

# ASPPA *asap*

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## DOL Fails to Finalize Fee Guidance

*Ilene Ferenczy, CPC, The Law Offices of Ilene H. Ferenczy, Atlanta, GA*

Most practitioners have been anxiously awaiting the issuance by the Department of Labor (DOL) of finalized versions of regulations it proposed in 2007 and 2008 relating to Form 5500 fee disclosures, fee and conflict disclosure to plan fiduciaries, and fee and other disclosure to participants. Notwithstanding instruction from the White House that regulations that were to be finalized in 2008 had to be proposed before June 1, 2008, the DOL assured the industry that its regulations (two of which were proposed after that deadline) would be issued in final form prior to the change in Administration.

It didn't happen.

As a result, these regulations are left to the Obama Administration to either withdraw, finalize, or leave in proposed state. Because the proposed regulations do not become effective until after they are finalized (i.e., you are not required to comply with these regulations in proposed form), no action is needed yet by practitioners or their clients to conform to these rules. In fact, in light of statements made by House Education and Labor Committee Chairman George Miller (D-CA) regarding Congress's desire to revisit fee disclosure, it is likely that these regulations will never see the light of day.

That does not mean that the subject of the regulations will go unaddressed. The need of plan fiduciaries to understand the fees paid by a plan and for participants to be given the information they need to evaluate the investment choices they make remains unmet throughout the marketplace. The Congress and the DOL in their new incarnations will likely review these issues during 2009, and either new legislation or regulations or both are likely to be proposed. While that guidance may be quite different from the regulations originally proposed by the DOL, the information that will need to be shared with plan fiduciaries and participants will probably be very similar to what we've been expecting. Furthermore, the courts are still adjudicating claims for breach of fiduciary duty in relation to the level of fees paid by plans.

So, this is still a pretty hot topic and practitioners should not be too sanguine about the fact that regulations have temporarily stalled.

### ▲ What Should We Do in the Meantime?

The most important items of note about in the meantime are the following:

- Some disclosure will be needed for 2009 Form 5500 completion. Under the new Schedule C, practitioners who do not provide that information to their clients will be identified as unresponsive on the filing. Therefore, practitioners must be thinking about how that information will be secured and then passed on to the client.
- You can be sure that Congress and the DOL will not drop the issue of fee disclosure to fiduciaries. Therefore, systems for obtaining and communicating this information should likely be considered, so that practitioners will be ready for the next set of rules when they come.
- Engagement letters and conflict of interest disclosures are considered by many to be good ways to identify your services and fees, help with collections, and limit your liability. If you do not use some form of letter or contract with your clients, you should consider doing so, and you should consider the level of fee and conflict disclosure you will use in your letters.

(Unofficial information as this is going to press indicates that the service provider regulations and the participant disclosure regulations will not be finalized and are expected to be withdrawn). ASPPA will continue to monitor the situation and keep you posted as developments warrant.