

**MEMO# 33682**

July 12, 2021

# Final ESMA Marketing Communication Guidelines

[33682]

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TO: EU ESG Disclosure Regulation Working Group  
EU Sustainable Finance Strategy Working Group  
Global Operations Advisory Committee  
ICI Global EU Capital Markets Union Task Force  
ICI Global Regulated Funds Committee  
International Compliance Advisory Committee RE: Final ESMA Marketing Communication Guidelines

On 27 May 2021, the European Securities and Markets Authority (ESMA) published [\[1\]](#) its final report [\[2\]](#) ("the report") on funds' marketing communications guidelines ("the Guidelines") under the Cross-border Distribution of Funds Regulation (CBDFR). [\[3\]](#) The final report follows the publication of a consultation paper (CP) on the draft guidelines in November last year, [\[4\]](#) to which ICI Global responded. [\[5\]](#)

## Final Report

ESMA notes that while stakeholders generally agreed with its draft Guidelines, there were recurring comments in the responses to the CP. In particular, ESMA highlights that the majority of respondents were concerned by the responsibility of fund managers to ensure that all marketing communications, even those issued by third-party distributors, meet the requirements in the Guidelines. Furthermore, ESMA notes that the majority of stakeholders felt that full account had not been taken of the on-line aspects of marketing communications. ICI Global made both of these points in its response.

## Guidelines

Annex I of the Final Report contains: (i) a summary of the feedback received by ESMA in response to the CP; and (ii) ESMA's response to this feedback. Annex IV contains the final Guidelines, which are also attached to this memo.

## Scope

ESMA highlights that the majority of respondents to the CP called for clarification of the

responsibility of fund managers with regards to the content of marketing communications. Furthermore, several respondents, including us,[\[6\]](#) considered that fund managers should not be held responsible for marketing communications issued by third-party distributors "on which they had no reach." Accordingly, ESMA has amended its Guidelines to remove the reference to the responsibility of fund managers for the content of marketing communications.

ESMA notes that the vast majority of respondents to the CP called for consistency between the Guidelines and the requirements in the MiFID II Delegation Regulation.[\[7\]](#) Furthermore, ESMA notes that some respondents indicated that the Guidelines were overly prescriptive and should be more principle-based. In our response, we identified specific aspects of the draft Guidelines that should be aligned to the MiFID II Delegation Regulation and more principles-based in nature. ESMA notes that respondents to the CP also identified the following gaps between the draft Guideline and the requirements in the MiFID II Delegation Regulation:

- The draft Guidelines are more prescriptive on the exact location of information on risks in marketing communications;
- The requirement in the draft Guidelines to disclose the source of past performance data goes further than the MiFID II Delegated Regulation;[\[8\]](#)
- The disclaimer in paragraph 45 of the draft Guidelines[\[9\]](#) is phrased differently and in a more restrictive manner than the MiFID II Delegated Regulation, reducing flexibility;[\[10\]](#)
- The requirement in the draft Guidelines to include a "prominent warning indicating that returns may increase or decrease as a result of currency fluctuation" is more stringent than the warning required by the MiFID II Delegated Regulation and as such the word "prominent" should be deleted.[\[11\]](#)

ESMA also notes that respondents identified other requirements in the MiFID II Delegated Regulation that were not in the draft Guidelines.

To take account of comments made by respondents to the CP, ESMA has made various changes to the final Guidelines including removing a point on the "positive list" of marketing communications and adding an additional point on the negative list to exclude pre-marketing materials, as we suggested in our response.[\[12\]](#)

ESMA highlights that the majority of respondents to the CP, including us, did not believe that the draft Guidelines appropriately took into account the on-line aspects of marketing communications. ESMA notes the particular concern of respondents that the reduced word count of social media messages was not compatible with the requirement to include several disclaimers in such communications. Accordingly, ESMA included a provision in the MiFID II Delegated Regulation[\[13\]](#) to provide more flexibility in the presentation of marketing communications in an on-line environment.

### ***Guidelines on the Identification of Marketing Communications***

ESMA highlights that the majority of respondents agreed that a negative list and a positive list of what should not and what should be considered respectively as marketing communications should be maintained in the Guidelines. ESMA noted the wide range of recommendations from respondents for changes to the lists in the draft Guidelines. ESMA has maintained amended negative and positive lists in the final Guidelines but has not added a suggested list of general criteria to help determine whether a communication

should qualify as a marketing communication as this may go beyond ESMA's mandate and overlap with the definition of marketing.

ESMA highlights that the majority of respondents agreed that the use of a short disclaimer to identify a marketing communication was appropriate. However, the majority of respondents, including us,[\[14\]](#) agreed that the content and length of the disclaimer should be adaptable depending on the circumstances (e.g., the target audience, means of communication, etc.) In response, ESMA has included in the final Guidelines a requirement that marketing communications include the following disclaimer:

"This is a marketing communication. Please refer to the [prospectus of the [UCITS/ AIF/EuSEF/EuVECA]/Information document of the [AIF/EuSEF/EuVECA] and to the [KIID/KID](delete as applicable)] before making any final investment decisions."

However, when the disclaimer is not fit to the format and length of an on-line marketing communication, the final Guidelines enable this to be replaced by a shorter identification of the marketing purpose of the communication, such as the words "Marketing Communication" in the case of a banner or short videos lasting only a few seconds on a website or the word "#MarketingCommunication" for social media platforms.

### ***Guidelines for the Description of Risks and Rewards in an Equally Prominent Manner***

ESMA highlights that while respondents generally agreed that risks and rewards should be presented in an equally prominent manner, many respondents, including us,[\[15\]](#) called for closer alignment with the requirements of the MiFID II Delegated Regulation[\[16\]](#) and considered the draft Guidelines to be overly detailed. Furthermore, many respondents mentioned that the Guidelines should only require the disclosure of relevant risks. We recommended that information should be laid out in a manner that ensures that relevant risks are at least as prominent as other information, consistent with the requirements in the MiFID II Delegated Regulation and taking into account the type of marketing communication concerned.[\[17\]](#) ESMA appears to have taken account of these comments in the final Guidelines.

### ***Guidelines on the Fair, Clear, and Nondeceptive Character of Marketing Communications***

ESMA notes that respondents generally agreed with its proposed approach to ensuring that marketing communications are fair, clear, and not misleading. However, the majority of respondents, including us,[\[18\]](#) disagreed with the proposed requirement for marketing communications to use the same information as is included in the information documents of the promoted fund. Instead, respondents suggested allowing the use of 'non-contradictory information' or 'consistent and noncontradictory information' instead of similar information. ESMA agrees with these suggestions and has amended the Guidelines accordingly.

ESMA highlights that respondents unanimously agreed that no minimum set of information on the characteristics of promoted investments should be required in all marketing communications.[\[19\]](#)

### ***Guidelines on the Presentation of Risks and Rewards***

ESMA notes that respondents, including us,[\[20\]](#) recommended that marketing communications should not be required to refer to all the risks included in the Key Investor Information Document (KIID) or Key Information Document (KID) but instead refer to material risks. In light of these comments, ESMA has amended the Guidelines to require that "relevant risks" should be referenced in marketing communications, consistent with the requirements in the MiFID II Delegated Regulation.[\[21\]](#)

### ***Guidelines on the Presentation of Costs***

ESMA highlights that several respondents agreed that marketing communications should have information allowing investors to understand the overall impact of costs on the amount of their investment and on expected returns. We recommended that ESMA should not require that all information presented in the prospectus or mandatory disclosures should be included in marketing communications.[\[22\]](#) ESMA took account of these comments by requiring that marketing communications should include an explanation to allow investors to understand the overall impact of costs on the amount of their investment and on the expected returns. ESMA also included a reference to its performance fee guidelines which require documents such as the prospectus, ex-ante information and marketing materials to clearly set out all information necessary to enable investors to understand properly the performance fee model.[\[23\]](#)

### ***Guidelines on Presentation of Past and Expected Future Performance***

ESMA highlights that several respondents disagreed with its proposed requirements for five or ten-year disclosure of past performance. Instead, respondents, including us,[\[24\]](#) suggested that the Guidelines should be consistent with existing UCITS KIID and MiFID requirements and that flexibility should be provided to communicate performance over the last five years or less rather than mandating ten-year past disclosures. Despite the feedback, ESMA did not amend its draft Guidelines and therefore will require UCITS to disclose ten years of past performance and AIF to disclose five years of past performance (with some exceptions for newer funds).

### ***Guidelines on Sustainability-related Aspects***

ESMA highlights that the majority of respondents believed that information on sustainability-related aspects of marketing communications should only be regulated by other legislation such as the Sustainable Finance Disclosure Regulation (SFDR).[\[25\]](#) ESMA notes that these respondents wanted ESMA to at least delay, or remove altogether, any requirement on sustainability-related aspects at least until the SFDR and MiFID II level 2 measures have been implemented.[\[26\]](#) ESMA notes respondents' concerns that imposing rules on sustainability-related aspects in the Guidelines would lead to a more complicated regulatory landscape, particularly as the SFDR already contains provisions on marketing communications.[\[27\]](#) We supported consistency with the SFDR and highlighted the need to avoid confusion as funds work to navigate an already challenging set of new requirements under the SFDR.

ESMA notes that some respondents supported including sustainability-related aspects in the Guidelines to aid the prevention of greenwashing. Furthermore, ESMA also notes that respondents raised concerns that the term "sustainability-related" aspects was not sufficiently specified, including particularly whether only products that promote environmental or social characteristics would be covered or whether this would extend to products involving consideration of other sustainable aspects (e.g., minimum exclusion

criteria). In our response, we proposed that sustainability-related information in marketing communications should be commensurate with the extent to which the investment strategy of the fund promotes environmental or social characteristics, or sustainable investment objectives.

ESMA notes that several respondents, including us, expressed concerns in relation to an example provided in the CP to illustrate the proposed application of the Guidelines to a fund that is primarily pursuing financial performance while also having sustainability aspects. ESMA notes that while respondents agreed that sustainable aspects included in a marketing communication need to be proportionate in relation to the actual role these aspects play, they did not agree that the example reflects this reasoning. ESMA highlights that respondents, including us, gave a misleading indication that funds primarily pursuing financial performance cannot also have an investment strategy that promotes sustainability.

Despite the feedback it received in response to the CP, ESMA considers that it is important to integrate the requirements on sustainability-related aspects of investments into the Guidelines. Furthermore, ESMA considers that these elements of the Guidelines do not contradict the disclosures requirements of the SFDR. ESMA notes that it has not amended the draft Guidelines to reflect the feedback it received, but should the ESAs develop implementing technical standards on the SFDR's marketing communications provisions, then it will review the Guidelines to ensure consistency.

### ***Cost and Impact of the Guidelines***

ESMA notes that the majority of respondents considered that the Guidelines would strongly impact fund managers' activities and require existing marketing communications to be adjusted. Furthermore, respondents highlighted that they would incur costs with respect to human resources, IT development, legal, compliance, and third-party service providers in order to implement the guidelines. ESMA acknowledges these costs and highlights that changes it has made to the proposed guidelines to ensure better consistency with existing MiFID requirements should reduce cost burdens.

### **Next Steps**

ESMA's Guidelines will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the Guidelines. The Guidelines will apply from six months after the date of publication on ESMA's website in all EU official languages.

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### **endnotes**

[1] ESMA Press Release: ESMA Publishes Guidance on Funds' Marketing Communications, 27 May 2021, available at

<https://www.esma.europa.eu/press-news/esma-news/esma-publishes-guidance-funds%E2%80%99-marketing-communications>

[2] Final Report: Guidelines on Marketing Communications under the Regulation on Cross-border Distribution of Funds, 27 May 2021, available at [https://www.esma.europa.eu/sites/default/files/library/esma34-45-1244\\_-\\_final\\_report\\_on\\_the\\_guidelines\\_on\\_marketing\\_communications.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-45-1244_-_final_report_on_the_guidelines_on_marketing_communications.pdf)

[3] Regulation 2019/1156 on facilitating cross-border distribution of collective investment undertakings, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1156>

[4] ICI Memorandum No. 33058, RE: ESMA Consultation on Marketing Communication Guidelines: Member Call on 25 January at 10:00am ET/3:00pm GMT/4:00pm CET, dated 20 January 2021, available at <https://www.ici.org/memo33058>

[5] ICI Memorandum No. 33096, RE: ESMA Consultation on Marketing Communication Guidelines: ICI Global Response, dated 8 February 2021, available at <https://www.ici.org/memo33096>

[6] Q1, ICI Global Response

[7] Article 44, Commission Delegated Regulation 2017/565 as regards organisational requirements and operating conditions for investment firms, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0565>

[8] Article 44(4), MiFID II Delegated Regulation

[9] ESMA proposed that when information on past performance is presented, this information should be preceded by the following statement: "Past performance does not predict future returns".

[10] Article 44(4)(d), MiFID II Delegated Regulation

[11] Article 44(4)(e), MiFID II Delegated Regulation

[12] Q3, ICI Global Response

[13] Article 44(2)(g), MiFID II Delegated Regulation

[14] Q6, ICI Global Response

[15] Q7, ICI Global Response

[16] Article 44(2), MiFID II Delegated Regulation

[17] Q8, ICI Global Response

[18] Q10, ICI Global Response

[19] Q11, ICI Global Response

[20] Q12, ICI Global Response

[21] Article 44(2)(b), MiFID II Delegated Regulation

[22] Q13, ICI Global Response

[23] Paragraph 46, ESMA Guidelines on Performance Fees in UCITS and certain types of AIF, 5 November 2020, available at

[https://www.esma.europa.eu/sites/default/files/library/esma34-39-992\\_guidelines\\_on\\_performance\\_fees\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-39-992_guidelines_on_performance_fees_en.pdf)

[24] Q14, ICI Global Response

[25] Regulation 2019/2088 on sustainability-related disclosures in the financial services sector ("SFDR"), available at <https://eur-lex.europa.eu/eli/reg/2019/2088/oj>

[26] Just prior to the deadline for response to the CP, on 4 February 2021 the Joint Committee of the ESAs submitted draft regulatory technical standards to the European Commission concerning the content, methodologies, and presentation of disclosures under the SFDR. Furthermore, subsequent to the CP on 21 April 2021 the European Commission published a package of measures concerning sustainable finance including amendments to MiFID II requirements on product governance and MiFIR requirements on organisational requirements and operating conditions for investment firms.

[27] Article 13, SFDR