

Regulatory News Alert

Cross-border fund distribution, be ready for August 2021: ESMA finalized its guidance for fund marketing communications

1 June 2021

On 27 May 2021, the European Securities and Markets Authority (ESMA) published its [final report](#) on the Guidelines under the [Regulation \(EU\) 2019/1156](#) on cross-border distribution of funds (CBR), which specify the requirements that funds' marketing communications must meet. The Draft Guidelines was originally proposed at the consultation that ESMA launched in November 2020, as provided in our [previous alert on the topic](#).

Amendments to the proposed Guidelines

Based on suggestions made by respondents from the public consultation, ESMA has amended the Guidelines and introduces the following main points:

1. Scope:

- The Guidelines will apply to all associated marketing communications including **potential investors** for undertakings collective investment in transferable securities (UCITS) and alternative investment funds (AIFs).
- ESMA has produced a non-exhaustive list of documents that should be considered as marketing communications (**the positive list**). However, ESMA has **removed communications describing the characteristics of a UCITS or an AIF** from this list to avoid any confusion (i.e. these requirements may prevent fund managers from providing information to distributors on the characteristics of such funds).
- **Information communicated as 'pre-marketing' was added to the negative list** of documents that should not be considered as marketing communications.

2. Identification of marketing communications:

- The requirement to include a **disclaimer** was amended to better fit the size and format of marketing communications, in particular in an on-line environment.
- ESMA has changed the **wording of the disclaimer** as: *“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.”*
- For **on-line marketing communications with space constraints**, the disclaimer may be replaced with a **shorter identification**, such as *“Marketing Communication”*.

3. Fair, clear and not misleading character of marketing communications:

- **The marketing communication should be written in one of the official languages of the Member State**, or in one of the official languages used in the part of the Member State where the fund is distributed, or in another language accepted by the national competent authorities of that Member State.
- ESMA clarified that using the information on indicators, simulations, or figures relating to risks and rewards, etc., **should be consistent and not contradictory** with that included in the fund’s prospectus, KID, or KIID. However, **the methodology and the value for the computation of the indicators should be the same** as in the legal regulatory documents.
- **Information on risks and rewards:**
 - ESMA **removed** the provision that, in the case of **illiquid AIFs** open to retail investors, the marketing communications should **inform investors** to invest a **small proportion of their assets**.
 - ESMA maintained consistency with the KIID regulation by including the disclosure of past performance in relation to a benchmark for recently established funds.
- **Information on costs:**
 - Costs should not refer only to purchasing, but also to the **holding, converting, or selling** of units or shares of an AIF or units of a UCITS.
 - The requirement concerning the **impact of currency fluctuations on the overall costs was simplified**.
 - However, marketing communications should clearly state the currency in question, together **with a warning that the costs may increase or**

decrease because of currency and exchange rate fluctuations.

- **Information on past performance:**
 - ESMA aligned the requirements for past performance and simulated past performance.
 - The past performance should be disclosed for the **preceding 10 years for funds establishing a KIID**, or for the preceding **five years for other funds**, or the whole period for which the relevant funds have been offered, if less than five years.
 - ESMA specified that in every case, past performance information should be based on complete 12-months periods, but that this information may be **supplemented with performance for the current year** updated at the end of the **most recent quarter**.

What does this mean for my organization?

- Throughout the guidelines, ESMA also clarified that the **guidelines are equally important for retail and professional investors**. As pointed out in the Consultation Paper, this requirement does not aim at addressing the content of the information on the risks and rewards, but rather relates to the format of the *description* of risks and rewards.
- ESMA also reminded that the Guidelines only aim at clarifying the requirements set out in the CBR, which have an **impact on the current practices in place for developing marketing communications**.
- On the particular **issue of fund managers' responsibility in relation to their distribution models**, ESMA stresses that such an issue is not explicitly addressed by the Regulation and hence is **not covered by the Guidelines**.

Next steps

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

Considering the upcoming legislative developments with the [PRIIPs KID](#) (key information documents for Packaged Retail Investment and Insurance-based Products) and [SFDR](#) (Regulation (EU) 2019/2088), ESMA also provided that:

- **PRIPs:** On the alignment of the **period for which past performance should be disclosed**, ESMA maintained its approach, which is based on the current difference existing between funds establishing a KIID and those establishing a KID. However, ESMA acknowledges that **this point should be addressed in the future**, as the **KIID should eventually be replaced by a PRIIPs KID**.
- **SFDR:** The Guidelines do not contradict the disclosure requirements of SFDR, but provide guidance regarding their practical implementation in marketing communications for funds. If the European supervisory authorities (ESAs) develop the technical standards (ITS) on **marketing communications in Article 13 of SFDR in the future**, ESMA will analyze the content of that ITS to ensure the Guidelines are consistent.

Your contacts

Financial Industry Solutions

Xavier Zaegel

Partner – Consulting IM & PERE Leader

Tel : +352 45145 2748

xzaegel@deloitte.lu

Lou Kiesch

Partner – Regulatory Consulting Leader

Tel : +352 45145 2456

lkiesch@deloitte.lu

François-Kim Hugé

Partner – Financial Industry Solutions

Tel: +352 45145 2483

fkhuge@deloitte.lu

Sylvain Crépin

Partner – Capital Markets/Financial Risk

Tel : +352 45145 4054

screpin@deloitte.lu

Regulatory Watch Kaleidoscope service

Simon Ramos

Partner – IM Advisory & Consulting Leader

Tel : +352 45145 2702

siramos@deloitte.lu

Benoit Sauvage

Director – Risk Advisory

Tel : +352 45145 4220

bsauvage@deloitte.lu

Jean-Philippe Peters

Partner – Risk Advisory

Tel : +352 45145 2276

jppeters@deloitte.lu

Marijana Vuksic

Senior Manager – Risk Advisory

Tel : +352 45145 2311

mvuksic@deloitte.lu

Deloitte Luxembourg
20 Boulevard de Kockelscheuer
L-1821 Luxembourg
Grand Duchy of Luxembourg

Tel: +352 451 451

Fax: +352 451 452 401

www.deloitte.lu

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