

MEMO# 28646

January 7, 2015

Institute Comment Letter to OMB on Department of Labor Proposed 408(b)(2) Focus Group Study

[28646]

January 7, 2015

TO: PENSION MEMBERS No. 1-15

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 1-15

BROKER/DEALER ADVISORY COMMITTEE No. 1-15

OPERATIONS MEMBERS No. 1-15

TRANSFER AGENT ADVISORY COMMITTEE No. 1-15 RE: INSTITUTE COMMENT LETTER TO
OMB ON DEPARTMENT OF LABOR PROPOSED 408(b)(2) FOCUS GROUP STUDY

The Institute filed the attached comment letter with the Office of Management and Budget (OMB) in response to a revised Department of Labor Information Collection Request (revised ICR) [\[1\]](#) regarding the Department's intended use of focus groups to explore current practices and effects of the final 408(b)(2) service provider regulation (final regulation). The focus groups are intended to gather information about the need for a guide, summary or other tool to help plan fiduciaries understand and navigate the disclosures. You may recall that the Department issued a proposed focus group ICR (proposed ICR) on the same day that it issued a proposed regulation (proposed rule) that would amend the final regulation to require covered service providers who meet their obligations under 408(b)(2) by use of multiple or lengthy documents to furnish a guide to assist plan fiduciaries in reviewing the required disclosures. [\[2\]](#)

The Institute provided comments to the Department on both the proposed ICR [\[3\]](#) and the proposed rule. [\[4\]](#) The revised ICR filed with OMB shows that the Department modified the proposed ICR materials [\[5\]](#) (including the proposed focus group script) presumably after receiving comments from the Institute and others. Although the Department made several of the changes we suggested, many of our concerns remain and the attached letter reiterates these unresolved concerns.

The comment letter first reiterates our concerns regarding the timing of the revised ICR and argues that the Department should have collected information regarding the need for a guide, summary or other tool to the disclosures prior to issuing a proposed rule requiring a guide, given that the focus groups are designed to provide the Department with information as to the necessity of a guide requirement. The letter recommends that the Department

reopen the proposed rule's comment period to enable the public to review and comment on the focus group results.

The letter next addresses the design of the revised ICR and reiterates our concerns regarding the limitations of focus groups, including the limited sample size and representation of the proposed focus groups as well as the subjectivity and bias that may be inherently present in any focus group. The letter recommends that the Department use the focus groups to pre-test a survey and collect the information it seeks through a survey instrument rather than solely through the use of focus groups. The letter also responds to the Department's statements in the revised ICR materials regarding its determination not to conduct a survey, including the Department's assertion that the conduct of a survey is not within its current contract and funding and would delay the information collection. [6] Specifically, the letter states that, given the potential cost of a guide requirement, the Department should take the appropriate time and expend the necessary funds to collect information in a statistically credible manner to determine what, if any, difficulties plan fiduciaries may be encountering in connection with the receipt of the 408(b)(2) disclosures prior to implementing a rule that would require a guide to the disclosures. Additionally, the letter questions the Department's sense of urgency associated with the revised ICR, reiterating our concerns that the Department has not provided any factual evidence or data to support the proposition that plan sponsors are encountering difficulties in understanding or locating information within the disclosures, and stating that neither the Institute's members nor members of groups representing plan sponsors believe such a problem exists.

The third section of the letter includes specific comments on the revised focus group script. The letter recommends changes to certain of the revised focus group questions and discusses various instances in the script where participant recall issues are a concern and where the script questions appear to illustrate bias or subjectivity. The final section of the letter provides comment on the Focus Group Feedback Consent Form included within the revised ICR materials and recommends that the Department revise the form to specify that, in reviewing the focus group reports, the Department will not have access to information that would allow the Department to identify any individual, retirement plan, or retirement plan sponsor.

Howard Bard
Associate Counsel

[Attachment](#)

endnotes

[1] The OMB notice requesting comments is available here:
<http://www.gpo.gov/fdsys/pkg/FR-2014-12-05/pdf/2014-28592.pdf>.

[2] See [Memorandum](#) to Pension Members No. 10-14, Bank, Trust and Retirement Advisory Committee No. 11-14, Broker/Dealer Advisory Committee No. 12-14, Operations Committee No. 11-14 [27960], dated March 14, 2014. The Department's fall 2014 regulatory agenda provides that the Department expects to issue a final rule in September 2015. For the Institute's Memorandum regarding the Department's fall 2014 Regulatory Agenda, see [Memorandum](#) to Pension Members No. 48-14, Bank, Trust and Retirement Advisory

Committee No. 49-14, Broker/Dealer Advisory Committee No. 55-14, Operations Members No. 21-14, Transfer Agent Advisory Committee No. 74-14 [28544], dated December 1, 2014.

[3] See [Memorandum](#) to Pension Members No. 20-14, Bank, Trust and Retirement Advisory Committee No. 21-14, Broker/Dealer Advisory Committee No. 25-14, Operations Committee No. 26-14, Transfer Agent Advisory Committee No. 28-14 [28119], dated May 13, 2014.

[4] See [Memorandum](#) to Pension Members No. 23-14, Bank, Trust and Retirement Advisory Committee No. 24-14, Broker/Dealer Advisory Committee No. 31-14, Operations Members No. 3-14, Transfer Agent Advisory Committee No. 33-14 [28179], dated June 11, 2014.

[5] The revised focus group script is available here: http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201408-1210-004&icID=212715 and the ICR supporting materials are available here: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201408-1210-004.

[6] In the “Supporting Statement for Paperwork Reduction Act 1995 Submissions” the Department explained its reasoning for not conducting a survey. Although the Department states that it understands that a survey could provide “statistical validity, depending on how it is constructed and carried out, whereas a focus group would not,” the Department states that it has decided not to pursue a survey at this time, because (1) a focus group allows more in-depth study of the topic, including responses to other focus group participants’ ideas and comments, and (2) the development and clearance of a survey would also delay obtaining information, including another ICR. Additionally, the Department states that these two items suggest a survey may have limited practical utility for the Department and that a survey is not within the scope of the Department’s current contract and funding. Finally, the Department states that the “recall” issue is of even greater concern with a survey, because respondents would not be prompted by a moderator to refresh their recollection about the disclosures they received, as they would in a focus group setting.