

# GIBSON, DUNN & CRUTCHER LLP

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March 7, 2008

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Fil Williams  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
Attn: 408(b)(2) Hearing  
Room N-5655  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Re: Hearing on Reasonable Contracts or Arrangements under Section  
408(b)(2)--Fee Disclosure, March 20, 2008, 9:00 a.m.  
Request to be Heard

Dear Mr. Williams:

Pursuant to the Notice of Hearing set forth at 73 Fed. Reg. 10405-06 (Feb. 27, 2008), scheduling a hearing on the Department of Labor's rulemaking on Reasonable Contracts or Arrangements under Section 408(b)(2)—Fee Disclosure, the undersigned hereby submits a request to be heard.

I represent Express Scripts, Inc., for the Pharmaceutical Care Management Association ("PCMA"), and my testimony will be offered on PCMA's behalf to enhance and supplement the PCMA's written submission of February 11, 2008.

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An outline of the topics to be discussed is attached hereto.

Respectfully,

*William Kilberg* /jcc  
William J. Kilberg, P.C.

WJK/jcc  
Enclosure(s)

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## Outline of Topics to be Discussed

By: William J. Kilberg, on behalf of Express Scripts, Inc., for the Pharmaceutical Care Management Association

Re: Hearing on Reasonable Contracts or Arrangements Under Section 408(b)(2)—Fee Disclosure, March 20, 2008, 9 a.m.

- |      |  |              |
|------|--|--------------|
| I.   | Introductory remarks   | 0:30 minutes |
| II.  | The proposed regulation should not be applied to contracts or arrangements involving the provision of administrative services to employee welfare benefit plans, specifically Pharmacy Benefit Management (“PBM”) service contracts.<br><br>a. The proposed regulations were intended to address a demonstrated need for greater transparency in the contracting for investment services to defined contribution plans, specifically the providers of pooled investment vehicles.<br><br>b. The Federal Trade Commission’s examination of the PBM industry has been thorough, and it has concluded that (1) market forces are operating to provide the transparency sufficient to allow consumers of PBM services, like ERISA-covered health plans, to make informed decisions regarding the selection of the PBM provider; and (2) attempts at mandating a disclosure regime will likely be anti-competitive, thereby increasing consumer costs with no offsetting benefit.<br><br>c. A majority of PBM contracts are entered into by plan sponsors, not the plans themselves, and the plans have no direct or indirect legal obligation to the PBM service provider. Thus, the number of contracts potentially subject to the new rule represents only a small percentage of PBM contracts.<br><br>d. As the Department has not conducted its own investigation of the PBM industry, it should defer to the FTC’s conclusions. | 5:00 minutes |
| III. | The term “compensation or fees” should be clarified as meaning “payments received in return for goods or services provided,” to underscore that “compensation” does not include, <i>inter alia</i> :<br><br>a. Discounts received by a PBM or an affiliate with respect to the acquisition of goods or services for resale to PBM clients and any related profits; and   | 2:00 minutes |

- b. Income earned by a PBM or an affiliate on the investment of its own assets.
- IV. The final regulations should not apply with respect to contracts already in effect on the effective date until such contract is extended or the compensation provisions materially modified. 2:00 minutes
- V. Concluding remarks 0:30 minutes