



# MFDF

*Trusted Insight for Independent Oversight*

Mr. Fred Wong  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Fiduciary Duties in Selecting Designated Investment Alternatives, RIN 1210-AC38

Dear Mr. Wong:

MFDF<sup>1</sup> welcomes the opportunity to comment on the Department of Labor’s (“DOL”) recent rule proposal (“the Proposal”) regarding the inclusion of alternative investment options in retirement plans.<sup>2</sup> As we discuss below, the Proposal mirrors other recent initiatives by the Securities and Exchange Commission (“SEC”), Commodity Futures Trading Commission (“CFTC”) and others to make alternative investment products and strategies more widely available to retail investors while simultaneously acknowledging the need for appropriate protections. As the DOL develops and implements its approach in this area, we believe it is important for it, as well as retirement plan sponsors and retirement investors, to appreciate the ways that registered investment companies, overseen by independent directors, advance investor protections that the DOL itself identifies as fundamental.

MFDF is an independent association for independent directors of mutual funds, ETFs, closed-end funds, and other registered investment companies (“RICs”). MFDF helps independent directors navigate an evolving regulatory environment and steward shareholders’ investments.

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<sup>1</sup> MFDF’s current membership includes over 1280 independent directors, representing 139 fund groups. Each member group selects a representative to serve on MFDF’s Steering Committee. This comment letter has been reviewed by the Steering Committee and approved by MFDF’s Board of Directors, although it does not necessarily represent the views of all members in every respect.

<sup>2</sup> See Fiduciary Duties in Selecting Designated Investment Alternatives, RIN 1210-AC38, 91 Fed. Reg. 16,088 (March 31, 2026).

MFDF provides tailored educational resources and facilitates peer-to-peer networking, with offerings that include webinars, white papers, and interactive conferences.

As we discuss below, the Investment Company Act of 1940, as amended (“Investment Company Act”) sets forth a regulatory framework for independent directors to oversee RICs and to represent the interests of RICs and their shareholders. MFDF believes that the important investor protections offered by independent directors can inform the Proposal. Retirement plan sponsors may find the unique, on-going investor protections offered by independent directors of RICs a useful tool in their investment process.

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In recent years, numerous financial regulators, including the SEC and the CFTC, have taken steps to broaden retail investor access to alternative investment strategies rather than limiting these strategies to wealthier and presumably more sophisticated investors. The DOL’s Proposal to expand access to alternative investment strategies in ERISA plans is consistent with this trend.

The Proposal clarifies a fiduciary’s duty of prudence when selecting investment options for retirement investors in ERISA plans and establishes a process-based safe harbor for use when selecting such investment options. It identifies the six factors that plan sponsors should consider in this process: the “performance, fees, liquidity, valuation, benchmarking and the complexity of the . . . investment alternative.”<sup>3</sup>

While the Proposal’s safe harbor does not require retirement plan sponsors to limit investment options to RICs, the factors suggested in the Proposal track protections in the Investment Company Act. As a result, the independent directors of RICs consider many of these factors on an on-going basis in their oversight of funds, including those that employ alternative strategies.<sup>4</sup> Importantly, the discretion and business judgment exercised by independent

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<sup>3</sup> Proposal, *supra* note 2, at 16,095.

<sup>4</sup> As our comment makes clear, we believe a retirement plan sponsor can consider the protections provided by the independent directors of a RIC in assessing its appropriateness for inclusion in a retirement plan. Perhaps even more importantly, independent directors provides these protections on an ongoing basis, which is clearly relevant to the future guidance the DOL plans to provide to sponsors on their ongoing oversight duties once they have selected an alternative investment option for inclusion in the plan. See the Proposal, *supra* note 2, at 16,093-94 (“The Department anticipates issuing interpretive guidance in the near

directors in discharging their fiduciary and regulatory obligations is narrower in scope than the fiduciary duty of prudence imposed on plan fiduciaries.<sup>5</sup>

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While RICs tend to exist within broader fund complexes and are managed by an investment adviser that is generally an affiliate of the sponsor of the fund complex and receives a fee for its services, the fund itself is an independent entity with its own board of independent directors. One challenge of the investment fund structure is a potential information asymmetry between advisers and shareholders. Thus, the role of the independent director is not only a governance feature, but a mechanism for mitigating this asymmetry through informed, ongoing oversight. Fund directors ultimately owe a fiduciary duty to the fund (and ultimately the fund's shareholders) and not to the fund's adviser or to the corporate entity that profits from managing the fund.

Independent directors are thus fundamental to the protection of fund investors. Pursuant to the Investment Company Act and the SEC's regulatory approach, independent directors regularly review the fund's performance, including the appropriateness of the benchmarks it uses to gauge its performance and the cost of the fund to its investors, including the fees paid to its investment adviser. Independent directors also oversee the process the fund uses to value its portfolio and the liquidity of that portfolio. Additionally, independent directors address conflicts in the management of the fund, including conflicts between funds managed by the same adviser, so that they are resolved in the best interests of the fund's shareholders.

Independent directors undertake these responsibilities to help protect the interests of fund shareholders. If independent directors have concerns regarding these factors, they can take a variety of actions, including renegotiating the fees paid to the adviser and other terms and conditions of the advisory contract. Independent directors are thus key to ensuring that fund

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term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu.”)

<sup>5</sup> See, e.g., *Hughes v. Northwestern University*, 595 U.S. 170 (2022) (“[P]lan fiduciaries are required to conduct their own investment evaluation to determine which investments may be included in the plan's menu of options,” even when the menu contains many registered funds.).

investors get what they pay for and play a key role in deepening the trust that investors place in RICs.

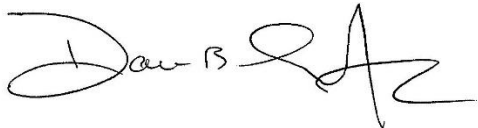
Hence, while plan sponsors who opt to offer plan participants access to alternative investments can choose among a variety of different investment structures, they may well recognize that the factors independent directors of RICs consider on a routine basis are well-aligned with the factors identified by the DOL. Furthermore, the role of independent directors is well known and tested vis-a-vis the 401k market as mutual funds are currently widely offered through retirement plans.

As noted above, the ongoing oversight provided by independent directors helps ensure that such investments are not only appropriate when initially chosen, but that they continue to be so as long as they remain a plan option. That assurance, however, does not substitute for the broader duty of plan fiduciaries to evaluate which investment options may be included in a plan's menu of options. Ultimately, the determination of suitability and "appropriateness" of investment options is the responsibility of plan fiduciaries.

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We would welcome the opportunity to discuss these comments in more detail. Please feel free to contact David Smith, MFDF's General Counsel, at [David.smith@mfdf.org](mailto:David.smith@mfdf.org) or 202-507-4491 or Carolyn McPhillips, MFDF's President, at [Carolyn.mcphillips@mfdf.org](mailto:Carolyn.mcphillips@mfdf.org) or 202-507-4493.

Sincerely,

A handwritten signature in black ink, appearing to read "David B. Smith Jr.", with a stylized flourish at the end.

David B. Smith Jr.  
Executive Vice President  
and General Counsel