

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_QUESTION_CPMC_1>

(a) We believe further clarifications are required

Sections 2(b) and 2(c), in particular, of Article 44 of the Commission Delegated Regulation (EU) 2017/565 ('**Article 44**') require fair and prominent indication of any relevant risks and that the layout of the document ensures prominence. Unlike the draft guidelines set out in Appendix IV of the ESMA Consultation Paper of 9 November 2020 (the '**Guidelines**'), Article 44 is silent about the exact location of risk information, whereas paragraph 11 of section 5 (*Guidelines on the description of risks and rewards in an equally prominent manner*) of the Guidelines notes that risk information should not be given in footnoting.

This additional requirement in the Guidelines appears to go beyond the requirements in Article 44.

We recommend that the Guidelines should not specify exactly where risks should be positioned because this varies by content, ensuring prominence and balance, as well as overall clarity of the communication. This can be achieved in a variety of ways. Additionally, for the same reason, the Guidelines are not consistent with Article 44 by requiring in paragraph 13 of section 5 (*Guidelines on the description of risks and rewards in an equally prominent manner*) that "risks and rewards should be mentioned either at the same level or one immediately after the other". The introduction of these additional requirements by the Guidelines goes beyond the purpose of the Guidelines set out in their section 2 (*Purpose*). As such the Guidelines in this area are inconsistent with Article 44 and with Article 4(1) of the Regulation (EU) 2019/1156 referred to in section 2 (*Purpose*) of the Guidelines.

The Guidelines also fail to incorporate Section 2(a) of Article 44.

Under Section 2(g) of Article 44 information shall be up-to-date and relevant to the means of communication used. Paragraph 6 of Section 4 (*Guidelines on the identification as such of marketing communications*) of the Guidelines, however, sets out a mandatory disclaimer

language to be used in all means of communication without considering the different characteristics of different means of communication, particularly contemporary means and methods of marketing, including digital methods.

Paragraph 7 of Section 4 (*Guidelines on the identification as such of marketing communications*) also fails to set out any comprehensive guidance on how to tailor the mandatory disclaimer set out in paragraph 6 of Section 4 in case of different social media platforms. The discrepancy between the Guidelines and the second limb of Section 2(g) of Article 44 (e.g. the requirement of providing information relevant as per the means of communication) is resolved even by paragraph 7 of Section 4 (*Guidelines on the identification as such of marketing communications*).

Although paragraph 29 of Section 6.1 (*General requirements*) sets out the requirement of using neutral information on social media platform, it also fails to set out sufficient guidance or clarification on the requirement of tailoring information as per the means of communication.

While that the Guidelines incorporate the requirement of using up-to-date information in marketing materials, they fail to contain sufficient guidance as per the content of the second limb of Section 2(g) of Article 44 (e.g. the requirement of tailoring information as per the means of communication).

(b) Yes.

Based on the examples provided by us in Q1.a above, we are of the view that:

- (i) Compared to Article 44, paragraphs 11 and 13 of Section 5 of the Guidelines are more comprehensive, but note that they reduce flexibility, despite the fact that marketing materials can take many forms. Such practice makes certain provisions of the Guidelines unnecessarily and overly prescriptive.;
- (ii) Section 2(a) of Article 44 is not captured by the Guidelines; and
- (iii) the second limb of Section 2(g) of Article 44 (e.g. the requirement of tailoring information as per the means of communication) is not adequately reflected into the Guidelines.

We are of the view that all these discrepancies create a gap between the Guidelines and both of Article 44 and Article 4(1) of the Regulation (EU) 2019/1156.

(c) Yes.

Based on the examples provided by us in Q1.a above, we are of the view that the following sections of the Guidelines should be further aligned with the Articles:

- (i) paragraphs 11 and 13 of Section 5;
- (ii) paragraphs 6 and 7 of Section 4; and
- (iii) paragraph 29 of Section 6.1 of the Guidelines should be further aligned with Article 44.

In addition, we recommend supplementing the current wording of the Guidelines so that it would also capture Section 2(a) of Article 44.

<ESMA_QUESTION_CPMC_1>

Q2 : Do you agree with this all-encompassing approach as regards the definition of marketing communications?

<ESMA_QUESTION_CPMC_2>

Yes, we agree.

However, we note the need to supplement the Guidelines with further provisions corresponding to the second limb of Section 2(g) of Article 44 (e.g. the requirement of tailoring information as per the means of communication).

<ESMA_QUESTION_CPMC_2>

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.

<ESMA_QUESTION_CPMC_3>

Yes. We recommend clarifying paragraph (e) of the positive list of Section 1 (*Scope*) of the Guidelines to exclude materials on a UCITS or AIF which are originated by a distributor without the knowledge of the UCITS management company or AIFM and are therefore outside of their control. Distributors should be accountable for materials which they have written provided they acted beyond the control of and/or by breaching the instructions of the fund managers.

<ESMA_QUESTION_CPMC_3>

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_QUESTION_CPMC_4>

No.

Based on the examples provided in Q.1.a above, we recommend supplementing the Guidelines with further provisions corresponding to the second limb of Section 2(g) of Article 44 (e.g. the requirement of tailoring information as per the means of communication).

More particularly, we recommend supplementing the Guidelines with further, detailed provisions in respect of all means of communication. We recommend specific focus contemporary means and methods of marketing, including digital, on how to indicate the marketing nature of this content as well as which information shall be mandatorily set out on such digital media appearances.

<ESMA_QUESTION_CPMC_4>

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.

<ESMA_QUESTION_CPMC_5>

Yes, the Guidelines should include a negative list. The list given is very short and we recommend adding the following:

- in person, telephone and oral conversations (provided the conversations are not based on a script delivered to more than one client);
- correspondence used in the ordinary course of business (provided the correspondence is not based on a communication to be used with more than one client);
- requests for information (“RFIs”), requests for proposal (“RFPs”) and due diligence questionnaires (“DDQs”);
- client reporting documents including portfolio reviews (provided the documents do not otherwise promote new products or services);
- shareholder reports (i.e., annuals and semi-annuals), prospectuses, private placement memoranda, offering documents, agreements and other legal documents;
- corporate press releases relating to corporate transactions (e.g. acquisitions and strategic partnerships) or issued pursuant to regulatory requirements (e.g. regulatory requirements under securities or disclosure laws and regulations), quarterly earnings, dividend announcements, organizational announcements/senior management staff changes, and regulatory filings (e.g. annual reports and shareholder letters); and
- communications relating to recruiting and talent management, inclusion and diversity, culture/ philanthropy.

The above list is not comprehensive, and the intention is that the typical use of such documents should not be altered.<ESMA_QUESTION_CPMC_5>

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?

<ESMA_QUESTION_CPMC_6>

A short disclaimer does seem appropriate. However, in line with the second limb of Section 2(g) of Article 44 (e.g. *the requirement of tailoring information as per the means of communication*) we are of the view that the actual content of such short disclaimer should also be tailored to and subject to the particular means of communication. We note that message size may be constricted in certain social media.

This means the mandatory content of such short disclaimers can vary depending on the form (e.g. printed / online) of the document as well as on which social media platform (e.g. twitter, LinkedIn, youtube, Instagram etc, if any.) was used to publish the actual content. Based on our interpretation of the Guidelines, however, neither paragraph 6 nor paragraph 7 of its Section 4 (*Guidelines on the identification as such of marketing communications*) covers any rules on this question. Thus, we recommend supplementing Section 4 of the Guidelines with

clear guidance on the content of the short disclaimer in respect of major social media channels (e.g. LinkedIn; Twitter; Instagram; Youtube etc.).

Furthermore, we have the following concerns / comments on the given mandatory wording of the short disclaimer set out in paragraph 6 of Section 4 (*Guidelines on the identification as such of marketing communications*).

Given the length of the mandatory wording of the short disclaimer set out in paragraph 6 of Section 4 (*Guidelines on the identification as such of marketing communications*), we believe that such wording is only appropriate to be used on printed materials and on such online communication channels which do not have any space limitation to deliver content. Thus, due to the limitation of space available, the mandatory short disclaimer given in paragraph 6 of Section 4 of the Guidelines is not appropriate and cannot be used on communication channels which operate with limited space to deliver the content (e.g. LinkedIn, Twitter, Instagram etc.). For the sake of clarity of the Guidelines, we urge ESMA to indicate this fact in paragraph 6 of Section 4 (*Guidelines on the identification as such of marketing communications*) of the Guidelines.

Furthermore, as per the actual content of the mandatory short disclaimer set out in paragraph 6 of Section 4 (*Guidelines on the identification as such of marketing communications*) of the Guidelines, we note the following:

- i) First sentence: We agree with the sentence “This is a marketing communication”
- ii) Second sentence: a) We do not think that the second sentence (“This is not a contractually binding document”) is particularly helpful given that legal recourse concerning misrepresentations could result from inaccuracies in marketing materials. b) Also, conceptually, “the man in the street” will be used when encountering marketing materials in most walks of life (e.g. cars, holidays, food products etc) without any expectation that advertisements could be construed as being contractually binding. It seems very unlikely that funds marketing would be any different. We see this line as an attempt to meet a need that does not exist.
- iii) We think that the third sentence could be more concisely worded; for instance “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 investment decision.”

Additionally, we do not believe that the Guidelines should be overly proscriptive as to the placement of the disclaimer. Paragraph 14 of Section 6.1 (*General requirements*) notes that the way information is presented may differ between retail investors and professional investors. Likewise, we believe that whilst it may be appropriate to display identification disclaimer at the start of materials for retail investors, it would be equally appropriate to show this at the end of the materials for professional investors. We also believe that paragraph 7 of Section 4 (*Guidelines on the identification as such of marketing communications*) concerning the placement of the identification disclaimer in videos is not consistent with the guidance for professional investors in Section 6 of the Guidelines noted above.

<ESMA_QUESTION_CPMC_6>

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.

<ESMA_QUESTION_CPMC_7>

Although we generally agree with the approach taken, we believe that Section 5 (*Guidelines on the description of risks and rewards in an equally prominent manner*) is overly detailed as to the placement of risks and rewards which might reduce the clarity of a document. Whilst risks and rewards should appear in a fair and balanced manner on a page, explicit directions such as those in paragraph 13 of Section 5 of the Guidelines (e.g. “risks and rewards should be mentioned either at the same level or one immediately after the other”) are overly prescriptive. The “fair, clear and not misleading” general guidelines concerning the character of marketing materials cover this point in themselves.

We also agree that it is reasonable that balancing risks should appear in at least equal to main body text font size within footnoting on a given page. This is wholly consistent with Article 44.

Additionally, we believe that Section 5 (*Guidelines on the description of risks and rewards in an equally prominent manner*) of the Guidelines should acknowledge concepts in their Section 6 (*Guidelines on the fair, clear and not misleading character of marketing communications*) that the needs of retail investors and professional investors may differ concerning the presentation of risks and rewards. Thus, we recommend supplementing the Guidelines supplemented with further provisions setting out such guidance.

<ESMA_QUESTION_CPMC_7>

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).

<ESMA_QUESTION_CPMC_8>

The second limb of Section 2(g) of Article 44 requires using information relevant as per the means of communication. In our interpretation of Article 44, this requirement captures all information regardless of the content of the information concerned and/or its form of distribution. Thus, the indication of risks and rewards in an equally prominent manner in marketing communication via all communication channels (e.g. printed, online etc.) falls within the scope of the second limb of Section 2(g) of Article 44.

Thus, it follows that 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 all means of communication channels.

However, as set out in our response to Question 6 above, we are convinced that due to technical and practical reasons not least the online versus off-line form of the communication channel used (e.g. paper-based v. non-paper-based media) should be considered when

drafting specific requirements as to the description of risks and rewards applied in different means of communication channels. Instead, the actual space limitation to deliver the particular content on the given communication channel should be the determining factor. Whilst we agree that, regardless of communication type, firms need to ensure that all communications are compliant, it is important to retain the necessary flexibility in how the requirements are applied. For example, a printed marketing material (being an off-line communication) and any Youtube content (being an online communication) have unlimited space to deliver information to investors, despite the fact that one is an online and the other is an off-line communication channel. In contrast, materials distributed via LinkedIn / Instagram / Twitter accounts have only very limited space available to deliver information to investors.

Thus, to adequately regulate the contemporary need of the market players and effectively protect the interests of the investors, we recommend supplementing the Guidelines with provisions on how to describe risks and rewards in an equally prominent manner in marketing communications in those cases when the contents are distributed on such communication channels which provide only very limited space available to their users to deliver information to investors (e.g. LinkedIn / Instagram / Twitter).

<ESMA_QUESTION_CPMC_8>

Q9 : What are your views on this approach? Do you agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications relating to funds open to retail investors and marketing communications relating to funds open to professional investors only?

<ESMA_QUESTION_CPMC_9>

We agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications directed at retail or professional audiences. Marketing materials for the same fund might be assessed differently for the two audiences. Thus, we recommend supplementing the Guidelines with further provisions setting out guidance on such differences.

<ESMA_QUESTION_CPMC_9>

Q10 : Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund?

<ESMA_QUESTION_CPMC_10>

We believe that marketing communications should be consistent with the information documents of a promoted fund. However, marketing documents should give the most important information concerning a promoted fund rather than necessarily all information, in the same way that a KIID concisely gives key information, e.g. a KIID will include the most important risk information rather than every risk factor as listed in the prospectus or information memorandum of a fund.

<ESMA_QUESTION_CPMC_10>

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?

<ESMA_QUESTION_CPMC_11>

We agree.

<ESMA_QUESTION_CPMC_11>

Q12 : What are your views on these requirements relating to the fair, clear and not misleading of the information on risks and rewards?

<ESMA_QUESTION_CPMC_12>

We agree with Paragraphs 33 – 28 of Section 6.2 of the Guidelines (*Information on risks and rewards*).

<ESMA_QUESTION_CPMC_12>

Q13 : Do you agree with this approach on the presentation of costs?

<ESMA_QUESTION_CPMC_13>

We agree with paragraph 39 of Section 6.3 of the Guidelines (*Information on costs*) that the costs of a fund should be clearly stated.

In respect of paragraph 40 of Section 6.3 of the Guidelines (*Information on costs*) we have reservations regarding the use of historic exchange rates on the basis that these may not be representative of future fluctuations of the relevant rate. We think that a relevant warning concerning the variability of rates may be more relevant.

<ESMA_QUESTION_CPMC_13>

Q14 : Do you agree with this approach relating to the information on past and expected future performance?

<ESMA_QUESTION_CPMC_14>

We agree with the approach to information on past performance (Paragraphs 41 – 49 of Section 6.4 of the Guidelines).

<ESMA_QUESTION_CPMC_14>

Q15 : Do you agree with this approach relating to the information on the sustainability-related aspects of the investment in the promoted fund?

<ESMA_QUESTION_CPMC_15>

Yes. However, whilst we agree with the guidelines in paragraphs 42 to 47 of Section 6.5 we strongly disagree with the example given in paragraph 46 which seems at odds with the rest of this section. The example states that if the investment strategy of a fund is primarily pursuing financial performance, any sustainability aspects of the fund should not be the main information of a marketing communication. Earlier, paragraph 46 states that “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.” We hope that ESMA will remove the example wording given.

<ESMA_QUESTION_CPMC_15>

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?

<ESMA_QUESTION_CPMC_16>

We believe that some of the proposed Guidelines are overly prescriptive in some areas (see Q6 and Q7 above for instance) and may have the unintended result of potentially making some marketing materials less clear when proscribed formats are adhered to. We also believe that Distributors should be accountable for materials which they have written provided they acted beyond the control of and/or by breaching the instructions of the fund managers.

The impact of the Guidelines would be that most marketing materials periodically produced as well as the relevant internal policies used by our firm would require some adjustment to ensure ongoing alignment.

<ESMA_QUESTION_CPMC_16>

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.

<ESMA_QUESTION_CPMC_17>

There could be a significant resource cost to execute on the updates that would be necessary, based on ESMA’s current draft. Given that a variety of regulatory adjustments are on the horizon (e.g SFRD, PRIIPS) the resource cost could likely be more limited if these are synchronized. It is difficult to quantify the exact costs involved. Broadly, many internal marketing material preparation guidelines would need to be amended and the majority of our firm’s annual output of marketing materials would need to be updated and reviewed outside of their normal periodic update processes. The costs and time involved will be material.

<ESMA_QUESTION_CPMC_17>