COMMENT LETTER

February 8, 2021

ESMA Consultation on Marketing Communications Guidelines ICI Global Response (pdf)

1 ESMA Consultation on Marketing Communications Guidelines ICI Global Response Q1: In light of the fact that the Guidelines should apply to all marketing communications relating to investment funds and that distribution of funds is often carried out by distributors, the requirements set out in the Guidelines were inspired by those set out in Article 44 of the Commission Delegated Regulation (EU) 2017/565. Against this background, please specify whether: a) You agree that the requirements set out in the Guidelines are in line with those set out in the provisions of Article 44 of the Commission Delegated Regulation (EU) 2017/565; b) You see any gap between the guidance provided under the Guidelines proposed in this consultation paper and the rules applying under the provisions of the aforementioned Article. If so, please justify the reasons and specify which gaps you have identified, including if you consider that the guidance provided under the proposed Guidelines is more comprehensive than the rules applying under the provisions of the aforementioned Article; and c) Any requirements of the proposed Guidelines should be further aligned with the provisions of the aforementioned Article. ESMA should clarify that a UCITS[1] is only responsible for ensuring the compliance of marketing communications that: (i) it produces; or (ii) are produced by a distributor under the terms of a contractual agreement with the ManCo (e.g., a distribution agreement). ESMA's proposal to make a UCITS responsible for ensuring compliance of all marketing communications, regardless of the issuer of the communications, and/or the distribution channel concerned, is not appropriate and not practical. For instance, distributors with whom the UCITS has no relationship (contractual or otherwise) may produce fund marketing communications without the UCITS' knowledge – under ESMA's proposals this would appear to create a compliance obligation for materials for which the UCITS is unaware. In our responses to other questions in this consultation, we recommend the following changes to other aspects of the proposed guidelines: - Clarifying the definition of a marketing communication – we propose changes to more clearly define those public, product specific communications that are within the scope of the guidelines and recommend that personalised communications, non-product specific communications and corporate and regulatory communications are out of scope; - Tailoring the application of the guidelines by the type and medium of communication – we propose changes to enable UCITS to continue to use different communication media, including digital technology, to present information to investors; 2 - Alignment with existing requirements – we propose the alignment of various aspects of the guidelines with existing requirements, including the presentation of risks and rewards with MiFID requirements and the presentation of investment performance with UCITS KIID

requirements; and - Marketing of sustainability-related information – we agree with ESMA’s high-level principles that: - Marketing communications should be based on the content of a UCITS prospectus and should not contradict the SFDR disclosure, and that - The sustainability-related information of a marketing communication should be commensurate with the extent to which the investment strategy of the fund promotes environmental or social characteristics, or sustainable investment objectives. - However, we strongly object to ESMA adding an example to these two principles that appears to create a new test that looks to whether a fund primarily pursues financial performance as its objective to determine how/where it can disclose sustainability- related information. This concept is not in the SFDR and should not be introduced in the marketing guidelines. [1] References to “UCITS” throughout our response to this consultation are to the UCITS itself (in the case of internally-managed funds) or to the appointed Management Company (in the case of externally-managed funds), as appropriate. Q2: Do you agree with this all-encompassing approach as regards the definition of marketing communications? We fully support ESMA’s efforts to develop a harmonised definition of marketing communications. Addressing divergent Member State approaches, including the content and “pre-approval” of such communications, should reduce uncertainty and burdens to the efficient provision of information to investors and distributors and remove barriers to the cross-border distribution of UCITS. As discussed in our responses to other questions in this consultation, we recommend changes to ESMA’s proposed definition and suggest ways in which the guidelines can be tailored to take account of different media and forms of communication. Q3: Do you agree that a non-exhaustive list of marketing communications should be included in the Guidelines? If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in the Section 1 of Annex IV below. We agree that a non-exhaustive list of marketing communications should be included in the guidelines. We also recommend a non-exhaustive negative list of communications that are outside the scope of the guidelines (see our answer to question 5). ESMA should also clarify that pre-marketing materials (as defined in the CBDF Regulation) are excluded from the definition of marketing communications such as communications, 3 by their nature, are not intended to constitute an offer or placement of a fund or allow investors to commit to acquiring the units or shares of a fund. Q4: Do you agree that the Guidelines appropriately take into account the on-line aspects of marketing communications? If not, please specify which aspects should be further detailed. ESMA’s guidelines should accommodate and encourage the use of digital marketing communications (e.g., online, mobile apps etc.) by providing UCITS with greater flexibility to determine how best to present information, such as risk and rewards, costs, and performance. For instance, enabling UCITS to use different methods to present information and allow for interactivity (e.g., enabling investors to use a sliding scale to see the costs and charges and performance scenarios over different holding periods) or other features such as pop-ups and hyperlinks. Allowing UCITS the flexibility to communicate in these ways would provide investors with the opportunity to access a greater volume of information in a more tailored manner (i.e., selecting the information that is relevant to them), which may, in turn, engender greater engagement and enhance investor understanding. Q5: Do you agree that the Guidelines should include a negative list of the documents that should not be considered as marketing communications? If not, please provide details on your views. If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in Section 1 of Annex IV below. We agree that a non-exhaustive negative list should be included in the proposed guidelines. We recommend adding the following “communications” to the negative list to exclude them from the scope of the guidelines: - Personalised communications – ESMA should exclude the following “bespoke” communications made by a UCITS to an investor: (i) extemporaneous and live communications (i.e., not solely based on a generalised script delivered to multiple clients); and (ii) communications resulting from a personal recommendation (e.g., under MiFID); - Non-product specific communications – ESMA should exclude all communications issued by a UCITS that are general in nature and do not refer to a specific fund (or a substantive portion of the funds managed by a UCITS ManCo), for instance including thought-leadership communications, descriptions of approaches to investment (e.g., thematic approaches), market commentary and analysis and outlooks. - Existing investor communications – ESMA should exclude all communications with existing investors that do not primarily promote other funds or services, including investor reports (e.g., portfolio reviews) and periodic reports (e.g., annual and semi- annual reports); - Corporate and regulatory communications – ESMA should exclude communications relating to corporate transactions (e.g., M&A), regulatory communications and filings, 4 and other corporate announcements (e.g., management changes, earning reports, corporate and social responsibility etc.) - Other distribution communications – ESMA should exclude other documents that do not have a specific marketing purpose (e.g., responses to requests for information, responses to requests for proposals, and completed due diligence questionnaires etc.) Q6: Do you agree that a short disclaimer is the most appropriate format to identify marketing communications as such and that the disclaimer should mention the existence of the prospectus of the fund? We do not object to requiring a disclaimer to be displayed on marketing communications to identify them as such. We recommend that ESMA provides UCITS with flexibility to determine how best to present the disclaimer, taking into account the type of communication concerned (e.g., a shortened disclaimer with a link to the full disclaimer etc.) For instance, requiring the disclaimer to be fully embedded in short-form social media marketing communications (e.g., tweets) is unlikely to be practical (i.e., the character limit may either not allow the disclaimer to be fully displayed or will not provide sufficient space for a message besides the disclaimer to be displayed.) Q7: Do you agree with the approach on the description of risks and rewards in an equally prominent manner? If you do not agree, please indicate your proposed approach to ensuring that all marketing communications describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner. We agree that risks and rewards should be presented in an equally prominent manner. We recommend that ESMA align its guidance with the approach under MiFID II – requiring information to be included that gives a fair and prominent indication of risks when referencing potential benefits, laid out in a manner that ensures that relevant risks are at least as prominent as other information (Art 44(2)(b) and (c), MiFID Delegated Regulation 2017/565). ESMA's proposal that risks, and rewards should be mentioned either at the same level or one immediately after the other, is more prescriptive (and mechanistic) than the approach under MiFID II. Depending on the type and layout of the communication this may reduce rather than enhance the prominence and balance of information (e.g., if presenting information in this way on a mobile phone screen and requiring the investor to scroll through information made it more challenging to compare one to another). Q8: Please specify whether any specific requirements should be set out in the Guidelines for the description of risks and rewards in an equally prominent manner in marketing communications developed in other media than paper (e.g. audio, video or on-line marketing communications). As set out in our response to question 7, we recommend that ESMA align its guidance with the approach under MiFID II to enable UCITS to determine how best to ensure that risks are fairly and prominently indicated when referencing potential benefits, taking into account the type of marketing communication concerned. 5 Q10: Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund? Marketing communications should contain key information on a UCITS that is consistent with, but not necessarily identical to, information in UCITS' legal and regulatory documents (e.g., the prospectus).

ESMA should clarify that its proposal for marketing communications to contain the same indicators, simulations or figures related to risk and rewards, costs and performance as in UCITS' legal and regulatory documents does not imply that identical information must be included in both sets of documents. ESMA should confirm that it is possible for only key information to be included in a marketing communication (e.g., a subset of that contained in the UCITS' legal and regulatory documents), subject to this information being consistent with the UCITS' legal and regulatory documents and the marketing communication otherwise being compliant (e.g., clear, fair, not misleading etc.) Such an approach is consistent with the UCITS KIID and PRIIPs KID, which contain key information on various aspects of a fund's costs (e.g., one-off, ongoing, incidental costs) consistent with the more detailed information that is outlined in the fund's prospectus. Q11: What are your views on this approach? Do you agree that no minimum set information on the characteristics of the promoted investments should be required in marketing communications as this should depend on the size and format of the marketing communication? We agree that there should not be a mandated minimum set of information that is included in marketing communications. Instead, as we have outlined in our response to other questions, UCITS should have the ability to determine the most effective manner of presenting information, taking into account the nature and type of the communication concerned. Q12: What are your views on these requirements relating to the fair, clear and not misleading character of the information on risks and rewards? We agree that the presentation of risks and rewards should be fair, clear and not misleading. Where marketing communications contain information on risk, we agree that they should refer to material risks in the KID and KIID, accompanied by a clear and prominent statement of where complete information on risks can be found (e.g., in the fund's prospectus). Q13: Do you agree with this approach on the presentation of costs? We agree that when providing information on costs, marketing communications should give a realistic picture of the costs borne directly or indirectly by investors. It may be possible to achieve this by presenting a sub-set of the information contained in the prospectus or mandatory disclosures (e.g., UCITS KID and PRIIPS KIID). ESMA should not 6 require that all information presented in the prospectus or mandatory disclosures be included in marketing communications. We note the ongoing discussions over reforms to the PRIIPs KID, including the presentation of costs. We urge ESMA to maintain flexibility for UCITS to provide additional explanatory materials as necessary to provide context to the calculation of these costs (e.g., in cases of negative transaction costs), subject to the outcome of the PRIIPs KID reforms, including their application to UCITS. Q14: Do you agree with this approach relating to the information on past and expected future performance? We support ESMA's approach to the presentation of performance information, aligned to existing UCITS KIID and MiFID II requirements. We welcome ESMA's acknowledgment that where funds are required to produce a PRIIPs KID, which does not include disclosure of past performance, that it may be appropriate for marketing communications to contain simulated past performance. We recommend that simulated past performance should be presented over the 1, 5, or 10 year periods required for the UCITS KIID (i.e., depending on available performance data). Q15: Do you agree with this approach relating to the information on the sustainability- related aspects of the investment in the promoted fund? We appreciate ESMA's recognition that the Guidelines must be consistent with the Sustainable Finance Disclosure Regulation (SFDR) and the forthcoming SFDR regulatory technical standards (RTS). We also agree with the following high-level principles stated in paragraphs 45 and 46 of the proposed Guidelines that: - Marketing communications should be based on the content of a UCITS prospectus and should not contradict the SFDR disclosure, and that - The sustainability-related information of a marketing communication should be commensurate with the extent to which the investment strategy of the fund promotes environmental or social characteristics, or sustainable investment objectives. These two principles permit appropriate marketing communications for SFDR Article 8 and 9 funds while addressing ESMA's concerns about preventing "greenwashing." This approach accurately reflects the provisions of SFDR Articles 8 and 9, which require extensive ESG fund prospectus disclosure to provide investors with disclosures that are "accurate, fair, clear, not misleading, simple and concise." Similarly, SFDR Article 13(1) requires marketing communications to not conflict with SFDR disclosures. It is critical that ESMA follow closely the SFDR's definitions in its Guidelines to ensure consistency with SFDR and avoid confusion as funds work to navigate an already challenging set of new requirements under SFDR. 7 We therefore urge ESMA to delete the example it proposed to illustrate paragraph 46, which introduces a new concept that is outside of the existing ESG product definitions in SFDR Articles 8 and 9: - For example, if the investment strategy of a fund is primarily pursuing financial performance, any sustainability-aspects of the investment in the promoted fund should not be the main information of a marketing communication (emphasis added). This example introduces the concept of a fund with an investment strategy that "is primarily pursuing financial performance" while also having "sustainability aspects" —a definitional concept that is not found in SFDR. SFDR does not use the concept of "primarily pursuing financial performance" to differentiate between ESG products. The SFDR creates two categories of ESG products: 1) a product that promotes, among other characteristics, environmental or social characteristics, or a combination thereof (Article 8 funds), and 2) a product that has sustainable investment as its objective (Article 9 funds). ESMA should not introduce a different concept other than the two identified in Article 8 and Article 9, particularly while SFDR requirements are still being finalised. The overall principle of paragraph 46 – that sustainability-related information should be commensurate with the extent to which the fund promotes environmental or social characteristics or has sustainable investments as its objective – is the right approach and consistent with SFDR. The example language should be deleted. Moreover, all UCITS have an investment strategy related to pursuit of financial performance. This includes SFDR Article 8 and Article 9 products (i.e., ESG funds). The use of the phrase "primarily pursuing financial performance" wrongly implies that a fund's investment strategy could not pursue both financial performance and sustainability aspects. We note that even impact funds invest with the intention to generate positive, measurable social and environmental impact alongside a financial return, according to the Global Impact Investing Network's widely accepted definition of impact investing. The above sentence also calls into question whether and how SFDR Article 8 and 9 products can provide investors with marketing information, consistent with the fund's prospectus disclosure, about how the fund promotes environmental or social characteristics (under SFDR Art. 8) or has a sustainable investment objective (under SFDR Art. 9). This would run counter to the intent of SFDR and would create significant confusion around marketing of SFDR Article 8 and 9 products. SFDR Article 8 and 9 funds must be able to communicate to investors both about the fund's performance and the sustainability characteristics or objectives of the product as disclosed pursuant to SFDR. Further, as ESMA notes in the consultation paper, SFDR Article 13(3) provides ESMA with the authority to develop future Implementing Technical Standards for ESG funds' marketing communications. This provides ESMA with the opportunity to first assess the market impact of the not-yet-final SFDR requirements and then ensure that any future updates to marketing guidelines are consistent with the SFDR framework. 8 Q16: What is the anticipated impact from the introduction of the proposed Guidelines? Do you expect that the currently used practices and models of marketing communications would need to be changed? A well-constructed harmonised marketing communications regime – incorporating our recommendations and addressing divergence in Member State approaches – will reduce complexity and cost for cross-border UCITS. Q17: What additional costs and benefits would compliance with the proposed Guidelines bring to the stakeholder(s) you represent? Please provide quantitative figures, where available. We recommend changes to ESMA's proposed guidelines that will enable UCITS to present information effectively in their marketing communications, in a manner that takes account of the nature and type of the communication concerned, including accommodating digital technology. This should provide UCITS investors with clearer information, engendering greater investor engagement and enhancing understanding. Harmonising approaches to marketing communications should also serve to reduce barriers to the cross-border distribution of UCITS, increasing choice for retail investors and enhancing economies of scale.