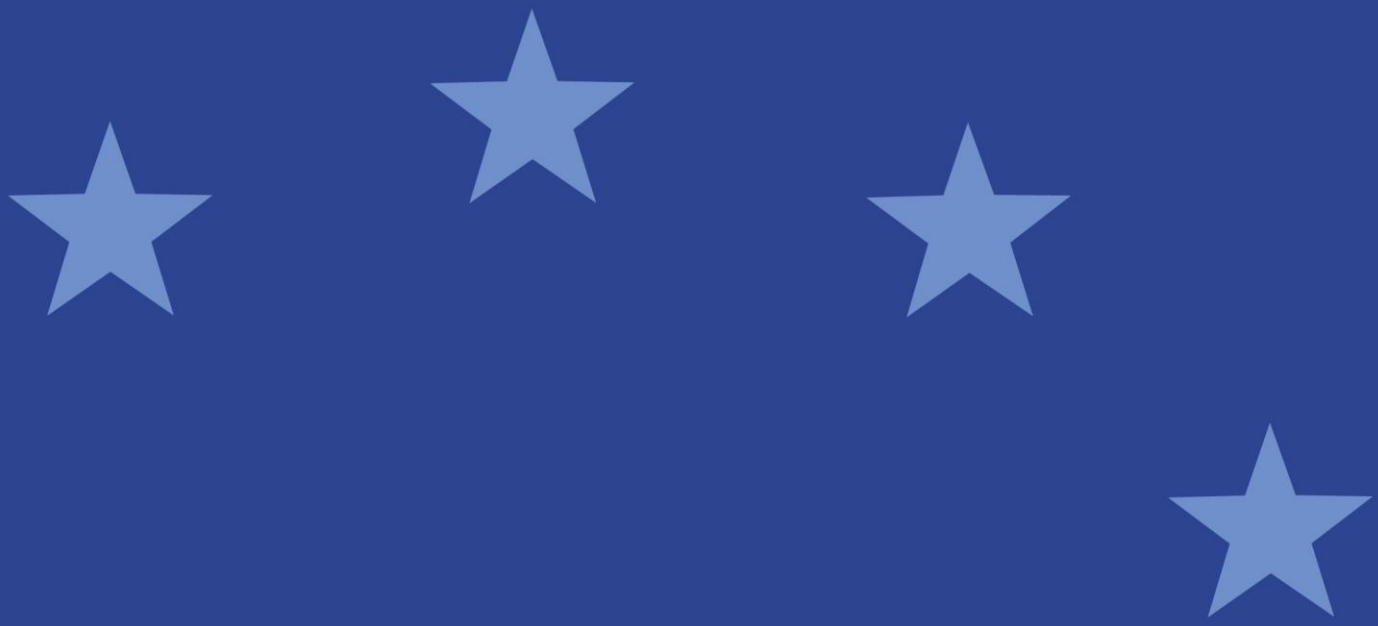
esma European Securities and Markets Authority

# Guidelines

## Guidelines on marketing communications under the Regulation on cross-border distribution of funds



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# 1 Scope

**Who?**

These guidelines apply to UCITS management companies, including any UCITS which has not designated a UCITS management company, Alternative Investment Fund Managers, EuVECA managers and EuSEF managers.

**What?**

The Guidelines should apply to all marketing communications addressed to investors or potential investors for UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs. Examples of documents that may be considered as marketing communications include, *inter alia*:

a) All messages advertising for a UCITS or an AIF, regardless of the medium, including paper printed documents or information made available in electronic format, press articles, press releases, interviews, advertisements, documents made available on the internet, as well as webpages, video presentations, live presentations, radio messages or factsheets.

b) Messages broadcasted on any social media platform, when such messages refer to any characteristics of a UCITS or an AIF, including the name of the UCITS or the AIF. For the purpose of these guidelines, the term “social media” should be understood as any technologies which enable social interaction and the creation of collaborative content online, such as blogs and social networks (Twitter, LinkedIn, Facebook, Instagram, Tiktok, Youtube, Discord etc.) or discussion forums, accessible by any means (in particular electronic means, via a computer or mobile applications for example).

c) Marketing material addressed individually to investors or potential investors, as well as documents or presentations made available by a UCITS management company, an AIFM, a EuVECA manager or a EuSEF manager to the public on its website or in any other places (fund manager’s registered office, distributor’s office, etc.).

d) Communications advertising a UCITS or an AIF addressed to investors or potential investors located both in the home Member State of the fund manager or in a host Member State.

e) Communications by a third party and used by a UCITS management company, an AIFM, a EuVECA manager, or a EuSEF manager for marketing purposes.

Examples of communications that should not be considered as marketing communications include, *inter alia*:

a) Legal and regulatory documents/information of a fund, such as the prospectus or the information which is to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of

Regulation (EU) No 346/2013, the KIID and/or KID, the annual and half-yearly reports of a UCITS or an AIF, the Memorandum & Articles of Association, By-Laws, Trust Deed or similar documents required to legally establish a fund, or notice to a General Meeting of shareholders/unitholders.

b) Corporate communications broadcast by the fund manager describing its activities or some recent market developments – such as the disclosure of quarterly or half-yearly earnings, dividend announcements, organisational announcements or senior management changes –which do not refer to a specific UCITS or AIF or a group of UCITS or AIFs, unless the activities of the fund managers are limited to one fund or a small number of funds which are implicitly identified in such corporate communication.

c) Short messages broadcast on-line, in particular on social media platforms (e.g. Twitter, LinkedIn, Facebook, Instagram, Tiktok, Youtube, Discord etc), which only include a link to a webpage where a marketing communication is available, but which do not contain any information on a specific AIF, UCITS or group of AIFs or UCITS.

d) Information or communication issued in the context of pre-marketing, as defined in Article 4(1)(aea) of Directive 2011/61/EU;

**When?**

These guidelines apply 6 months after the date of the publication of the guidelines on ESMA's website in all EU official languages.

# 2 Purpose

1. As specified in Article 4(6) of the Regulation[1], the purpose of these guidelines is to specify the application of the requirements for marketing communications set out in Article 4(1) of the Regulation. In particular they establish common principles on the identification as such of marketing communications, the description of risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and the fair, clear and not-misleading character of marketing communications, taking into account on-line aspects of such marketing communications. However, the Guidelines do not intend to replace existing national requirements on the information to be included in marketing communications (such as those relating to the fiscal treatment of the investment in the promoted fund) to the extent these are compatible with any existing harmonised EU rules (e.g. rules on disclosure of costs or performance in the KIID should not be contradicted or diminished by different national disclosure requirements on costs or performance in marketing communications).
2. In accordance with Article 4(6) of the Regulation, these guidelines will be updated periodically.

[1] Regulation (EU) 2019/1156 of the European Parliament and the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014.

# 3 Compliance and reporting obligations

## 3.1 Status of the guidelines

3. This document contains guidelines issued under Article 16 of the ESMA Regulation[2]. In accordance with Article 16(3) of the ESMA Regulation national competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.

## 3.2 Reporting requirements

4. National competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA. In the absence of a response by this deadline, national competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.

# 4 Guidelines on the identification as such of marketing communications

5. Any reference to a UCITS or an AIF in a press article, advertisement or press release on the internet or on any other medium may only be published after the home national competent authority of the promoted fund has granted approval, where such approval is required for the marketing, and, if applicable, the UCITS management company, the AIFM, the EuSEF manager or the EuVECA manager has received notification that it may market the promoted fund in the targeted host Member State.

6. The requirement for marketing communications to be identifiable as such should imply that all marketing communications include sufficient information to make it clear that the communication has a purely marketing purpose, is not a contractually binding document or an information document required by any legislative provision, and is not sufficient to take an investment decision. In this context, a marketing communication should be deemed to be identified as such when it includes a prominent disclosure of the terms "*marketing communication*" (even when preceded by the # symbol when the use of that symbol accentuates the text which it precedes in the case of on-line marketing communications), such that any person looking at it, or listening to it, can identify it as a marketing communication.

7. Additionally, marketing communications should include a disclaimer such as the following:

> "*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.*"

[2] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority).

8. However, when this disclaimer is not fit to the format and length of an on-line marketing communication, it may 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.
9. The disclaimer should be clearly displayed in the marketing communication. Clarity should be assessed in consideration of the type of communication: in case of a video presentation, the disclaimer should be embedded in the video and displaying the disclaimer just at the end of the video should not be considered appropriate.
10. A marketing communication should not be considered identifiable as such when it contains excessive cross reference to legal or regulatory provisions unless this is appropriate (e.g. reference to the provisions of a domestic law setting governing the functioning of the specific type of AIF to which the communication relates).

# 5 Guidelines on the description of risks and rewards in an equally prominent manner

11. When a marketing communication includes information on risks and rewards, the following requirements should be met.
12. Marketing communications that reference any potential benefit of purchasing units or shares of an AIF or units or shares of a UCITS should be accurate and always give a fair and prominent indication of any relevant risks. This equally prominent disclosure of risks and rewards should be assessed in relation to both the presentation and the format of these descriptions.
13. When disclosing risks and rewards information, the font and size used to describe the risks should be at least equal to the predominant font size used throughout the information provided, and its position should ensure such indication is prominent. Information on risks should not be disclosed in a footnote or in small characters within the main body of the communication. Presenting risks and rewards in the form of a two-column table or summarised in a list clearly differentiating the risks and the rewards on a single page is a good example of how risks and rewards can be presented in an equally prominent manner.
14. Marketing communications should not refer to the rewards without referring to the risks. In particular, a marketing communication should not describe only the rewards and refer to another document for the description of the risks.
15. Both the risks and rewards should be mentioned either at the same level or one immediately after the other.

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

## 6.1 General requirements

*Suitability of the marketing communication to the target investors or potential investors*

16. All marketing communications, regardless of the target investors, should contain fair, clear and not misleading information. However, the level of information and the way that the information is presented may be adapted to whether investment in the promoted fund is open to retail investors (i.e. UCITS or retail AIFs), or to professional investors only (i.e. non-retail AIFs). In particular, marketing communications promoting funds open to retail investors should refrain from using excessively technical wording, provide an explanation of the terminology used, be easy to read and, where relevant, provide adequate explanation on the complexity of the fund and the risks arising from investment to assist investors' understanding of the characteristics of the promoted fund.
17. The marketing communication 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.

*Consistency with other documents*

18. The information presented in the marketing communication should be consistent with the legal and regulatory documents of the promoted fund, as applicable, in particular:
    a) The prospectus or the information to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of Regulation (EU) No 346/2013,
    b) The legal documentation of the fund, in particular the Memorandum & Articles of Association, By-Laws, Trust Deed or similar documents required to legally establish a fund,
    c) The KID or KIID,
    d) The information disclosed on the websites of UCITS management companies, AIFMs, EuVECA managers and EuSEF managers under Regulation (EU) 2019/2088, and
    e) The annual and half-yearly reports.
19. This requirement is applicable to, inter alia, the disclosure of the investment policy, recommended holding period, risks and rewards, costs, past and expected future performance, and sustainability-related aspects of the investment.

20. Consistency between the marketing communication and the legal and regulatory documents does not mean that all relevant information which is necessary to make an investment decision should be embedded in the marketing communication. However, the wording or the presentation used in the marketing communication should not be inconsistent with, add to, diminish or contradict any information mentioned in the legal or regulatory documents of the promoted fund.

21. Where indicators, simulations or figures relating to risks and rewards, costs, or past and expected future performance returns are mentioned or disclosed in marketing communications, they should be consistent with the indicators, simulations or figures used in the legal and regulatory documents of the fund. This means that the methodology and the value for the computation of the indicators should be the same as in the legal and regulatory documents although the presentation may be different.

*Description of the features of the investment*

22. When a marketing communication describes some features of the promoted investment, the following requirements should be met.

23. The information on the features of the investment should be kept up to date.

24. The amount of information included in a marketing communication should be proportionate to the size and format of the communication. For example, when the marketing communication is a paper-printed or in electronic format, the font and font size should be such that the information is easily readable; if audio or video is used, the speed of speaking and volume of sound should make the information understandable and clearly audible.

25. When marketing communications describe some features of the investment, they should contain sufficient information to understand the key elements of those features and should not make excessive cross-reference to the legal and regulatory documents of the promoted fund.

26. When providing details on the characteristics of the promoted fund, the communication should describe in an accurate manner the features of the investment which is promoted. Accordingly, the communication should:

    a) When the promoted fund is open to retail investors, make it clear that the investment which is promoted concerns the acquisition of units or shares in a fund, and not in a given underlying asset such as building or shares of a company, as these are only the underlying assets owned by the fund.

    b) Include at least a short description of the investment policy of the fund and an explanation on the types of assets into which the fund may invest.

27. When the communication relates to the use of leverage, regardless of how the leverage is gained, it should include an explanation on the impact of this characteristic, concerning the risk of potential increased losses or returns.

28. When marketing communications describe the investment policy of the promoted fund, in order to assist investors' understanding, the following is recommended practice:

a) In the case of index-tracking funds, the words “passive” or “passively managed” should be included in addition to the words “index-tracking”;

b) When the promoted fund is actively managed, explicitly using the terms “active” or “actively managed”;

c) Active funds which are managed in reference to an index should provide additional disclosure on the use of the benchmark index and indicate the degree of freedom from the benchmark;

d) Active funds which are not managed in reference to any benchmark index should also make this clear to investors.

29. The information contained in marketing communications should be presented in a way that is likely to be understood by the average member of the group of investors to whom it is directed, or by whom it is likely to be received. When the marketing communication promotes a fund open to retail investors, it should be ensured that the meaning of all terms describing the investment are clear.

30. Marketing communications should refrain from referring to the name of the national competent authority in a manner that would imply any endorsement or approval of the units or shares which are promoted in the communication by the authority. In particular, a visa or marketing authorisation granted by a national competent authority may be referred to in a marketing communication, but it should not be used as a sales argument.

31. In the case of short marketing communications, such as messages on social media, the marketing communication should be as neutral as possible, also it should indicate where more detailed information is available, in particular by using a link to the relevant webpage where the information documents of the fund are available.

32. All statements embedded in the marketing communication should be adequately justified based on objective and verifiable sources, which should be quoted. In addition, the communication should refrain from using overoptimistic wording, such as “the best fund” or “the best manager”, wording that would diminish the risks, such as “safe investment” or “effortless returns”, or wording that may imply high returns, without clearly explaining that such high returns may not be reached and that there is a risk of losing all or part of the investment.

33. Comparison of the promoted fund with other funds should be limited to funds characterised by a similar investment policy and a similar risks and rewards profile, unless the marketing documents contain a pertinent explanation on the difference of the funds.

34. Any reference to external documents, such as an independent analysis published by a third-party, should mention at least the source of the information and the period to which the information contained in the external document relates.

## 6.2 Information on risks and rewards

35. In addition to the requirements set out in section 5 above relating to the description of risks and rewards in an equally prominent manner, the following requirements should be met by marketing communications when they include information on such risks and rewards.

36. The disclosure of the risk profile of the promoted fund in a marketing communication should refer to the same risk classification as that included in the KID or the KIID.

37. Marketing communications that mention the risks and rewards of purchasing the units or shares of the promoted fund should refer at least to the relevant risks mentioned in the KID, the KIID, the prospectus, or the information referred to in Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of Regulation (EU) No 346/2013. These marketing communications should also mention where complete information on the risks can be found in a clear and prominent manner.

38. In case of AIFs open to retail investors, the marketing communication should clearly mention the illiquid nature of the investment where this is the case.

39. The representation of a ranking in a marketing communication may be based only on similar funds in term of investment policy and risk/rewards profile. The ranking's representation should also include the reference to the relevant period (at least 12 months or its multiple) and the funds' risk classification.

40. For funds recently set up and for which no past performance records are available, the reward profile may be represented only by reference to the benchmark's past performance or to the objective return, when a benchmark or objective return are envisaged in the legal and regulatory documents of the promoted fund.

## 6.3 Information on costs

41. When referring to the costs associated with purchasing, holding, converting or selling units or shares of an AIF or units of a UCITS, 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[3].

42. Where any part of the total costs is to be paid in, or represents an amount of, a currency other than that of the Member State in which the target investors are residents, the marketing communication should clearly state the currency in question, together with a warning that the costs may increase or decrease as a result of currency and exchange rate fluctuations.

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[3] For clarity, the existing guidelines relating to the disclosure of performance fees under the "ESMA Guidelines on performance fees in UCITS and certain types of AIFs" (ESMA34-39-992) apply. Paragraph 46 of the "ESMA Guidelines on performance fees in UCITS and certain types of AIFs" provides that "The prospectus and, if relevant, any ex-ante information documents as well as marketing material, should clearly set out all information necessary to enable investors to understand properly the performance fee model and the computation methodology. Such documents should include a description of the performance fee calculation method, with specific reference to parameters and the date when the performance fee is paid, without prejudice to other more specific requirements set out in specific legislation or regulation. The prospectus should include concrete examples of how the performance fee will be calculated to provide investors with a better understanding of the performance fee model especially where the performance fee model allows for performance fees to be charged even in case of negative performance." This measure is specific to the disclosure of performance fees whereas these guidelines on marketing communications are intended to provide guidance on the fair, clear and not misleading character of the information on costs contained in marketing communications.

## 6.4 Information on past performance and expected future performance

*Information on past performance*

43. In accordance with paragraph 22 above, when a marketing communication refers to the past performance of the promoted fund, this information should be consistent with the past performance included in the prospectus, in the information to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of Regulation (EU) No 346/2013, in the KID or in the KIID. In particular, when the performance is measured against a benchmark index in the prospectus, the information to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of Regulation (EU) No 346/2013, the KID or the KIID, the same benchmark index should serve as a reference in the marketing communication.

44. Information on past performance, including simulated past performance, should not be the main information of the marketing communication. It should be based on historical data. It should mention the reference period chosen for measuring the performance and the source of the data. Past performance should be disclosed for the preceding 10 years for funds establishing a KIID, or for the preceding 5 years for other funds, or the whole period for which the relevant funds have been offered if less than 10 years for funds establishing a KIID or less than 5 years for other funds. In every case past performance information should be based on complete 12-months periods but this information may be supplemented with performance for the current year updated at the end of the most recent quarter.

45. Any change that affected significantly the past performance of the promoted fund, such as a change of the fund manager, should be prominently disclosed.

46. When displaying cumulative performance, the communication should also display the performance of the fund for each year of the considered period. To be displayed in a fair and not misleading manner, the cumulative performance could be presented, for example, in the form of a graph.

47. When information on past performance is presented, this information should be preceded by the following statement:

    "*Past performance does not predict future returns*".

48. If the information on past performance relies on figures denominated in a currency other than that of the Member State in which the target investors are residents, the currency is clearly stated, together with a warning indicating that returns may increase or decrease as a result of currency fluctuations.

49. When no information on the past performance of the promoted fund is available, in particular when it has been recently set up, marketing communications should avoid disclosing a simulated past performance based on non-pertinent information. Hence, disclosing simulated past performance should be limited to marketing communications relating to:

a) A new share class of an existing fund or investment compartments, where the performance can be simulated on the basis of the performance of another share class, provided the two share classes have the same (or substantially the same) features; and

b) A new feeder fund whose performance can be simulated by taking the performance of its master, provided that the feeder's strategy and objectives do not allow it to hold assets other than units of the master and ancillary liquid assets, or that the feeder's characteristics do not differ materially from those of the master.

50. Information on simulated past performance should satisfy, *mutatis mutandis*, the requirements set out in paragraphs 44 to 49 above.

*Information on expected future performance*

51. When a marketing communication refers to the expected future performance and to the reward profile of the promoted fund, the following requirements should apply.

52. Expected future performance should be based on reasonable assumptions supported by objective data.

53. Expected future performance may be disclosed only per fund and no aggregate figures should be allowed.

54. Expected future performance should be disclosed on a time horizon which is consistent with the recommended investment horizon of the fund.

55. When information on expected future performance based on past performance and/or current conditions is presented, this information should be preceded by the following statement:

> "*The scenarios presented are an estimate of future performance based on evidence from the past on how the value of this investment varies, and/or current market conditions and are not an exact indicator. What you will get will vary depending on how the market performs and how long you keep the investment/product.*"

56. Marketing communications should also include at least a disclaimer according to which future performance is subject to taxation which depends on the personal situation of each investor and which may change in the future.

57. The information on expected future performance should include a statement according to which investment may lead to a financial loss if no guarantee on the capital is in place.

58. If the information concerns an ETF, marketing communications should indicate the regulated markets where the fund is traded, and if any figures on expected future performance is mentioned in the marketing communication, they should be based on the fund's NAV.

## 6.5 Information on sustainability-related aspects

59. When a marketing communication refers to the sustainability-related aspects of the investment in the promoted fund, the following requirements should be met.

60. The information should be consistent with the information included in the legal and regulatory documents of the promoted fund. A link to the website where information on sustainability-related aspects is provided pursuant to Regulation (EU) 2019/2088 in relation to the promoted fund should be included in the marketing communication, where relevant given the nature of the marketing communication.

61. Information on the sustainability-related aspects of the promoted fund should not outweigh the extent to which the investment strategy of the product integrates sustainability-related characteristics or objectives.

62. When they refer to the sustainability-related aspects of the promoted fund, marketing communications should indicate that the decision to invest in the promoted fund should take into account all the characteristics or objectives of the promoted fund as described in its prospectus, or in the information which is to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013, Article 14 of Regulation (EU) No 346/2013 where applicable.