

MEMO# 28033

April 14, 2014

ICI Submits Letter to OMB Regarding Department of Labor's Proposed 408(b)(2) Guide Rule

[28033]

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TO: PENSION COMMITTEE No. 10-14

PENSION OPERATIONS ADVISORY COMMITTEE No. 8-14 RE: ICI SUBMITS LETTER TO OMB REGARDING DEPARTMENT OF LABOR'S PROPOSED 408(b)(2) GUIDE RULE

The Institute drafted and submitted the attached letter to the Office of Management and Budget (OMB) in response to the proposed amendment to the Information Collection Request (ICR) included within the Department of Labor's (DOL) proposed 408(b)(2) guide rule (proposed rule). [\[1\]](#) We are pleased that four additional trade organizations joined the Institute as signatories on the letter.

OMB, in accordance with its obligations under the Paperwork Reduction Act (PRA), requested comments relating to the collection of information associated with the proposed rule (i.e, the guide requirement). [\[2\]](#) Specifically, OMB requested comments that will assist it in evaluating whether the proposed collection of information is necessary for the proper performance of DOL, including whether the information will have practical utility. Additionally, OMB requested comments that evaluate the accuracy of DOL's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used. As we discussed during the April 8, 2014 joint Committees call, although comments on the proposed rule are due to DOL on or before June 10, 2014 (90 days from the date of publication of the proposed rule in the Federal Register), comments on the ICR amendment associated with the proposed rule were due to OMB by April 11, 2014 (30 days from the date of publication of the proposed rule in the Federal Register). [\[3\]](#)

The letter states that DOL is using the proposed rule itself as an opportunity to collect data and information from the public in order to make findings necessary that the guide contemplated by the proposed rule is (i) necessary for the proper performance of the functions of the agency, and (ii) will have practical utility. Accordingly, the letter states that DOL has not completed the threshold steps of determining whether the guide is needed or will be useful to plan sponsors. Additionally, the letter states that DOL has not developed a realistic estimate of the total time required for affected service providers to prepare the guide. Further, the letter states that given the volume and specificity of comment sought by

DOL on the costs associated with the guide, as well as DOL's statements in the preamble to the proposed rule regarding its lack of data and the imprecision of its estimates, it is clear that DOL is using the proposed rule to obtain data (from those it seeks to regulate) necessary for it to estimate the cost burden associated with the proposed rule.

The letter notes that DOL has provided a 90-day period, or until June 10, 2014, for receiving comments on the proposed rule and states that DOL will simply not be in a position to certify compliance with the PRA, if at all, until it has, at a minimum, completed its information and data collection contemplated by the proposed rule. Further, the letter states that it is unlikely that the public will be in a position to sufficiently inform OMB of its concerns within the 30-day comment period specified by OMB. Given these circumstances, where DOL proceeded with a notice of proposed rulemaking without a sufficient basis with respect to the need, or a realistic estimate of the total time and cost required to comply with the proposed data collection, OMB would not appear to have the ability to conduct its PRA analysis within the required timeframe (60 days from the date of the proposed rule's publication in the Federal Register). As such, the letter states that OMB should hold off on conducting its ICR analysis associated with the guide requirement until DOL develops a record as to the need (and associated costs) for the guide. In the event that OMB concludes that it does not have the authority to delay its ICR analysis, the letter urges OMB to disapprove the ICR and direct DOL to resubmit it after an adequate record has been developed.

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[Attachment](#)

endnotes

[1] For a description of the proposed rule, see [Memorandum](#) to Pension Committee No. 6-14, Pension Operations Advisory Committee No. 4-14 [27959], dated March 14, 2014.

[2] The Paperwork Reduction Act was enacted to reduce the total amount of paperwork burden the federal government imposes on businesses and private citizens and governs executive agency ICRs. Regulations promulgated to implement the PRA provisions include within the definition of "Collection of Information" the requirement to disclose information to third parties. Therefore, the proposed rule's requirement that covered service providers furnish a guide, summary or other tool to the disclosures required by the final 408(b)(2) regulation is governed by the PRA.

[3] Comments on a separate ICR, relating to DOL's intent to conduct focus groups to gather information about the need for a guide, summary or similar tool to help plan fiduciaries navigate and understand the disclosures, are due to DOL on or before May 12, 2014.