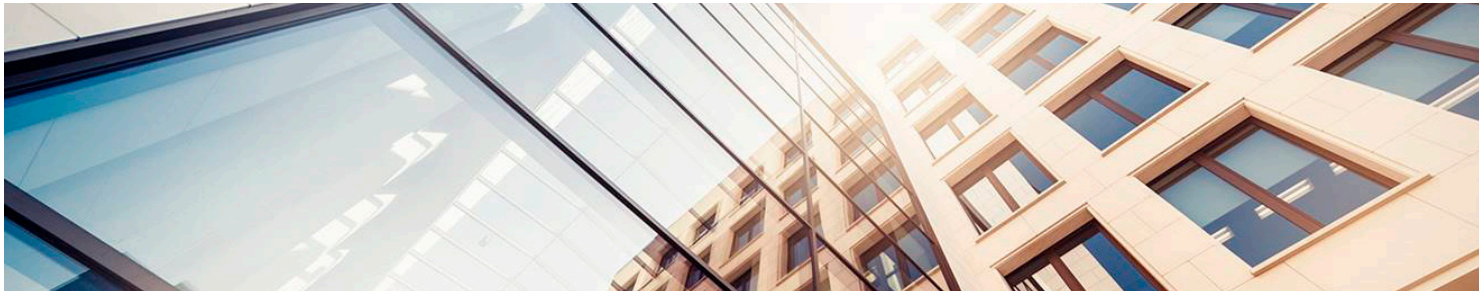


## ESMA final report on guidelines for funds' marketing communications



On 27 May 2021, the European Securities and Markets Authority (“ESMA”) published the **final report** of its guidelines for funds’ communications under article 4 of **EU Regulation 2019/1156** (the “Regulation”) on the cross-border distribution of collective investment undertakings, with an up to **six month delay** to the earlier application date of 2 August 2021.

### Purpose

The Regulation requires EEA fund managers to ensure that all “marketing communications” addressed to investors and potential investors are identifiable as such and describe the risks and rewards of purchasing units or shares in an equally prominent manner. The Regulation also sets out certain other conditions in relation to marketing communications, including that information in marketing communications must be fair, clear and not misleading. Our separate note (available [here](#)) provides more information on the broader requirements of the Regulation and corresponding Directive. The guidelines will set common principles for marketing communications, and in particular (i) on what qualifies as a marketing communication, (ii) on the description of risks and rewards of purchasing units or shares of an AIF or units or shares in a UCITS in an equally prominent manner and (iii) on the fair, clear and not-misleading character of marketing communications taking into account online aspects where applicable.

### Timing

The guidelines were expected to enter into force from 2 August 2021 (ie when the Regulation comes into effect), however the final report appears to grant a slight delay as it notes that the guidelines will apply six months after their publication on ESMA’s website in all EU official languages. As the final report has only just been published, we expect therefore an application date of January/February 2022.

### Scope

The guidelines are addressed to EEA AIFMs and UCITS management companies, as well as EuVECA and EuSEF managers. Such managers will be responsible for all marketing communications addressed to investors in relation to funds that they manage (a helpful change in the latest draft is that fund managers should not be held responsible for marketing communications prepared by third-party distributors as previously stated in the draft guidelines).

The guidelines include a non-exhaustive list of the types of communications to be viewed as marketing communications, as well as a negative list of all the types of communications that would not be subject to the guidelines. The proposed lists are set out in the guidelines at Annex IV of the final report and have not changed significantly in the latest version (other than to helpfully exclude communications provided to distributors that are not intended for investors). The guidelines will apply to all marketing communications addressed to investors or potential investors of AIFs and UCITS, including EuVECAs, EuSEFs, ELTIFs, and Money Market Funds regardless of format, outlook or content.

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### Content of the guidelines:

#### Guidelines on identification as such of marketing communications

> ESMA notes that the distinction between marketing communications and legal and regulatory documents may not always be clear, especially for retail investors, and proposes that any documents which are not legal or regulatory documents should include a short marketing disclaimer. Such disclaimer would make it clear that the communication has 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 such marketing communication. This disclaimer should also mention the existence of the legal and regulatory documents of the promoted fund and where to obtain them. Suggested wording for this disclaimer is included in the guidelines and has been shortened in the latest draft. Additionally, there now is scope to take a proportionate approach for online marketing communications by just adding the phrase “Marketing Communication” (eg in the case of a banner or short website videos lasting only a few seconds) or “#MarketingCommunication” (eg for social media platforms) rather than using the full prescribed disclaimer.

- > Any reference to a UCITS or an AIF in a press article, advertisement or press release may only be published after the home regulator of the promoted fund has granted approval of the fund, where such approval is required for the marketing of the fund and if applicable, the fund managers have received notification that they may market the promoted fund in the targeted host Member State.

#### **Guidelines on the description of risks and rewards of purchasing units or shares of an AIF or units or shares in a UCITS in an equally prominent manner**

- > ESMA notes that the disclosure of relevant risks and rewards if presented in the document, should be referred to in the same manner ie by using the same predominant font size (eg information on risks should not be disclosed in a footnote or in small characters within the main body of the communication). Additionally, both the risks and rewards should be mentioned either at the same level (eg in a table) or immediately after the other. However the final report indicates that there may be some flexibility on this point and that the time spent on risks and rewards need not be the same.
- > The final report also clarifies that (i) only relevant risks should be disclosed and not all material risks; and (ii) a proportionate approach can be adopted for risk/reward disclosures in online marketing communications with length limitations.

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

This section of the guidelines is divided into several parts, and ESMA proposes that:

##### **General requirements**

- > Wording should be adapted to the target audience of investors or potential investors and should be written in the official languages, 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 acknowledges in the final report that a proportionate approach can be taken for marketing communications aimed only at professional investors – but unhelpfully concludes that if a fund is open to retail investors, all marketing communications regarding it should be viewed as being aimed at retail. This is a potentially problematic position given the concept of “marketing communications” would also capture bilateral promotional communications with professional investors in retail funds, and firms may therefore need to reassess these communications with a retail lens.
- > The information presented in the marketing communication should be consistent with the legal and regulatory documents required.
- > The description of the features of the investments should be up to date, easily readable, have a short description of the investment policy, understandable for the average member of the group of investors to whom it is directed, and the information should be verified, especially regarding comparison with other funds.

##### **Information on risks and rewards**

- > In addition to the requirements mentioned above regarding the description of the risks and rewards in an equally prominent manner, the guidelines also set out requirements for the information to be contained in any risks and rewards disclosure, and the consistency which is required between marketing communications and the documentation of the fund (such as the KID, KIID, prospectus and the information to be disclosed to investors).

- > In this regard ESMA has maintained that the same methodology and values should be used to compute risks, costs and performance indicators, as are used for KIDs/KIIDs. This means that in practice firms will not be able to use their own costs, risks etc. methodologies in client marketing presentations or supplementary key fact documents for their funds.
- > In relation to AIFs that are open to retail investors, there is a requirement to clearly mention the illiquid nature of the fund investment in the marketing communication (where this is the case).

##### **Information on costs**

- > The overall impact of costs on the amount of the investment and expected returns must be explained when referring to the costs associated with purchasing shares or units of a fund.
- > In the final report, ESMA has helpfully decided to drop the requirement to include indicative currency rates, and similar to the MiFID II requirements, firms must simply state the currency of the product with a warning that currency and FX fluctuations may increase/decrease costs.

##### **Information on past performance and expected future performance**

- > Information on the past performance of a promoted fund in a marketing communication should be consistent with the past performance included in the prospectus/other regulatory disclosures, should cover the preceding 10 years (funds publishing KIIDs) or five years (other funds) where this data is available and must be based on complete 12-month periods (although, taking a more flexible approach than the same MiFID II rules, the final report notes that this information can be supplemented with performance for the current year updated at the end of the most recent quarter).
- > Information on past performance, including simulated past performance should be based on historical data and accompanied by the reference period and the source.
- > Information on expected future performance must be disclosed taking into account various factors: eg it should be based on reasonable assumptions supported by objective data. It should also be disclosed only per fund, on a time horizon consistent with the recommended investment horizon of the fund. Several statements regarding taxation and the possibility of a potential loss also have to be made.

##### **Information on sustainability-related aspects**

- > The guidelines contain some requirements regarding sustainability-related aspects of marketing communications (eg consistency between marketing communications and the legal and regulatory documents of a fund which promotes being sustainable). The final report has not made any significant changes to this section.
- > In particular, there is a requirement to ensure that information on ESG/sustainability within marketing materials does not outweigh the extent to which the investment strategy of the product actually takes ESG characteristics or objectives into account, and to include a link to the website disclosures made under SFDR (Regulation (EU) 2019/2088) where relevant given the nature of the marketing communication.

##### **Next steps**

The guidelines will be translated into the official EU languages and published on ESMA's website.

As noted above, the guidelines will apply six months after their publication date on a comply or explain basis, meaning national regulators will have to notify ESMA whether they comply or not with the guidelines. As the final report has only just been published, we expect therefore an application date of January/February 2022.

The guidelines are available [here](#).

## Investment funds contacts

If you would like to discuss these guidelines, or any aspects of AIFMD or the UCITS Directive, please contact your usual Linklaters LLP contact or anyone shown below.



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