact information for the ERISA covered plan. For other group health plans (such as non-federal governmental plans), the explanation must explain how the policyholders will use the rebate to benefit subscribers.

What are the Tax and Reporting Obligations of Insurers Who Pay Rebates?

The MLR rebates reduce the Insurance Company's taxable income. Cash rebates paid to individual policyholders generally do not need to be reported on Form 1099-MISC. And rebates paid to group policyholders (e.g., employers) are also generally not reported as (1) there is no reporting requirement to corporations and tax exempt organizations, and (2) the income must be fixed and determinable, which would require knowledge of the policyholder's tax positions.

Is a Rebate on a Policy Purchased on the Individual Market Taxable?

IRS FAQs state that the policy owner is taxed on the rebate only to the extent that he or she received a tax benefit from deducting the premiums. However, the FAQs are silent concerning the tax consequences of receiving a rebate for an individual policy that is purchased with pre-tax dollars, such as through an employer's cafeteria plan, or an employer's health reimbursement arrangement. Presumably, the individual would need to report the amount of the rebate on his/her Form 1040 as "other income." It does not appear that the insurer or employer is subject to any reporting requirements in this circumstance (e.g., Form 1099 or Form W-2).

Is a Rebate on a Policy Purchased on the Group Market with Employee After-tax Premium Payments Taxable?

The employee is taxed on the rebate (either cash or premium reduction) only to the extent that he or she received a tax benefit from deducting the premiums. Therefore, the employee has no income if he or she did not deduct the premiums on his or her tax return. And regardless of any prior deduction of premiums, no taxable income results (although any deduction for current year premiums is reduced) if the employer provides the rebate to all current employees participating in the health plan, without regard to who participated in the year the rebate relates. Importantly, in no event is the rebate subject to employment taxes.

Is a Rebate on a Policy Purchased on the Group Market with Employee Pre-Tax Premium Payments (e.g., 125 Plans) Taxable?

If the rebate is distributed as a premium reduction for the employee, then the amount paid for the coverage is less, resulting in increased taxable wages. If the rebate is distributed in cash, then the rebate is treated as taxable wages, subject to income and employment taxes. ■

This article, reprinted with permission of the authors and Groom Law Group, was originally published as a Benefits Brief on July 19, 2012.

Compliance with EEOC Guidance on Using Arrest and Conviction Records in Employment Decisions by John Okray

Summary

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) published updated guidance[1] relating to the use of arrest and conviction records by employers in the employment decision-making process. Specifically, the Guidance is meant to help private and public sector employers mitigate potential claims of unlawful employment discrimination based on race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964, as amended (CRA). Reliance on state or local laws that permit acts that would be unlawful under Title VII are preempted and do not afford any protection against liability. Corporate counsel should consult with their human resources department to confirm they are utilizing best practices in this area.

Background

The guidance describes the fact that there has been a steady increase in the number and percentage of people who have had involvement with the American criminal justice system. If the incarceration rates remain unchanged, the U.S. Department of Justice predicts that 1 in 17 White men, 1 in 6 Hispanic men, and 1 in 3 African American men are expected to serve time in prison. Based on this type of data, the EEOC states that employment exclusion based on a criminal record may have a disparate impact on certain individuals protected under the CRA. The guidance supplements prior court decisions and previous EEOC guidance[2] on this topic.

Arrest vs. Conviction

As would be expected, the guidance reaffirms that arrest records should not be afforded the same weight as convictions since the former is not proof of the alleged criminal conduct. Someone who has been arrested might not have formal criminal charges brought against him/her, the charges may be dismissed, or the defendant may be found innocent by a judge or jury. Therefore, the guidance states that an arrest record alone cannot be used as the sole basis for denying employment. However, the guidance does note that an arrest may cause an employer to inquire into the conduct involved in an arrest and, if said conduct would potentially exclude an applicant[3], the employer may perform a fact based analysis to determine whether exclusion is justified. Unlike arrests, convictions may generally be treated as evidence of the alleged crime and the related conduct.

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Validation Studies under the Uniform Guidelines vs. Targeted Screens Using the *Green* Factors:

The guidance suggests employers use one of two different methods to demonstrate that an exclusion based on criminal conduct is "job related and consistent with business necessity".[4] First, an employer may validate their criminal conduct screening process for the position(s) using the Uniform Guidelines on Employment Selection Procedures standards[5]. As part of a validation study, an employer would need to obtain data regarding the criminal conduct and its impact on subsequent work performance.

As a validation study would be impracticable for most employers, the guidance focuses more on employers conducting targeted screens using factors identified in *Green v. Missouri P. R. Co.*, 549 F.2d 1158 (8th Cir. 1977). In *Green* the U.S. Court of Appeals for the Eighth Circuit described three factors (the *Green* factors) that should help determine whether an exclusion is job related and a business necessity:

1. The nature and gravity of the offense or conduct.
2. The time that has passed since the offense or conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

If a targeted screen based on the *Green* factors is narrowly tailored to exclude employment based on criminal conduct that is closely related to the employment sought, an employer may be able to justify exclusion based on the screen alone. However, the guidance recommends that employers can further mitigate their potential Title VII liability by conducting an individualized assessment of the facts and circumstances.

Individualized Assessments

Conducting an individualized assessment consists of an employer informing the applicant that they may be excluded because of prior criminal conduct. The employer then gives the applicant the opportunity to provide additional information to demonstrate that the exclusion should not apply or that the conduct is not highly correlative to the position sought. In addition to the obvious situations where the criminal record may contain inaccurate information, the guidance describes a number of other factors that may be relevant, including:

- The facts and circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents or criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g. education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state or local bonding program.

If an applicant does not respond to the request for additional information, the guidance states that an employer may make its employment decision without it.

Other Federal, State, and Local Laws and Regulations

Some states and local jurisdictions may have laws that impose restrictions on certain employment based on prior criminal conduct. However, state and local laws that permit acts that would be unlawful under Title VII are preempted. The guidance therefore advises employers that any reliance on state or local laws that permit employment exclusion that is not job related and consistent with business necessity will not provide any protection against Title VII liability.

Unlike state and local laws, reliance on other federal laws and regulations may be a defense to an employment discrimination claim. A number of industries may have specific exclusionary policies, such as airport security screeners, federal law enforcement officers, port employees, etc. Certain occupations also require a license or security clearance and federal law may prescribe prohibitions on their issuance based on relevant criminal conduct. Title VII would not preempt these federal restrictions; however, if an employer exceeded the restriction they may have exposure to a Title VII discrimination claim. Lastly, if the employer is utilizing a third party to obtain criminal background or certain other information regarding applicants or employees, they must comply with applicable disclosure and other obligations imposed under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.

Employer Best Practices

The guidance contains a number of best practice suggestions throughout the publication and in a section devoted to the topic. Some of the guidance's best practice recommendations are listed below (*with the author's additional comments in italics*):

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.
  - › *The Guidance contains a number of hypothetical examples that could be adapted for training purposes.*
  - › *Also provide periodic training on other applicable federal, state, and local laws and regulations. Document the training session materials and attendance.*
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
  - › Identify essential job requirements and the actual circumstances under which the jobs are performed.
  - › Determine the specific offenses that may demonstrate unfitness for performing such jobs.
    - ▪ Identify the criminal offenses based on all available evidence.
  - › Determine the duration of exclusion for criminal conduct based on all available evidence.
    - ▪ Include an individual assessment.
    - ▪ *When conducting an individual assessment, consider including a representative from the applicable business unit and the human resources and legal departments.*

- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- *To mitigate potential future problems, if the legal department has an employment litigation attorney, consider having him/her review the policies and procedures. Alternatively, the corporation's outside employment counsel could provide such a review.*

- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.
  - *Some law firms may offer complimentary training sessions to human resources departments on topics such as this as part of their business development efforts.*
  - *A company may wish to have the legal, compliance and/or internal audit department conduct periodic checks of how the policies and procedures are being administered, while being cognizant of privilege and discovery issues.*
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
  - *The obligation to keep this information confidential could be added as an addendum to the company's confidentiality / non-disclosure attestation to be signed by staff with access to this information.*
- *If the employer procures criminal information from a consumer reporting agency, have the agency confirm in writing it is in compliance with all applicable federal, state, and local laws, rules, and regulations.* ■

John Okray is deputy general counsel of American Beacon Advisors, Inc. and chair of the FBA Corporate & Association Counsel Division.

[1]Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, EEOC (4/25/2012) available at www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[2]Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., EEOC (Feb 4, 1987); EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment, EEOC (July 29, 1987); Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, U.S. Equal Employment Opportunity Commission (Sept. 7, 1990).

[3]This paper generally refers to potential discrimination of "applicants" in the "hiring" process. However, protections described for applicants in the hiring process should also be assumed to extend to existing employees in the employment retention context.

[4]Guidance at 14.

[5]29 C.F.R. § 1607.5 outlines the standards.

An Interview with Dennis Clark President of Foundation of the Federal Bar Association

Dennis Clark is the president of the Foundation of the Federal Bar Association. He manages his own firm, Clark Law Firm PLLC in Detroit, Mich. He previously served as Vice President of Compliance and Ethics for the Auto Club Group and was formerly a partner and shareholder with Plunkett Cooney P.C. He received his J. D. from Boston University School of Law and his undergraduate degree from the University of Notre Dame.

The Foundation's website says that it was chartered by Congress as a nonprofit organization in 1954. Could you please tell us more about the history of the Foundation and its mission?

Clark: The Foundation is affiliated with the FBA but is a separate 501(c)(3) organization. The Foundation's mission is to: (1) promote and support legal research and education; (2) advance the science of jurisprudence; (3) facilitate the administration of justice; and (4) foster improvements in the practice of federal law.

Contributions to the Foundation of the Federal Bar Association and its restricted funds may be treated as charitable contributions for tax purposes.

Can you describe some of the Foundation's programs or initiatives that you feel have had a positive impact?

Clark: Two of our principal programs or initiatives are our Restricted Funds and Chapter Grants. The Restricted Funds include:

Judicial Research and Education Fund. This fund provides support for the conduct of research, programs, and education relating to the federal courts and federal jurisprudence. A grant from this fund was used to generate the Federal Bar Association's White Paper on Judicial Compensation and the update to the original document. These white papers were well received by the federal judiciary, including the Chief Justice of the Supreme Court. The reports also received extensive coverage in the *Washington Post* and *The Third Branch*.

Public Service Scholarship. This fund provides funding for college tuition, books, fees, and housing during pursuit of an undergraduate degree. The student must attend classes full-time and have a parent or guardian who is currently employed as a federal government attorney or federal judge and is a member of the Federal Bar Association.

Ilene and Michael Shaw Public Service Award Fund. This fund, made possible by the generous contributions of Ilene and Michael Shaw, is used for the annual Michael Shaw Public Service

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Award (for chapter public service programs) and the Ilene and Michael Shaw Younger Lawyer Public Service Grant (for chapter-sponsored public service and pro-bono activities implemented by the chapter's Younger Lawyers Committee).

Elaine "Boots" Fisher Memorial Fund. Supports the FBA's annual Elaine R. "Boots" Fisher Award, which is presented as a memorial to the outstanding and unselfish contributions made by "Boots" Fisher to improve the quality of life and opportunities of all persons. The award is intended to stimulate, encourage and recognize exemplary community, public and charitable service by members of the Federal Bar Association. As such, the fund makes an annual charitable contribution to an organization for which an FBA member has performed outstanding public service.

Minnesota Chapter Donor Advised Fund. This donor advised fund was established by the Foundation in conjunction with the FBA's Minnesota Chapter. Distributions from the fund are made at the Foundation's discretion and must be in line with the Foundation's Mission.

In regard to Chapter Grants, the Foundation administers the Chapter Community Outreach Grant Program, which provides funding in support of community service or outreach projects that involve FBA chapter participation. Grant applications are accepted twice during the Foundation's fiscal year. Currently, the maximum grant amount is $5,000 and the number of grants awarded each year is dependent upon available funding and the number and quality of applications. All FBA chapters are encouraged to apply for a grant.

What inspired you to get involved with the Foundation?

Clark: My involvement with the Foundation stems from my interest in and commitment to its mission as well my desire to make an overall contribution to the work of the FBA.

What is the Fellows of the Foundation of the Federal Bar Association program?

Clark: Established in March 2002, the Fellows of the Foundation of the Federal Bar Association are individuals who have demonstrated exceptional dedication to the FBA. They are nominated by a Fellow of the Foundation and invited to join by the Fellows Chair or the President of the Foundation. Fellows must be FBA members in good standing for at least five years. Each fellow must execute a written pledge of $1,500 to be paid to the Foundation over five years. Fellows' contributions support the Foundation's mission and help to build the Foundation corpus. In addition to supporting the general activities of the Foundation, the Fellows also sponsor an annual silent auction at the FBA's annual convention to raise funds for Foundation activities. Currently, the Foundation has 208 Fellows.

Please contact the Foundation at (571) 481-9100 or via email at foundation@fedbar.org to learn more or express an interest in becoming a Fellow.

What are your goals for the Foundation?

Clark: We seek to increase donations to the Foundation and grow the assets in order to provide more grants and funding to programs and initiatives that advance our mission.

What are the different options people have for supporting the Foundation?

Clark: There are a number of options. First, the Foundation's website has a link which would allow a person or chapter to donate online. Go to www.fedbar.org/foundation. Then, scroll down and click on "Help Support the Foundation" for different contribution options.

Donations can also be mailed to the Foundation of the Federal Bar Association, 1220 North Fillmore Street, Ste. 444, Arlington, VA 22201. Please note the online donation option allows the donor to contribute either to a restricted fund or the general fund. If mailing a donation, please specify the fund to which you are contributing.

Additionally, consider the Chapter 1% Program, whereby Chapters have the opportunity to assist the activities of the Foundation by pledging 1% of the Chapter's gross revenues annually to the Foundation.

The Foundation of the Federal Bar Association appreciates any contributions in support of its mission and initiatives. More information about the Foundation of the Federal Bar Association can be found on its website at www.fedbar.org/foundation. ■

Cease and Desist: Does it Really Mean No Further Contact?

by Melissa Green

If you or your firm act as a professional debt collector for any length of time, receipt of a Cease and Desist letter (C&D) on an account you are working to collect is probably inevitable. Debt collectors often ask, "Does this mean I cannot contact this person again?" The answer is a qualified "Yes".

The consumer's right to issue a C&D to a collector originates in Section 805(c) of the Fair Debt Collection Practices Act (FDCPA). According to the statute, once a consumer makes it known to the debt collector he wants communication to stop, "the debt collector shall not communicate further with the consumer with respect to the debt".

Recently, questions have come up regarding how to interpret C&Ds. In one example, a letter from a customer requested only telephone contact to stop. In another, a letter from the customer requested that all contact stop but noted contact could still occur via email if necessary.

In both examples, the analysis remains the same. According to the law, it is clear that "the debt collector shall not communicate further with the consumer with respect to the debt." Therefore, no contact may continue in these situations.

But what about that qualified "yes" earlier? Section 805(c) contains some exceptions. Even though a C&D is received, contact may still be made in three (and possibly four) situations.

Contact after receipt of a C&D may be made:

1. To advise that further collection efforts have been terminated;
2. To notify that certain remedies which are ordinarily invoked in such circumstances may be invoked;
3. To notify that a specific remedy will be invoked; and
4. To inform the customer of the results of an investigation of a credit bureau dispute.

The U.S. Federal Trade Commission (FTC) recently issued an advisory opinion (available at www.ftc.gov/os/statutes/andersonbeatoletter.pdf) regarding the results of a credit bureau investigation (the fourth exception). According to the FTC, the Fair Credit Reporting Act (FCRA) trumps the FDCPA concerning customer contact.

If a debt is disputed by a consumer, the FCRA requires an investigation of the validity of the debt and a report of the results. Failure to report the results is a violation of the FCRA. Therefore, responding to a credit bureau dispute is an exception for contact after receipt of a C&D from the customer.

There are some final points to keep in mind with C&Ds. A C&D in no way relieves a customer of the debt. In fact, some argue that once a debt collector receives a C&D from a consumer, it may accelerate accounts to repossession or replevin stages as contacting the customer to make arrangements on their account is no longer a possibility.

Also, a C&D does not prohibit a customer from contacting the debt collector. If the customer initiates contact, the debt collector may speak to them. A debt collector can advise the customer of amounts due, of possible repossession (if that is in fact the case) and of any other existing account status. Remember, this is only if the customer initiated contact.

A customer can continue to initiate contact at their convenience but the debt collector will continue to be bound by the C&D unless it is revoked. Along those same lines, a customer with a C&D on file may later request the debt collector to contact them again. Unless this request explicitly says it revokes the earlier C&D, it is seen as a one time request for contact. It does not entirely revoke the force of the C&D. Debt collectors may honor each individual contact request as it occurs and then revert to the C&D status.

As you can see, C&D letters have the potential to confuse and confound collectors. Two pieces of advice on this topic: when in doubt, err on the side of caution and document everything. ■

Melissa Green is the Enterprise Risk Office Compliance Manager for U.S. Bank and Vice Chair for Publications of the Corporate & Association Counsel Division.

CACD Recent Events

Webinar: Transitioning to the Role of In-House Counsel

On June 1, 2012, the FBA Corporate & Association Counsels Division (CACD) and the Young Lawyers Division (YLD) co-sponsored a webinar entitled "Transitioning to the Role of In-House Counsel." The discussion was focused on the types of responsibilities in-house counsel have, challenges they face, current hot topics, and advice for attorneys considering going in-house in the future. Panelists included Matthew Moschella, partner with Sherin and Lodgen LLP and chair of the YLD; John Okray, deputy general counsel of American Beacon Advisors and chair of the CACD; Melissa Green, compliance manager for U.S. Bank and vice-chair of publications of the CACD; and Alisha Bloom, director of legal affairs for CompuGroup Medical.

Federal Bar Association Calendar

November 28, 2012	2013 General Counsels' Banking Law Dinner Hotel Monaco // Washington D.C.
February 1, 2013	2013 Public Service Career Fair // George Mason University // Fairfax, VA
March 1, 2013	37th Annual Tax Law Conference // Ronald Reagan Building // Washington D.C.
March 17-20, 2013	FBA/ICI Mutual Funds and Investment Management Conference // Palm Desert, CA
April 4-6, 2013	2013 Midyear Meeting // West Arlington Gateway // Arlington, VA
April 11-12, 2013	38th Annual Indian Law Conference // Hilton Buffalo Thunder // Sante Fe, NM
May 1-5, 2013	Biannual Labor & Employment Law Conference (Sponsored by the FBA Labor & Employment Section & Corporate & Association Counsel Division) Westin New Orleans Canal Place // New Orleans, LA
May 28, 2013	FBA Supreme Court Admissions Ceremony // U.S. Supreme Court // Washington D.C.
May 30-31, 2013	25th Annual Insurance Tax Seminar // J.W. Marriott // Washington, D.C.
Sept. 26-28, 2013	2013 Annual Meeting and Convention // The Caribe Hilton // San Juan, PR

Please watch your email for details on other CACD CLE programs and events.
For a full calendar and details of FBA events, see www.fedbar.org/calendar.

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The Federal Bar Association offers an unmatched array of opportunities and services to enhance your connections to the judiciary, the legal profession, and your peers within the legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

Advocacy

The opportunity to make a change and improve the federal legal system through grassroots work in over 80 FBA chapters and a strong national advocacy.

Networking

Connect with a network of federal practitioners extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Leadership

Governance positions within the association help shape the FBA's future and make an impact on the growth of the federal legal community.

Learning

Explore best practices and new ideas at the many Continuing Legal Education programs offered throughout the year—at both the national and chapter levels.

expand your connections, expand your career

THREE WAYS TO APPLY TODAY: ① Join online at www.fedbar.org; ② Fax application to (571) 481-9090; or ③ Mail application to FBA, 1220 North Fillmore St., Suite 444, Arlington, VA 22201. For more information, contact the FBA membership department at (571) 481-9100 or membership@fedbar.org.

FEDERAL BAR ASSOCIATION APPLICATION FOR MEMBERSHIP (CONTINUES ON REVERSE)

Applicant Information

First Name M.I. Last Name Suffix (e.g., Jr.) Title (e.g., Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female Have you been an FBA member in the past? ❍ yes ❍ no Which do you prefer as your primary address? ❍ business ❍ home

Business

Firm/Company/Agency Number of Attorneys

Address Suite/Floor

City State Zip Country

( ) ( )

Phone Fax E-mail

Home

Address Apt. #

City State Zip Country

( ) ( )

Phone Fax

/ /

Date of Birth E-mail

Bar Admission and Law School Information (required)

U.S.

Court of Record: _____

State/District: _____ Original Admission: / /

Tribal

Court of Record: _____

State: _____ Original Admission: / /

Foreign

Court/Tribunal of Record: _____

Country: _____ Original Admission: / /

Students

Accredited Law School: _____

State/District: _____ Expected Graduation: / /

Practice Information

PRACTICE TYPE

Private Sector: ❍ Private Practice ❍ Corporate/In-House

Public Sector: ❍ Government ❍ Association Counsel
❍ Nonprofit ❍ University/College
❍ Military ❍ Judiciary

PRIMARY PRACTICE AREAS

❍ Administrative
❍ Admiralty/Maritime
❍ ADR/Arbitration
❍ Antitrust/Trade
❍ Bankruptcy
❍ Communications
❍ Criminal
❍ Environment/Energy
❍ Federal Litigation
❍ Financial Institutions
❍ General Counsel
❍ Government Contracts
❍ Health
❍ Immigration
❍ Indian
❍ Intellectual Property
❍ International
❍ Labor/Employment
❍ Military
❍ Social Security
❍ State/Local Government
❍ Taxation
❍ Transportation
❍ Veterans

connect

Membership Categories and Optional Section, Division, and Chapter Affiliations

Membership Levels

Sustaining Membership

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5% discount on the registration fees for all national meetings and national CLE events.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $155	❍ $135
Member Admitted to Practice 6-10 Years	❍ $215	❍ $190
Member Admitted to Practice 11+ Years	❍ $255	❍ $220
Retired (Fully Retired from the Practice of Law)	❍ $155	❍ $155

Active Membership

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $95	❍ $75
Member Admitted to Practice 6-10 Years	❍ $155	❍ $130
Member Admitted to Practice 11+ Years	❍ $195	❍ $160
Retired (Fully Retired from the Practice of Law)	❍ $95	❍ $95

Associate Membership

Foreign Associate *Admitted to practice law outside the U.S.* ❍ $195
Law Student Associate *Currently enrolled in an accredited law school* ❍ $30

Dues Total: $ _____

Practice Area Sections

- ❍ *Alternative Dispute Resolution* $15
- ❍ *Antitrust and Trade Regulation* $15
- ❍ *Bankruptcy Law* $10
- ❍ *Civil Rights Law* $10
- ❍ *Criminal Law* $10
- ❍ *Environment, Energy, and Natural Resources* $15
- ❍ *Federal Litigation* $10
- ❍ *Government Contracts* $20
- ❍ *Health Law* $10
- ❍ *Immigration Law* $10
- ❍ *Indian Law* $15
- ❍ *Intellectual Property Law* $10
- ❍ *International Law* $10
- ❍ *Labor and Employment Law* $15
- ❍ *Securities Law Section* $0
- ❍ *Social Security* $10
- ❍ *State and Local Government Relations* $15
- ❍ *Taxation* $15
- ❍ *Transportation and Transportation Security Law* $20
- ❍ *Veterans Law* $20

Career Divisions

- ❍ *Corporate & Association Counsel* (past/present member of corporate/association counsel's staff) $20
- ❍ *Federal Career Service* (past/present employee of federal government) N/C
- ❍ *Judiciary* (past/present member or staff of a judiciary) N/C
- ❍ *Senior Lawyers** (age 55 or over) $10
- ❍ *Younger Lawyers** (age 36 or younger or admitted less than 3 years) N/C

For eligibility, date of birth must be provided.

Sections and Divisions Total: $ _____

Chapter Affiliation

Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. *No chapter currently located in this state or location.

Alabama
- ❍ Birmingham
- ❍ Mobile
- ❍ Montgomery
- ❍ North Alabama

Alaska
- ❍ Alaska

Arizona
- ❍ Phoenix
- ❍ William D. Browning/ Tucson–$10

Arkansas*
- ❍ At Large

California
- ❍ Central Coast
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ North Central Florida Law Student–$0
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Chicago

Indiana
- ❍ Indianapolis

Iowa
- ❍ Iowa–$10

Kansas*
- ❍ At Large

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Lafayette/ Acadiana
- ❍ New Orleans
- ❍ North Louisiana

Maine*
- ❍ At Large

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri*
- ❍ At Large

Montana
- ❍ Montana

Nebraska*
- ❍ At Large

Nevada
- ❍ Nevada

New Hampshire*
- ❍ At Large

New Jersey
- ❍ New Jersey

New Mexico*
- ❍ At Large

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota*
- ❍ At Large

Ohio
- ❍ John W. Peck/ Cincinnati/ Northern Kentucky
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota*
- ❍ At Large

Tennessee
- ❍ Chattanooga
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ Del Rio–$25
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont*
- ❍ At Large

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Tidewater

Washington*
- ❍ At Large

West Virginia*
- ❍ At Large

Wisconsin*
- ❍ At Large

Wyoming
- ❍ Wyoming

Chapter Total: $ _____

Payment Information and Authorization Statement

TOTAL DUES TO BE CHARGED (membership, section/division, and chapter dues): $ _____

❍ Check enclosed, payable to Federal Bar Association
Credit: ❍ American Express ❍ MasterCard ❍ Visa

Name on card (*please print*)

Card No. Exp. Date

Signature Date

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application and/or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5% which is used for congressional lobbying and is not deductible. Your FBA dues include $14 for a yearly subscription to the FBA's professional magazine.