



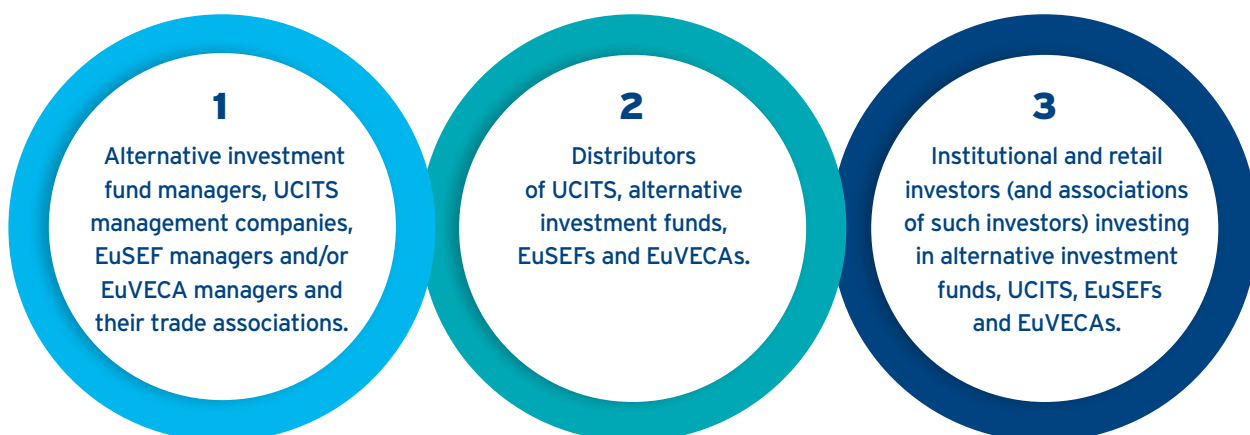
ESMA CONSULTS ON GUIDANCE FOR FUNDS' MARKETING COMMUNICATIONS

On 9 November 2020 the European Securities and Markets Authority (ESMA) launched a consultation on 'Guidelines on marketing communications under the Regulation on facilitating cross-border distribution of funds' (the CP or Guidelines).¹

Regulation (EU) 2019/1156 of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings (the Regulation)² specifies that AIFMs, EuVECA³ managers, EuSEF⁴ managers and UCITS management companies shall ensure that marketing communications addressed to investors are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and that all information included in marketing communications is fair, clear and not misleading.

The Regulation provides that ESMA shall develop guidelines on the application of these requirements for marketing communications, taking into account the online aspects of such marketing communications.

The CP represents the first step in the development of these guidelines and sets out proposals on which ESMA is seeking the views of external stakeholders. The CP will be of interest to:



Background

The Regulation, along with the directive on cross-border distribution of collective investment undertakings⁵, aims at facilitating the cross-border marketing of UCITS and AIFs, including EuVECAs and EuSEFs (referred to collectively as “funds” in this e-briefing), throughout the EU by removing existing barriers and enhancing the protection of investors.

In order to achieve this goal, the Regulation contains various tasks ascribed to ESMA, in particular to develop three sets of implementing technical standards setting out standard forms, templates and procedures for the publication of information by competent authorities on their websites and for the

notifications by competent authorities to ESMA in relation to national marketing requirements, regulatory fees and charges, and funds distributed on a cross-border basis.

In addition, Article 4(6) of the Regulation requires ESMA to issue guidelines by 2 August 2021. According to Article 4(6), these Guidelines shall take into account the online aspects of marketing communications.

As this is a general requirement that can apply to all aspects of marketing communications, ESMA is of the view that it should not be detailed in a separate section of the Guidelines, but rather treated as an aspect of all other requirements mentioned in Article 4(1) of the Regulation.

Against this background, the following sections of the CP summarise ESMA's proposals in relation to the Guidelines:

Section 3	Scope of the Guidelines.
Section 4	Guidelines on the identification as such of marketing communications.
Section 5	Guidelines on the description of risks and rewards in an equally prominent manner.
Section 6	Guidelines on the fair, clear and not misleading character of marketing communications.
Annex I	Contains the legislative mandate set out in the Regulation to develop the Guidelines.
Annex II	Sets out the cost-benefit analysis related to the draft guidelines.
Annex III	Sets out the list of questions contained in this paper.
Annex IV	Contains the full text of the draft guidelines.

Scope of the Guidelines

Since the scope of the Regulation is limited, by virtue of its Article 2, to fund managers, only these entities are subject to the Guidelines. Consequently, distributors, such as investment firms, are not subject to the Guidelines, although they may have to apply other rules governing the information issued to investors or potential investors, such as Article 44 of the Commission Delegated Regulation (EU) 2017/565, which contains conditions for ensuring fair, clear and not misleading information to clients.

ESMA acknowledges that the distribution of funds is often carried out by distributors rather than directly by their fund managers, and that discrepancies between the requirements applicable to fund managers marketing the unit or shares of the funds that they manage and those applicable to distributors should be avoided, where possible. To this end, the requirements set out in the Guidelines have been designed to be substantially equivalent to those set out in Article 44 of the Commission Delegated Regulation (EU) 2017/565.

Notwithstanding the above, Article 4 of the Regulation specifies that fund managers are responsible for all marketing communications addressed to investors in relation to funds that they manage. Hence, they should be responsible for ensuring compliance of all marketing communications addressed to investors even when they are being addressed by distributors. This concerns, for example, situations where the authorised fund

manager delegates the marketing function for the funds that it manages to a distributor. In such a situation, the fund manager should ensure that the relevant requirements for marketing communications are complied with by the distributor. In order to do so, it should contractually impose on the distributor(s) the requirement to comply with the applicable marketing requirements the manager is subject to.

Guidelines on the identification as such of marketing communications

Article 4(1) of the Regulation provides that all marketing communications addressed to investors shall be identifiable as such. In ESMA's view, the purpose of this requirement is to ensure that investors or potential investors can clearly identify that a communication aims at promoting investment in the shares or units of a fund and distinguish them from the legal and regulatory documentation of the fund, which provides more detailed information on the features of its units or shares.

The distinction between marketing communications and legal and regulatory documents may not always be clear, especially for retail investors. In addition, when provided in an online environment, marketing communications may not always appear as such. For example, the use of short messages on social media or the use of full webpages dedicated to promoting the investment in shares or units



of an AIF or a UCITS may make it difficult to understand that the communication has a marketing objective.

To avoid all possible confusion between the legal documentation of a fund and marketing communications, ESMA is of the view that these communications should include a short disclaimer, which would make it clear that they have a marketing aim, and which would draw the attention of investors or potential investors to the fact that an investment decision should not be based only on this marketing communication.

This disclaimer should also mention the existence of the legal and regulatory documents of the promoted fund, in particular the prospectus or the information documents referred to in Article 23(1) of the AIFMD, Article 13(1) of the EuVECA Regulation or Article 14(1) of the EuSEF Regulation, and of the KID or KIID, as to ensure that investors or potential investors are made aware of the existence of these documents. This disclaimer should be stated in a clear manner, which should be assessed in consideration of the type of marketing communication (e.g. for video presentations, the disclaimer should appear in a prominent manner in the video, a short warning at the end of the video would not be sufficient).

Additionally, Article 4(2) and 4(5) of the Regulation require that marketing communications disclose the existence of the fund's prospectus or KIID. In accordance with these provisions, marketing communications should clearly indicate where and how to obtain these documents.

Guidelines on the description of risks and rewards in an equally prominent manner

According to Article 4(1) of the Regulation, UCITS management companies, AIFMs, EuVECA managers and EuSEF managers shall ensure that all marketing communications describe the risks and rewards of purchasing units or shares of an AIF or units or shares of a UCITS in an equally prominent manner.

In ESMA's view, this requirement does not aim at addressing the content of the information on the risks and rewards of

investing in the shares or units promoted in the marketing communication. It rather relates to the format of the description of risks and rewards and aims at allowing investors or potential investors to identify in a clear and easily understandable manner both the risks and the rewards of the promoted fund. This requirement should ultimately lead to a balanced disclosure of risks and rewards.

The disclosure of risks and rewards in an equally prominent manner does not imply that this information is mandatory in all marketing communications. However, the following requirements should be applied for all marketing communications that include a reference to the risks or rewards of investing in the promoted fund.

This requirement does imply that the marketing communication should refer to both the risks and the rewards in the same manner, by using the same font and size, and by placing each description along with the other in the communication. This could be done, for example, either in the form of a table or as a list.

Marketing communications in which risks and rewards are not described with a similar format should be considered as not meeting the requirements set out in the Regulation. This would concern marketing communications where the rewards are described at the beginning while the risks are described at the end, marketing communications in which the rewards are described in the main body while the risks are described in a footnote, or marketing communications which contain only a description of the rewards and refer to another document containing the description of the risks.

Guidelines on the fair, clear and not misleading character of marketing communications

Under Article 4(1) of the Regulation, fund managers shall ensure that "all information included in marketing communications is fair, clear and not misleading". The purpose of these requirements is to ensure that the information contained in all marketing communications is balanced, understandable, not confusing to investors or potential investors, and is

consistent with, and not contrary to, the legal and regulatory documentation of the promoted fund.

However, the Guidelines do not aim at replacing existing national requirements on the information to be included in marketing communications (such as those relating to the fiscal treatment of the investment in the promoted fund) to the extent these are compatible with any existing harmonised EU rules (e.g. rules on disclosure of costs or performance in the KIID should not be contradicted or diminished by different national disclosure requirements on costs or performance in marketing communications).

To achieve this goal, ESMA proposes that the Guidelines include different sets of requirements to be taken into account when drawing up marketing communications. In particular, the Guidelines should set out some general requirements that all marketing communications, regardless of their format, outlook or content, should meet.

Additionally, the Guidelines should include guidance on the presentation of some specific information, in particular information on the risks and rewards of purchasing units or shares of a fund, the costs associated with the investment, the past and expected future performance, and the sustainability-related aspects of the investment.

Next steps

The CP represents ESMA's first step in the development of guidelines on the application of these requirements for marketing communications, taking into account the online aspects of such marketing communications.

ESMA invites feedback from interested stakeholders on the proposed guidelines by 8 February 2021 and will consider this feedback with a view to issue final guidelines by 2 August 2021.

¹ See https://www.esma.europa.eu/sites/default/files/library/esma34-45-926_-_cp_guidelines_on_marketing_communications.pdf.

² See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1156&from=EN>.

³ European Venture Capital Fund.

⁴ European Social Entrepreneurship Fund.

⁵ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1160&from=EN>.

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