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DUFAS Public Consultation on the Marketing Communications Guidelines of ESMA



ESMA:

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.

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Q1a. Do 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?

We agree that the Guidelines on marketing communications should be aligned with the provisions of Article 44 of the MiFID Commission Delegated Regulation (EU) 2017/565.

However, the Guidelines should take into consideration the differences in marketing communications between retail (UCITS) and professionally-oriented funds (AIFs). This differentiation should be made clearer throughout the Guidelines given these diverging type of investors and distribution channels. It should allow for less requirements on marketing communications of funds expressly aimed at professional investors, in line with the last MiFID II quick fix amendments.

Furthermore, the Guidelines should express that the management company or fund manager cannot assume responsibility for a distributor's marketing communications over which the former has no formal control. This is for instance the case if no formal delegation of distribution is arranged by contract, but also with modern day technology where funds are available on platforms and reach the (end) investor through a multi-step distribution chain.

Q1b. Do 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?

We see some gaps when comparing the Guidelines with art. 44 Commission Delegated Regulation (EU) 2017/565. For example, incorporation of article 44(2)(g), i.e. "the information is up-to-date and relevant to the means of communication used", and section 2(a) of Article 44 is missing in the Guidelines. We suggest to fully align the wording of art. 44 with the Guidelines, and where such full alignment does not take place, indication of the reason why.

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

We generally agree with an all-encompassing approach regarding the definition of marketing communications. However we suggest defining 'marketing communication' in a more accurate and consistent manner. In the Consultation Paper (CP) bullet 10 and 11 refers to article 4 (x) AIFMD and 'a direct or indirect offering'. In the CP bullet 18, 21 and 24 it refers to 'promotion' of funds in marketing communication. In Annex IV it uses the word 'advertising'. The draft Guidelines provide a description in bullet 6 which is different again. Please clarify to ensure a market wide consistent approach.

Q3. Do you agree that a non-exhaustive list of marketing communications should be included in the Guidelines?

We are not sure whether or it is really necessary to include a non-exhaustive list of marketing communications, although we can understand that there is some merit to having such list. For the negative list, we would suggest *inter alia* adding the information to be disclosed under articles 3,4,5 and 10 SFDR, as they are compulsory website disclosures.



Q4. Do you agree that the Guidelines appropriately take into account the on-line aspects of marketing communications?

With set texts such as disclaimers, or the requirement of mentioning compulsory elements of the fund/product in all marketing communications, the Guidelines do not adequately take into account the on-line aspects of marketing communications as they can be very short & the presentation (screen) limited. The overriding principles should therefore apply to that type of communication, in that it should be fit to the size and format – but still is fair, clear and not misleading. As such we propose to allow for a more principle based approach, which would also fit to be applicable to future communication solutions

Q5. Do you agree that the Guidelines should include a negative list of the documents that should not be considered as marketing communications?

We believe that all regulatory documentation and regulatory reporting of the fund should not be considered to be marketing. Such list should be non-exhaustive. This may also include forms of communication such as certain media interviews, but also as indicated in response to Q3 the information to be disclosed under articles 3,4,5 and 10 SFDR, as they are compulsory website disclosures.

We also propose to clarify what the elements define what is not marketing communication – as in only general information. For instance when a referral to a fund is made without the intention of marketing, or not by the fund manager. For a market-wide consistent approach it would be good to define the elements of the 'bottom line' - the difference between marketing communications and general communications.

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 would like to comment that nr 5 proposed Guidelines is in our view too wide in scope where it states *"A UCITS management Company, an AIFM, (...) should ensure that any reference to a UCITS or an AIF it manages in a press article, advertisement or press release on the internet or on any other medium is published only after its home NCA has granted approval (...)".* The management company have in no way control on 'any reference' to its funds in a free press world.

A short disclaimer does seem appropriate, but the content or length of such disclaimer should be tailored to the particular means of communication, in particular with regards to social media (e.g. twitter, LinkedIn, YouTube, Instagram, etc.) if any. The proposed wording in the Guidelines may be useful for marketing with no space restrictions. This is however different in respect to social media. Finally, fund managers should have flexibility in terms of placement of the disclaimer, particularly in connection with social media or marketing via video.



Q7. Do you agree with the approach on the description of risks and rewards in an equally prominent manner?

We generally agree with this approach. However, reference should be made to relevant risks rather than any risks, similar to MiFID marketing rules. Furthermore, there should be more differentiation in the description of risks and rewards depending whether the marketing communication is addressed to retail investors or professional investors.

The Guidelines should be in line with article 44(2)(g) of the Commission Delegated Regulation (EU) 2017/565 regarding the description of risks and rewards depending *on the communication channel used*. In that context, the Guidelines should reflect that description of relevant risks and rewards may vary depending on the communication channel used, particularly such channels which provide only very limited space to their users to deliver information to investors (e.g. LinkedIn/Facebook, Instagram/Twitter).

Q8. 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?

We 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.



Q9. Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund?

We agree that in general marketing communications should be consistent with, and not contrary to, the legal and regulatory documents of the promoted funds.

Q10. 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?

Yes. 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 communications.

Q11. What are your views on these requirements relating to the fair, clear and not misleading of the information on risks and rewards?

No comments.

Q12. Do you agree with this approach on the presentation of costs?

The Guidelines provide that *"when a marketing communication mentions the costs associated with the investment in the promoted fund, it should at least allow investors to understand the overall impact of costs on the amount of their investment and on the expected returns"*. This seems to align with the comparable mandatory MiFID requirements for all costs information. Where the marketing communication is from a fund that does not act as distributor, this may be potentially misleading as the costs of distribution may not be included.

Q13. Do you agree with this approach relating to the information on past and expected future performance?

We believe that the information on past and expected future performance should be completely aligned with the anticipated revision of PRIIPs, the review of draft RTS PRIIPs in particular. No additional or diverging rules for marketing should be prescribed in these Guidelines.

Q14. Do you agree with this approach relating to the information on the sustainability-related aspects of the investment in the promoted fund?

We do believe that guidance on marketing of the sustainability-related aspects of the investment in the promoted fund should be dealt with by the SFDR (Sustainable Finance Disclosure Regulation) rather than in the cross-border fund legislation. Article 13 of the SFDR specifically stipulates that financial market participants and financial advisers shall ensure that their marketing communications do not contradict the information disclosed pursuant SFDR. In addition, the ESAs may develop, through its Joint Committee, draft implementing technical standards to determine the standard presentation of information on the promotion of environmental or social characteristics and sustainable investments. This should be awaited before guidance hereon are reflected in these Guidelines.



Q15. 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?

In the Netherlands, the Dutch regulator, the AFM issued guidance on marketing, i.e. information in general in its policy "*Beleidsregel Informatieverstrekking*", as amended 31 December 2018. It should be investigated whether these Guidelines are consistent with current AFM policy.

Q16. What additional costs and benefits would compliance with the proposed Guidelines bring to the stakeholder(s) you represent?

No comments.

Questions or suggestions?

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