ADISA
ALTERNATIVE & DIRECT INVESTMENT SECURITIES ASSOCIATION
Education ▲ Networking ▲ Advocacy

450 E. 96th Street
Suite 185
Indianapolis, IN 46240

317-663-4180 *main*
www.adisa.org

May 16, 2024

The Honorable Joseph Manchin III
United States Senate
306 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Ted Budd
United States Senate
304 Russell Senate Office Bldg.
Washington, DC 20510

The Honorable William Cassidy
United States Senate
455 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Roger Marshall
United States Senate
479A Russell Senate Office Building
Washington, DC 20510

Dear Senators Manchin, Budd, Cassidy, and Marshall:

On behalf of the Alternative and Direct Investment Securities Association (ADISA), I write to express our support for passage of a Congressional Review Act (CRA) resolution (S.J. Res 79) disapproving the final Department of Labor (DOL) rule published in the Federal Register on April 25, 2024, titled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" (89 FR 32122).

ADISA is the largest association of the retail alternative and direct investment industry in the United States, with over 5,000 members employing more than 220,000 investment professionals, together serving the interests of two million investors throughout the country. ADISA's membership includes retail and managing broker-dealers, Securities and Exchange Commission ("SEC") and State registered investment advisers and firms that sponsor, manage, and distribute various alternative investments including REITs and BDCs, interval funds, and energy programs.

The Congressional Review Act was enacted by Congress in 1996, and signed into law by President Clinton, in an effort to reassert influence over the agency rulemaking process in response to concerns surrounding a rapidly growing number of unnecessary federal regulations. Many viewed rulemakings as having become overly burdensome and unnecessarily expensive; the CRA provided a mechanism for Congressional oversight and to ensure federal agencies were faithful to Congressional intent.[1]

The use of the CRA to disapprove the DOL's Fiduciary Rule is perhaps the perfect opportunity to prevent an excessive, unnecessarily expensive rule with no basis in study or current data, one which will harm the very Americans the DOL espouses to protect, and one promulgated through an abrogated process in violation of the Administrative Procedures Act.

<u>The DOL Rule Will Increase the Wealth GAP and Negatively Impact Retirement Savings.</u> The DOL Rule will unnecessarily impede the ability of a broad cross section of Americans to save for retirement while also increasing the wealth gap by eliminating available investment options, and increasing the advice and services costs to retirement savers:

[1] Congressional Research Services 2021

- In 2021, the Hispanic Leadership Fund (HLF) released a study[2] demonstrating the overwhelmingly destructive impact on Americans of the DOL's revival of its 2016 fiduciary rule, essentially the same as the current Rule. The HLF study concluded that the DOL's actions will increase the wealth gap for Hispanic and Black Americans by *nearly 20 percent.* Without data to the contrary, it's hard not to imagine a similar result in 2024 with this Rule.

- In 2016 the DOL passed a virtually identical 'Fiduciary Rule' that was ultimately invalidated by the Fifth Circuit Court of Appeals in 2018.[3] While that rule was in effect but prior to its invalidation, the accounting and business consulting firm Deloitte studied 21 financial institutions that represented almost half of the U.S. financial advisors across the country. The study found that (i) access to brokerage advice services has been eliminated or limited by 53% of study participants as part of their approach to complying with the Rule; (ii) a shift of retirement assets to fee-based programs had accelerated as the result of the elimination or limitation of brokerage advice services; and (iii) 95% of study participants made changes to the products available to retirement investors, including limiting or eliminating asset classes offered and certain share classes or product structures. In other words, in a relatively brief period following the Rule's adoption, Americans holding more than 10 million accounts representing nearly $900 billion lost access to a vital model for affording financial services and products and/or were provided with fewer options and higher costs.[4]

The potential harm means the CRA is vitally necessary. What little research exists suggests that there already exists lack of access to financial advisory services in underserved communities across America. Since the U.S. General Accounting Office concluded in 2023 that achieving adequate retirement savings is an existing and growing problem for low-moderate income families,[5] the CRA seems the right mechanism to nullify a rule likely to restrict investment choices and raise costs--two ends that are clearly at odds with Congressional intent in this area. It is both perplexing and counterintuitive to think that the DOL would adopt a rule potentially so damaging to Americans for whom the agency purports to protect. Sound retirement policy should focus on increasing access for all Americans-- not just some-- to products that support wealth creation, thereby shrinking the wealth gap among many socio-economic groups.

The DOL Eschewed Public Comment, Abrogating the Rulemaking Process in Violation of the Administrative Procedures Act. The process by which DOL promulgated its new version of the Fiduciary Rule raises serious questions: in developing and adopting this Rule the DOL failed to adequately ensure public input was provided and considered from key stakeholders, violating core requirements of the APA which mandates that federal agencies provide the public a meaningful opportunity to participate in the rulemaking process. By ignoring stakeholder concerns, the DOL has promulgated a rule that fails to protect the best interests of many retirement savers and hard-working Americans. These shortcomings undermine the principles of transparent and accountable government:

- **Insufficient and historically short comment period.** The comment period for the proposed Fiduciary Rule was 60 days, compared to 119 days for the 2010 version of the fiduciary proposal, and 105 days for the 2015 fiduciary proposal. Despite the rulemaking period's inclusion of several significant holidays, including Christmas and New Year's, DOL summarily dismissed stakeholders' requests for an extended comment period.

- **Unprecedented hearing in the middle of the comment period.** For perhaps the first time in history, DOL held a hearing in the middle of the comment period, rather than waiting for commenters to finish their review of the proposal. Thus, stakeholders were

2 https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf
3 Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab., 885 F. 3d 360 (5th Cir. 2018) (Chamber).
4 Deloitte 2017
5 US GAO 2023

prohibited from reviewing or addressing issues raised in many other stakeholder comment letters in their testimony.

- **DOL's process appears driven solely by political deadlines, not policy quality**. The motivation for this rushed process appears to be driven by a May 2024 deadline to ensure that the final rule cannot be subject to a Congressional Review Act vote in 2025. In other words, DOL's efforts are not driven by a desire to get this rule right, but rather by political deadlines during an election year. It's adoption of the Fiduciary Rule on this abbreviated and unnecessarily truncated schedule represents a classic "rush to judgment" – in this case made worse by a failure to conduct adequate research into the Rule's impact.

The DOL Rule Lacks Meaningful Economic Impact Analysis. Considering the above points, it is clear there is a need for a wide-ranging impact study of the proposed Rule to assess how retirement savers will be impacted by the final rule and to search for approaches that will expand opportunity and not negatively increase the wealth gap.

- ADISA supports public policies which do not result in unintended consequences nor negatively impact investors who are retirement savers. A study to analyze the proposal and its impacts on all stakeholders and the wealth gap and to identify ways to achieve sound policy goals without harming many low balance retirements savers should have been done before any rule was proposed much less promulgated. Congress can ensure this is done, and Americans are protected, by using the CRA to disapprove the DOL Rule.

It is both perplexing and counterintuitive that the DOL and "consumer" advocates have refused to provide Americans or Congress with credible data about the likely impact of the Rule on all investors and raises the question, why has the DOL refused to support a timely study to ensure investors are not negatively impacted and the wealth gap not increased by the Rule?

In the process of moving too quickly to adopt an important (arguably a trillion-dollar impact) and far-reaching rule for various reasons, the DOL avoided examining the interaction of the Rule on other related policies and regulations, such as Regulation Best Interest (Reg BI). The DOL also missed the opportunity to do the type of vital, careful research needed to understand both the intended and unintended consequences of the Rule on small balance savers, older savers, new savers, and savers from communities that have experienced and continue to experience wealth and retirement savings gaps.

In conclusion, ADISA strongly believes the Biden Administration and the political leadership within the Department of Labor have violated both the letter and spirit of the Administrative Procedure Act, thereby warranting the use of the CRA.

We appreciate your continued focus on this issue and thank you for your strong leadership. We look forward to continuing to work with you and all relevant parties, including the DOL. We appreciate your support in protecting the financial futures of countless American families.

Sincerely,

Jade Miller
President

cc: Chairman Bernie Sanders, Senate Committee on Health, Education, Labor and Pensions
ADISA L & R Drafting Committee (C. Bowman, J. Grady, J. Harrison, T. Rosenfield)