

ESMA Report on MiFID II Marketing Requirements

On 27 May 2024, the European Securities and Markets Authority ("ESMA") published a report on the application of the Markets in Financial Instruments Directive II ("MiFID II")¹ disclosure requirements to marketing communications by investment firms². This was based on a Common Supervisory Action ("CSA") and a mystery shopping exercise performed by the national competent authorities throughout 2023.

Review Areas

The CSA focused on the following areas:

- (a) Whether the information was clearly identifiable as marketing communication;
- (b) Whether the content (including advertisements) was provided in a fair, clear and non-misleading manner, regardless of the means of communication used;
- (c) The criteria used by the firm for the selection of the target audience (including advertisements) concerning financial instruments and investment services;
- (d) The organisational requirements and processes of firms in relation to marketing; and
- (e) The social media strategies of firms, including the use of influencers or digital engagement practices.

Overall Findings

The report covers various aspects of the organisation and content of marketing communications, such as internal controls and processes, outsourcing and collaboration with third parties, record-keeping and complaints handling and the presentation of information on risks, costs, performance, comparisons and sustainability. In general, ESMA found good practices being employed by investment firms. However, the report also identified some areas where improvement is needed to ensure compliance with MiFID II requirements and to protect investors from misleading information.

ESMA stressed the importance of control functions and senior management being involved in the development, design and oversight of marketing communications, including advertisements, and their having adequate internal procedures in place. Investment firms should remember that as part of their oversight responsibility, the actual distribution of marketing communications must also be monitored to ensure it occurs as approved.

Procedures Related to Sustainability

ESMA noted that firms do not have specific processes and procedures in place for sustainability-related claims in marketing communications. ESMA encourages control functions and senior management to be

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065>

² https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5931_Final_Report_on_the_2023_Common_Supervisory_Action_and_Mystery_Shopping_Exercise_on_marketing.pdf

involved in such claims to mitigate greenwashing risks and to ensure that sustainability claims are fair, clear and not misleading. Where investment firms make sustainability-related claims in their marketing communications, these should be accurate, specific, substantiated and understandable³.

Outsourcing Marketing Communications to Third Parties

Several investment firms reviewed during the CSA had opted to outsource marketing communications or to collaborate with third-party firms. While this is permissible, shortcomings were noted in the review of the marketing communication produced by the third parties, and ESMA expects investment firms to have adequate review and approval processes in place where third parties are involved.

Marketing Communication Considerations

In designing and distributing their marketing communications, investment firms should ensure these are compliant with the following criteria:

- (a) Marketing material must be clearly identifiable as such and should not be confused with factual information;
- (b) Risks and benefits must be presented in a balanced manner regardless of the means of communication used, and should not be obscured or presented in a way that can be easily overlooked;
- (c) Information on costs, charges and special offers should be clear and not misleading and must clearly mention all fees which might apply;

³ This is in line with the general trend at EU level calling for more accountability in relation to sustainability claims. The European Supervisory Authorities have called for enhanced supervision and improved market practice on sustainability-related claims: <https://www.esma.europa.eu/press-news/esma-news/esas-call-enhanced-supervision-and-improved-market-practice-sustainability>

- (d) Risk warnings (when required) must be displayed in a prominent manner; and
- (e) Information on past and future performance should be accompanied by appropriate warnings and should be consistent with the regulatory requirements.

Recommended Measures for Firms

The report serves as a timely reminder of the importance of adhering to MiFID II disclosure requirements in marketing communications. It is recommended that investment firms review and revise their marketing materials and related processes to ensure compliance.

The Financial Services Regulatory Group at Maples Group can assist investment firms in navigating the complexities of MiFID II compliance, for example through carrying out review audits of your marketing materials and processes, or by assisting in developing or updating policies and procedures that align with MiFID II requirements and best practices for marketing communications.

Further Information

Further information on our Irish Financial Services Regulatory Group and the services we provide is available on our website⁴ and in our FSR⁵ and FinTech⁶ brochures. If you would like further information, please liaise with your usual Maples Group contact or the persons below.

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⁴ <https://maples.com/en/services/specialty-services/irish-financial-services-regulatory>

⁵ <https://maples.com/-/media/files/pdfs/articles-and-chapters/financial-services-regulatory-group---core-services.pdf>

⁶ <https://maples.com/-/media/files/pdfs/general/fintech---june-2021.pdf>

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