

New ESMA Guidelines for Fund Marketing Communications

ESMA has published its final report and guidelines on marketing communications¹ (the "Guidelines") which set out disclosure principles and requirements for any communications which market funds to EU investors.

The Guidelines have been issued in the context of the new EU regime on the cross-border distribution of investment funds, which come into effect on 2 August 2021 (for further details on this regime please see our previous client update²).

While the Guidelines bring a level of clarity and practical guidance to the requirements for marketing communications, notably they do not replace, i.e. they are in addition to, existing national requirements on the information to be included in marketing communications.

It can also be noted that ESMA has recently released its first report on national rules governing the marketing of funds³, which, inter alia, collates in one place the requirements in each EU member state for marketing funds.

While many of the obligations are not in principle new (e.g. use of disclaimers, must be fair, clear and not misleading, consistency with a fund's legal and regulatory documentation), the impact of the Guidelines may well be that

individual asset manager's marketing materials will become more akin to regulatory disclosures with the introduction of legalistic language, for example the requirement for short marketing communications to be 'as neutral as possible'.

Who is in scope?

The obligations in the Guidelines apply directly to UCITS management companies, AIFMs, EuVECA managers and EuSEF managers ("Managers").

What marketing information is in scope?

The Guidelines apply to all '**marketing communications**' addressed to EU-based investors or potential investors in any fund (UCITS or AIFs). A very broad meaning to what can constitute marketing communications is set out and includes:

- All messages advertising for a UCITS or an AIF, regardless of the medium (printed material, articles / releases / interviews in the press, webpages and documents on the internet, presentations whether live or on video or radio).
- Messages broadcast on any social media platform (e.g. Twitter, LinkedIn, Instagram, YouTube, etc.), which refer to any fund characteristics (including its name).
- Marketing materials or presentations addressed to individual investors or the public.
- Communications advertising a fund to investors or potential investors.

¹ <https://www.esma.europa.eu/document/final-report-guidelines-marketing-communications>

² <https://maples.com/en/knowledge-centre/2021/6/eu-cross-border-fund-distribution-rules-are-you-ready>

³ <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-first-overview-national-rules-governing-fund-marketing>

- Communications by a third party used by a Manager for marketing purposes.

Exception / Marketing Information not in Scope

The Guidelines also provide examples of communications that should not be considered as marketing communications, including:

- Legal and regulatory documents / information, such as a fund's prospectus, constitutional documents, financial reports or the KIID / KID.
- Corporate communications broadcast by the Manager describing its activities or recent market developments which do not identify a specific fund or group of funds (e.g. disclosure of earnings or senior management changes).
- **'Pre-marketing'** communications for AIFs only (as defined in AIFMD under the new cross-border distribution of funds regime).
- Short messages broadcast online, in particular, on social media which only include a webpage link where a marketing communication is available but which do not refer to a specific fund or group of funds.

Requirements under the Guidelines

The Guidelines build out the high-level obligations in Article 4(1) of the Regulation on cross-border distribution of funds⁴ requiring Managers to ensure that all marketing communications addressed to investors: (i) are identifiable as such; (ii) give equal prominence to descriptions of the risks and rewards of purchasing units / shares in a fund; and (iii) that all information contained in marketing communications is fair, clear and not misleading.

⁴ Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings

What follows is a summary of several of the key requirements.

Guidelines on the Identification as such of Marketing Communications

- All marketing communications should make it clear that its purpose is purely for marketing and it is not sufficient to take an investment decision. A prominent disclosure of the term 'marketing communication' will be deemed to identify the relevant information as such.
- Marketing communications should clearly display a disclaimer such as: "*This is a marketing communication. Please refer to the [prospectus of the fund] and to the [KIID / KID] (as applicable) before making any final investment decisions.*" Where this disclaimer does not fit to the format and length of an online marketing communication, it may be replaced by a shorter identification such as the words "Marketing Communication" (or the hashtag #MarketingCommunication on social media platforms). The appropriate level of clarity is format-dependant (e.g. in the case of video presentations, the disclaimer should be embedded in the video and not merely displayed at the end of the video).

Guidelines on the Description of Risks and Rewards in an Equally Prominent Manner

- Where marketing communications reference any potential benefit of purchasing units / shares, a fair and equally prominent indication of any relevant risks should be disclosed⁵, at the same level or one immediately after the other. Marketing communications should not refer to the rewards without referring to the risks.
- When disclosing such information, the font and size used to describe the risks should be at least equal to the predominant size used

⁵ Presenting risks and rewards in the form of a two-column table or summarised in a list clearly differentiating the risks and the rewards on a single page is a good example of how risks and rewards can be presented in an equally prominent manner.

throughout and its position should ensure prominence (e.g. information on risks should not be disclosed in a footnote).

Guidelines on the Fair, Clear and not Misleading Character of Marketing Communications

- Marketing communications should be suitable to the target investors or potential investors. Promoters of funds open to retail investors should avoid using excessively technical wording and provide an explanation of terminology.
- Information presented in marketing communications (e.g. sustainability-related aspects⁶) should be consistent with that contained in the promoted fund's legal and regulatory documents.
- Where features of the promoted investment are described, such information is to be kept up to date and **should contain sufficient information to understand the key elements of those features and should not make excessive cross-reference to the fund's legal and regulatory documents.**
- The amount of information included should be proportionate to the size and format of the communication and should be presented in a way likely to be understood by the average member of the group to whom it is directed or likely to be received.
- Marketing communications that mention risks and rewards should at least refer to the relevant risks in the fund's legal and regulatory documents and mention where complete information on the risks can be located in a clear and prominent manner.
- When referring to costs, an explanation on the overall impact of costs on the amount

of investors' investment and expected returns should be included along with the impact of any currency / exchange rate fluctuations.

- The Guidelines include detailed provisions and several disclaimers that may apply regarding disclosure of past fund performance, simulated performance and expected future performance. For example, in the case of past performance, the disclaimer "*Past performance does not predict future returns*" must precede any such information, and performance should not be the main information in the communication and should be based on historical data.
- Where information on the sustainability-related aspects of the fund are mentioned: (i) it should not outweigh the extent to which the investment strategy integrates sustainability-related characteristics or objectives; and (ii) marketing communications should indicate that the decision to invest should take into account all of the fund characteristics or objectives as described in its prospectus.

Timeline

The Guidelines will apply six months after their date of publication on ESMA's website in all EU official languages.

Further Information

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