



European Securities and  
Markets Authority

# Final Report

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



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# 1 Executive Summary

## Reasons for publication

Regulation (EU) 2019/1156 of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings (the “Regulation”) specifies that AIFMs, EuVECA managers, EuSEF managers and UCITS management companies shall ensure that marketing communications addressed to investors are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and that all information included in marketing communications is fair, clear and not misleading.

The Regulation provides that ESMA shall develop guidelines on the application of these requirements for marketing communications, taking into account the on-line aspects of such marketing communications.

On 8 November 2020, ESMA published a Consultation Paper (CP) on the proposed draft Guidelines<sup>1</sup>. The public consultation closed on 8 February 2021.

This Final Report provides an overview of the feedback received through the public consultation and explains how ESMA took this feedback into account. It also contains the final set of Guidelines on marketing communications.

## Contents

Section 2 contains an overview of the document. Annex I provides the Feedback Statement. Annex II sets out the cost-benefit-analysis which details the expected impact of the Guidelines. Annex III sets out the legislative mandate to develop the Guidelines.

The Guidelines are set out in Annex IV.

## Next Steps

The Guidelines contained in Annex IV of this Final Report will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the Guidelines. These Guidelines will apply 6 months after the date of the publication of the guidelines on ESMA’s website in all EU official languages.

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<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/esma34-45-926 - cp\\_guidelines\\_on\\_marketing\\_communications.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-45-926_-_cp_guidelines_on_marketing_communications.pdf)

## **2 Overview**

### **Background**

1. On 9 November 2020, ESMA published a CP on the draft Guidelines on marketing communications relating to UCITS and AIFs.
2. The consultation closed on 8 February 2021.
3. While stakeholders generally agreed with the draft Guidelines, the responses included certain recurring comments. In particular, a majority of respondents were concerned by the responsibility of fund managers to ensure that all marketing communications, even those issued by third-party distributors, meet the requirements set out in the draft Guidelines. The majority of stakeholders also agreed that the on-line aspects of marketing communications were not sufficiently taken into account and asked that the draft Guidelines are amended to facilitate on-line marketing. These points were addressed in the draft Guidelines, as explained in the Feedback Statement below.
4. The detailed content of the responses and ESMA feedback is outlined in the Feedback Statement set out in Annex I below.

### **Cost-benefit analysis**

5. A cost-benefit analysis of the Guidelines is included in Annex III of this Final Report. It has been updated to reflect respondents' feedback.

### **Contents and next steps**

6. Annex IV of this Final Report includes the Guidelines that ESMA will publish. They have been updated to reflect feedback from the public consultation.
7. These Guidelines will apply 6 months after the date of the publication of the guidelines on ESMA's website in all EU official languages.

## 3 Annexes

### 3.1 Annex I: Feedback Statement

8. ESMA received 21 responses, 2 of which were confidential, mainly from asset managers and their associations, a consumer association, and one public body. ESMA consulted the Securities and Markets Stakeholders Group (SMSG), but the SMSG chose not to opine on these Guidelines.
9. As a general comment, some respondents mentioned that the Guidelines should not replace existing national requirements relating to marketing practices, in particular those requirements stemming from guidelines issued by national trade associations.
10. A majority of respondents also called for a clarification of the responsibility of fund managers as regards the content of marketing communication. As a recurring comment, it was indicated that fund managers should not be held responsible for marketing communications issued by third-party distributors on which they had no reach. Several respondents mentioned that, pursuant to Article 44 of the Commission Delegated Regulation (EU) 2017/565 (the “MiFID II Delegated Regulation”), investment firms were not responsible for the marketing communications issued by their distributors and argued there is no reasons that the Guidelines impose such responsibility on fund managers. It was also mentioned that only delegated functions may imply a responsibility for a fund manager and that marketing by distributors is not carried-out on a delegation basis, so that fund managers should not be held liable for the activities of these distributors. Finally, it was mentioned that making fund managers responsible for marketing communications issued by distributors may require the adoption of a new rule of national law.

#### **ESMA’s response:**

ESMA staff reminds that the purpose of the Guidelines is to ensure that the rules set out in Article 4(1) of the Regulation are applied in a consistent and harmonised manner in all Member States.

On the responsibility of the fund manager, ESMA points out that the Regulation specifies the requirements for marketing communications and does not explicitly address the responsibility of funds managers for their content. In this context, ESMA amended the wording of the “Who?” part within the Scope section of the Guidelines and deleted its second sentence which went beyond the mere determination of the scope of the guidelines.

**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?**

11. The vast majority of respondents expressed their support for ESMA's proposal to ensure consistency of the requirements set out in the Guidelines with those stemming from Article 44 of the MiFID II Delegated Regulation. The majority of these respondents insisted that the requirements set out in the Guidelines are aligned with those set out in the MiFID II Delegated Regulation to the best extent possible as this would facilitate the application of the Guidelines, while one respondent went further and insisted that the Guidelines should not only be consistent but identical to the requirements set out in the MiFID II Delegated Regulation.
12. Some respondents indicated that the Guidelines were overly prescriptive and should be more principle-based, like the provisions of Article 44 of the MiFID II Delegated Regulation. On the contrary, a limited number of respondents mentioned that the provisions of Article 44 of the MiFID II Delegated Regulation should not merely be duplicated in the Guidelines, since their purpose is to specify the requirements which are specifically set out to govern fund marketing.
13. Finally, some respondents identified some gaps between the requirements set out in the draft Guidelines and certain requirements set out in Article 44 of the MiFID II Delegated Regulation. In particular, the following gaps were identified by these respondents:
- The draft Guidelines are more prescriptive on the exact location of information on risks in marketing communications;
  - Paragraph 42 of the draft Guidelines goes further than Article 44(4) of the MiFID II Delegated Regulation by imposing disclosing the source of the data on past performance and imposing that this information is not mentioned in a footnote;
  - The disclaimer set out in paragraph 45 of the draft Guidelines is phrased differently and in a more restrictive manner than the requirement set out in Article 44(4)(d) of the MiFID II Delegated Regulation, which allows some flexibility in the drafting of the disclaimer;
  - The requirement set out in paragraph 46 of the draft Guidelines to include a "prominent warning indicating that returns may increase or decrease as a result of currency fluctuation" is more stringent than the warning imposed by Article 44(4)(e) of the MiFID II Delegated Regulation. To this end, it was suggested that the word "prominent" is deleted;

- The draft Guidelines did not include the following requirements set out in Article 44 of the MiFID II Delegated Regulation which impose:
  - Including the name of the investment firm;
  - Specifying the source of the information used for comparisons;
  - Including the key facts and assumptions used to make the comparison;
  - Including appropriate performance information which covers the preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than 5 years, or such longer period as the firm may decide, and in every case that performance information is based on complete 12-month periods;
  - Not basing or referring to simulated past performance where the marketing communication contains information on future performance;
  - Basing the information relating to expected future performance on performance scenarios in different market conditions (both negative and positive scenarios), and reflecting the nature and risks of the specific types of instruments included in the analysis;
  - Where the information refers to a particular tax treatment, prominently stating that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

14. To further align the Guidelines with the requirements set out in Article 44 of the MiFID II Delegated Regulation, some respondents made the following proposals:

- Amending paragraph 10 of the draft Guidelines on the risks to be disclosed in marketing communications, which required the disclosure of “any” risks, to align it with Article 44(2)(b) of the MiFID II Delegated Regulation, which imposes the disclosure of only “relevant” risks;
- Deleting the requirement set out in paragraph 11 of the draft Guidelines according to which the position used to describe the rewards should be the same as that used to describe the risks, and align it with the requirements set out in Article 44(2)(c) of the MiFID Delegated Regulation, which restricts the creative freedom to the font size only;
- Deleting the requirement set out in paragraph 13 of the draft Guidelines, according to which risks and rewards should be mentioned either at the same level or one immediately after the other, as this goes beyond the requirements set out in Article 44 of the MiFID II Delegated Regulation.

**ESMA’s response:**

ESMA took note of the various suggestions made by respondents to amend the Guidelines in order to clarify what constitutes a marketing communication, or to ensure better consistency with the requirements set out in Article 44 of the MiFID II Delegated Regulation. Some amendments were made in the Guidelines on the basis of these comments. In particular, the following changes were implemented:

- Point e) of the “positive list” of marketing communications<sup>2</sup> was removed;
- An additional point was added to the “negative” list of documents that should not be considered as marketing communications, to make reference to the information communicated in the context of pre-marketing;
- The requirement to include a disclaimer to clearly identify a marketing communication was amended to better fit the size and format of marketing communications, in particular in an on-line environment;
- The requirements relating to the format of the risk disclosure were amended.

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

15. As regards the scope of the marketing communications that will be subject to the Guidelines, respondents generally agreed with ESMA’s all-encompassing approach, though some respondents also asked that the definition of “marketing communications” is clarified in the Guidelines. Several respondents insisted that the definition of “marketing communications” should be consistent with that of “marketing” and “pre-marketing”.

**ESMA’s response:**

ESMA reminds that the purpose of the Guidelines is to specify the requirements applicable to the information contained in marketing communication, but not to define what constitutes “marketing”. Therefore, a general definition of what a “marketing communication” is would risk going beyond ESMA’s mandate.

**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.**

16. The majority of respondents agreed that a non-exhaustive list of marketing communications could help clarify the documents which have to meet the requirements specified in the Guidelines, while one respondent would prefer an exhaustive list. On the contrary, a consumers’ association disagreed with having a list of marketing communications; in their views, all marketing communications should be regarded as such,

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<sup>2</sup> According to this point, the following documents should have been regarded as marketing communications: “Communications describing the characteristics of a UCITS or an AIF, which are handed down to distributors by a UCITS management company, an AIFM, a EuVECA manager or a EuSEF manager, which are eventually addressed to investors or potential investors, even if such communications were not meant to be handed down to investors or potential investors”.

except for the ones listed in the negative list, which should thus be the only list kept in the Guidelines.

17. Out of the respondents who agreed with the non-exhaustive list, some of them suggested amending it, in particular to remove point (e)<sup>3</sup>, which should, in their views, be included in the negative list of documents that should not be qualified as marketing communications. According to these respondents, the inclusion of the documents referred to in this point would prevent fund managers from providing information to distributors on the characteristics of funds.

**ESMA's response:**

ESMA took note of the support expressed by respondents for the non-exhaustive list of documents that should be considered as marketing communications, but also acknowledges the consumers' association's comment, according to which there should be no limitation to what is considered as a "marketing communication".

In this context, ESMA reminds that the purpose of the non-exhaustive list is to give examples of communications that should generally be qualified as "marketing communications" and that are therefore subject to the requirements set out in the Guidelines. The purpose of this list is not to restrict the scope of marketing communications. Therefore, ESMA kept the non-exhaustive list.

However, ESMA took note of the comments regarding point (e) of the list, and removed it from the guidelines to avoid any confusion.

**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.**

18. The majority of respondents did not agree that the on-line aspects of marketing communications were appropriately taken into account. Generally, respondents called for greater flexibility in the presentation of marketing communications in a digital environment. This concerned, in particular, the incompatibility between the reduced size of messages on social media and the requirements contained in the draft Guidelines to include several disclaimers in marketing communications. A consumers' association called for a neutrality of the Guidelines as regards the on-line aspects of marketing communications and mentioned that the appropriateness of the information to its support should be assessed on a case-by-case basis.
19. To remedy this, some respondents suggested that the principle-based approach set out in Article 44(2)(g) of the MiFID II Delegated Regulation, which requires that information contained in marketing communications is relevant to the mean of communication used, is transposed in the Guidelines. Some other respondents also suggested clarifying what the

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<sup>3</sup> Point e) of the non-exhaustive list of marketing communications included in the draft Guidelines read as follows: "Communications describing the characteristics of a UCITS or an AIF, which are handed down to distributors by a UCITS management company, and AIFM, a EuVECA manager or a EuSEF manager, which are eventually addressed to investors or potential investors, even if such communications were not meant to be handed down to investors or potential investors."

“on-line aspects of marketing communications” are. Finally, one respondent insisted that the requirements contained in the Guidelines as regards the on-line aspects of marketing communication do not conflict with existing EU legislation, in particular rules on distance marketing and consumer protection laws.

**ESMA’s response:**

ESMA took note of respondents’ reaction on the room for better taking into account the on-line aspects of marketing communications in the Guidelines. In particular, ESMA took note of the strong and recurring request to ensure that advertising on social media (Facebook, Twitter, LinkedIn, etc.) is not hampered.

In this context, ESMA agreed that mirroring the provision set out in article 44(2)(g) of the MiFID II Delegated Regulation was appropriate, as it would ensure a better consistency of the Guidelines with the rules applicable to distributors and would provide more flexibility in the presentation of marketing communications in an on-line environment.

Therefore, ESMA amended the Guidelines accordingly.

**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.**

20. The majority of respondents agreed that a “negative list” of documents that should not be considered as marketing communications would be helpful. Among these respondents, a majority of them were of the view that the negative list should not be exhaustive and insisted on including the information and documents that fund managers are legally obliged to publish. Only one respondent called for an exhaustive list.

21. As regards the content of this negative list, some respondents suggested adding certain types of communications, in particular the following:

- In person, telephone and oral conversations, provided that the correspondence is not based on a script delivered to more than one client. This should concern in particular documentation or information provided in presentations to analysts or institutional investors with the purpose of knowing the interest of institutional investors in a given offer and therefore relates to what is considered as pre-marketing;
- Communications resulting from a personal recommendation;
- Correspondence used in the ordinary course of business, provided that this correspondence is not based on a script used with more than one client;
- Requests for information, requests for proposal and due diligence questionnaires;

- The documentation or information which relates to investment strategies and investment ideas which is disclosed to professional investors domiciled or registered in the EU, in order to verify their interest in an AIF or a sub-fund thereof, provided this is carried out under the terms established by Article 30a of the AIFMD;
- Client reporting documents which include portfolio reviews, provided that the documents do not otherwise promote new products or services;
- Shareholder reports (i.e. annual and half-yearly reports), prospectuses, private placement memoranda, offering documents, agreements and other legal documents, in particular the information to be disclosed pursuant to Article 10 of the SFDR;
- 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 or senior management staff changes, and regulatory filings (e.g. annual reports and shareholder letters);
- Corporate advertising campaigns that contain exclusively generic information about an entity or its social purpose, intended to make it known to the public;
- The periodic publications issued by analysts and experts defined in the Commission Delegated Regulation (EU) 2016/958<sup>4</sup>;
- Information for the acquisition of products or for carrying out transactions on products, as well as information or warnings about the characteristics and risks of the products or services offered that are provided to investors in compliance with information obligations, through any support, including the entity's website.
- Information sent to clients or published on-line about objective data of a financial instrument that does not include subjective elements or value judgments about it, as well as the documents or informative publications that are sent to clients explaining the situation of the markets and what the entity's management decisions have been in the mentioned market context for a given period. This concerns, for example, communications issued by a fund manager which are general in nature and do not refer to a specific fund or a substantive portion of the funds managed by the fund manager, e.g. thought-leadership communications, thematic-approaches, or analyses and outlooks;
- Media interviews, except for “infomercials”; and

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<sup>4</sup> Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

- Communications relating to recruiting and talent management, inclusion and diversity, culture or philanthropy.
22. Some respondents also outlined that the information that fund managers must publish in accordance with certain legislations which were not mentioned in the draft Guidelines, should not be considered as marketing communication. This concerned in particular the information to be published pursuant to the SFDR<sup>5</sup> or the revised Shareholders Right Directive<sup>6</sup>.
23. Some respondents called for excluding marketing communications related to closed-ended funds which are closed to subscriptions. Some respondents also called for flexibility for marketing communications addressed to non-EU investors.
24. On the contrary, certain respondents were not in favour of this negative list and would prefer replacing it by a list of criteria that should be met for a communication to be qualified as a “marketing communication”, although these respondents did not specify the criteria that would be relevant in this case.
25. Finally, some other respondents, who agreed with the idea of a negative list, also deemed it relevant to have such a list of criteria.

#### **ESMA’s response:**

ESMA took note of the overall majority expressed for keeping the negative list of communications that should not be considered as marketing communication and would therefore not be subject to the requirements set out in the Guidelines. ESMA agrees that both the “positive” and the “negative” list of marketing communications should be kept and extended on the basis of proposals made by respondents, in order to facilitate stakeholders’ understanding of the scope of the Guidelines. ESMA amended the list to take into account some of the suggestions made to further specify the communications that should not qualify as “marketing communications”.

In addition, ESMA also took note of the suggestion to add a list of general criteria that could help determine whether a communication should qualify as a “marketing communication”. However, while this list of criteria could help understand what constitutes a “marketing communication”, it may be considered as going beyond ESMA’s mandate and overlap with the definition of “marketing”. Hence, only the positive and negative lists were kept in the Guidelines.

#### **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?**

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<sup>5</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosure in the financial services sector.

<sup>6</sup> Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

26. A majority of respondents agreed that the use of a short disclaimer to identify a marketing communication was appropriate.
27. However, a majority of respondents also agreed that the content and length of the disclaimer should be adaptable depending on the circumstances. Generally, respondents asked for the possibility to tailor disclaimers depending on criteria, such as the target audience (retail or professional investors), the means of communication used (traditional media or social media where there might be a text and space-limit) and whether the type of communication makes the advertising nature of the marketing communication self-evident.
28. In this regard, some respondents recalled article 44(2)(g) of the MiFID II Delegated Regulation and believed that market participants should be allowed to tailor the content of a short disclaimer to the particular means and content, especially with regards to social media. Similarly, a handful of respondents requested the Guidelines to be supplemented with clear guidance on the content of a short disclaimer in respect of marketing communications via social media channels. Some respondents suggested that ESMA should consider a short and generic disclaimer coupled with a link inserted into the communication for access to further information.
29. Furthermore, several respondents did not believe it necessary to include the sentence “*This is not a contractually binding document*” in the disclaimer. These respondents mentioned that the sentence could create the illusion that the other documents mentioned in the last sentence of the disclaimer are contractual documents. Some respondents were of the view that it should simply suffice to state that “*this is a marketing communication*” or “*market message*”.
30. Additionally, a few respondents did not agree with the last sentence of the disclaimer as there is already an obligation to refer to the prospectus and the KIID/KID in the marketing communication pursuant to Article 4(2) and 4(5) of the Regulation.
31. Many respondents also believed that the Guidelines should be less prescriptive in terms of the placement of the disclaimer. Respondents called for flexibility, in particular when the marketing communication target professional investors only and when the market communication is broadcasted via video or social media. As such, two respondents noted that it would be appropriate to display the disclaimer at the end of the material for professional investors. On the contrary, one respondent believed that the Guidelines should specify that the disclaimer should appear at the beginning of a video.
32. Lastly, a few respondents had comments on paragraph 5 of the draft Guidelines regarding fund managers’ responsibility for third party actions<sup>7</sup>.

**ESMA’s response:**

In accordance with the requirement set out in Article 4(1) of the Regulation, which imposes that marketing communications are identifiable as such, ESMA considered it appropriate that a common disclaimer should appear in all marketing communications. However, ESMA agreed

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<sup>7</sup> Par. 5 of the draft Guidelines read as follows: “A UCITS management company, an AIFM, a EuSEF manager or a EuVECA manager 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 national competent authority has granted approval of the promoted fund and, if applicable, it has received notification that it may market the promoted fund in any host Member State targeted by that marketing communication.”

that the precise format of the disclaimer could be amended to better fit the various means of communication. In light of responses received, ESMA amended the wording of the disclaimer. ESMA also amended the Guidelines to take into account on-line marketing communications with space constraints.

ESMA noted that some respondents wanted further flexibility in terms of the placement of the disclaimer. However, ESMA believed that it was important that a short disclaimer was visible upfront on the first page of a paper-printed communication and was not put at the end of a video as this could be missed by investors or potential investors. If not, the disclaimer would lose its purpose.

As regards the concerns expressed on fund managers' responsibilities for third party actions, ESMA reminded that the concerned paragraph of the Guidelines aims at ensuring that no marketing communications are issued in relation to a fund that has not yet been authorised for marketing, where such authorisation applied. In light of this, ESMA kept the paragraph and amended it to clarify that the requirements it contains may not always be applicable.

**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.**

33. Respondents generally agreed that risks and rewards should be presented in an equally prominent manner. Many respondents called for closer alignment with the requirements contained in article 44(2) of the MiFID II Delegated Regulation and considered section 5 of the draft Guidelines to be overly detailed. Several respondents mentioned that the Guidelines should only require the disclosure of relevant risks, as required by article 44(2)(b) of the MiFID II Delegated Regulation.
34. Some respondents also wanted a stronger link between section 5 and 6 of the Guidelines. Those respondents especially believed that section 5 should acknowledge that the needs of retail investors and professional investors may differ concerning the presentation of risks and rewards.
35. A few respondents outlined that the requirements set out in the draft Guidelines regarding the usage of font and size of text when presenting risks and rewards were more stringent than those included in article 44(2)(c) of the MiFID II Delegated Regulation. In this context, these respondents asked for the Guidelines to be aligned with the MiFID II Delegated Regulation.
36. In terms of placement of risks and rewards, respondents noted that the Guidelines should be more flexible. In particular, some respondents found paragraph 13 of the draft Guidelines to be overly prescriptive and technical<sup>8</sup>. In that context, it was mentioned that it might be difficult to comply with paragraph 13 when rewards are disseminated throughout a marketing communication, as it would be difficult to assess when to disclose risks. Also,

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<sup>8</sup> Par. 13 of the draft Guidelines read as follows: "Both the risks and rewards should be mentioned either at the same level or one immediately after the other."

it was found that the general rule to have “*fair, clear and not misleading*” marketing communications should suffice in this regard.

37. Lastly, consumer representatives suggested that information on risks should always be present in marketing communications.

**ESMA’s response:**

In light of the comments received, ESMA agreed that it was appropriate to align the Guidelines with the wording of article 44(2)(b) of the MiFID II Delegated Regulation in order to avoid discrepancies. In particular, ESMA adjusted the wording relating to the font and format of text included in marketing communications as well as clarify that only relevant risks must be disclosed.

ESMA noted the view expressed by some respondents that section 5 should take the distinction between retail and professional investors into further account. As pointed out by ESMA in the Consultation Paper<sup>9</sup>, 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. The purpose is to allow investors and potential investors to identify in a clear and easily understandable manner both the risks and the rewards of the promoted fund. ESMA believes this is of equal importance for retail and professional investors alike.

ESMA took note of the comment according to which paragraph 13 of the Draft Guidelines was overly prescriptive. However, ESMA reminds that this paragraph aims at avoiding that risks and rewards are presented in a manner that makes them hard to compare, as this would not be consistent with the requirement set out in the Regulation. Therefore, ESMA kept paragraph 13 in the final Guidelines but deleted the last sentence according to which the time spent on risk and reward should be the same.

**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).**

38. Some respondents called for more specific and flexible considerations for marketing communications developed in other media than paper. For example, it was suggested that factors such as the time spent mentioning risks and rewards in audio as well as the number of rewards and risks mentioned should be clarified.

39. Other respondents called for considerations specifically relating to text space limitations. These respondents wanted ESMA to better take into account the specificities of communication channels which provide limited space to their users to deliver information to investors (e.g. LinkedIn/ Instagram/Twitter) and adapt the requirements for the description of risks and rewards in an equally prominent manner in these cases. Several respondents suggested adopting a “one click approach”, according to which on-line banners or short messages would not be subject to the requirements set out in the

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<sup>9</sup> Available [here](#).

Guidelines when they allow accessing a marketing communication by simply clicking on the link it contains.

**ESMA's response:**

ESMA notes the call for having more specific and flexible considerations for non-paper marketing communications, especially for on-line marketing communications conveyed via social media with length limitations.

In light of the responses, ESMA agreed that the principle set out in Article 44(2)(g) of the MiFID II Delegated Regulation, which requires that the information contained in marketing communications is relevant to the means of communication, should be duplicated in the Guidelines.

However, ESMA did not agree with the “one-click approach” suggested by certain respondents, as it risks causing some confusion for investors and potential investors, who may not be inclined to click on the link contained in the short message or the banner. Additionally, this approach would be particularly difficult to supervise, and may thus imply some investor protection issues.

**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?**

40. Respondents generally agreed on the proposed approach by ESMA in the draft guidelines.
41. However, some respondents asked for the deletion of the second sentence of paragraph 27 of section 6 of the draft Guidelines<sup>10</sup>. According to these respondents, this point did not define terms that could be considered unclear. It would then oblige fund managers to explain all the terms used in marketing communication, even if these terms are basic and therefore known to retail investors.
42. According to some respondents ESMA should consider more proportionality in case of marketing communications towards professional investors. In this case, the respondent mentioned that some of the requirements aimed at the protection of retail investors could be disregarded, without specifying the concerned requirements. On a similar note, other respondents were of the view that ESMA should consider the possibility to more generally exempt marketing communications aimed at professional investors from the requirements set out in the Guidelines. Moreover, for other respondents, the Guidelines should make a clearer distinction between marketing communications aimed at professional investors and those which may also be aimed at retail investors. For example, the proposed disclaimer relating to the identification of a marketing communication as such would always be superfluous for professional investors.

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<sup>10</sup> Paragraph 27 of the draft Guidelines read as follows: “When the marketing communication promotes a fund open to retail investors, it should provide additional wording to ensure that the meaning of all terms describing the investment is clear”.

43. For some respondents, the distinction should be between funds targeting retail investors and funds targeting professional investors rather than funds open to retail investors and funds open to professional investors.
44. Finally, to avoid reducing the clarity and non-misleading character of a marketing communication to the language in which it is written, some respondents were of the view that the terms “clear” and “not-misleading” should be replaced by the term “appropriate”, or the wording could be rephrased to show that the provision of the marketing communication in the relevant languages “participates” to the clarity of the communication.

**ESMA’s response:**

ESMA took note of the views expressed by respondents on whether the fair, clear and not misleading character of marketing communications should be assessed differently for marketing communications aimed at retail investors or at professional investors. In particular, ESMA agreed that the wording of the Guidelines on the requirement to explain the terms describing the investment could be clarified to avoid any unnecessary burden. The purpose of this requirement is not to oblige explaining all terms, but only those that may not be understood by retail investors. Hence, ESMA made some amendments to the relevant sentences in the Guidelines, in order to clarify the content of this requirement, and to restrict this requirement to marketing communications aimed at retail investors only.

While ESMA also agreed that certain requirements were not appropriate for marketing communications aimed only at professional investors, ESMA reminded that the requirements set out in Article 4(1) of the Regulation, which must be specified in the Guidelines, are applicable to all marketing communications. Hence, it was not possible to completely exempt marketing communications aimed at professional investors from the requirements set out in the Guidelines.

In this context, ESMA also agreed that it should be clarified when a marketing communication should be considered as aimed at retail investors only or at professional investors only. As it would not be possible to supervise whether a marketing communication is actually targeting retail investors based only on its content, the only criterion that appears suitable is the target audience of the promoted fund. Consequently, a marketing communication promoting a fund which is open to retail investors should always be considered as a marketing communication aimed at retail investors. Conversely, a marketing communication promoting a fund open only to professional investors should be considered as targeting only professional investors.

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

45. The majority of respondents disagreed with the approach whereby marketing communications should use the same information as the one included in the information documents of the promoted fund. According to these respondents, the information included in marketing communications should only be consistent with the information used in fund materials but not necessarily identical because it might not always be practically possible to use identical information in marketing documentation. In this context, some respondents suggested allowing the “use of ‘non-contradictory information’ or ‘consistent and non-contradictory’ instead of similar information.

46. Some respondents were of the view that paragraph 24(a) of the draft Guidelines<sup>11</sup> was superfluous and could be deleted.
47. Some respondents were of the view that the last sentence of paragraph 26<sup>12</sup> should be deleted because it was not clear and could lead to the inclusion of too many information that would not fit the purpose of marketing materials.
48. In addition, some respondents suggested removing the reference to '*high-yield*' in paragraph 29 because this terminology is usually used to categorise one segment of fixed income strategies and therefore could introduce some confusion.
49. Some respondents argued against paragraph 30 of the draft Guidelines<sup>13</sup>, stating that this paragraph would make the use of comparisons by external providers difficult.
50. Furthermore, few respondents were of the view that the terminology 'passive/passively-managed' was not always known to investors and that the reference to 'index-tracking funds' should be sufficient.

**ESMA's response:**

ESMA took note of the views expressed by respondents, which aimed mostly at deleting certain requirements. While ESMA agrees that the purpose of the Guidelines should not be to impose unnecessary precautions and disclaimers in marketing communications, it should be reminded that they shall specify the requirements set out in Article 4(1) of the Regulation. In ESMA's view, this can be achieved mainly by clarifying that certain information need to be presented in a certain manner to be considered as fair, clear and not misleading.

As regards the consistency with the legal and regulatory documentation of the promoted fund, ESMA took note of respondents' views and agreed that using information which is not the same, but is consistent and not contradictory with that included in the fund's prospectus, KID or KIID, should be sufficient to achieve investor protection. Hence, ESMA amended the relevant requirements in the Guidelines. However, in order to ensure convergent application, ESMA clarified that that the methodology and the value for the computation of the indicators should be the same as in the legal regulatory documents although the presentation may be different.

As for the other requirements mentioned by respondents, ESMA is of the view that these requirements should be kept. However, certain requirements appear to be fit mostly for retail investors, but not necessarily for professional investors, such as the reference to "high yield". Hence, the reference to "high yield" was removed from the Guidelines.

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<sup>11</sup> Par. 24 of the draft Guidelines read as follows: "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) 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."

<sup>12</sup> Par. 26 of the draft Guidelines read as follows: "When the marketing communication promotes a fund open to retail investors, it should provide additional wording to ensure that the meaning of all terms describing the investment are clear."

<sup>13</sup> Par. 30 of the draft Guidelines read as follows: "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, such as "high yield", 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."

**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?**

51. Respondents unanimously agreed 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's response:**

In light of the unanimous feedback from stakeholders, ESMA did not introduce any minimum set of information on the characteristics of the promoted investments.

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

52. First, it was noted that the draft Guidelines did not require marketing materials to include information on risks and rewards.

53. Some respondents did not agree with ESMA's suggestion to "refer to the same risk classification as that included in the KID or the KIID" as suggested in paragraphs 34 and 35. According to these respondents, these references could be misleading for the certain type of investor (who do not understand their nature and intent). Therefore, these respondents asked for more targeted information about risk towards these types of investors.

54. Some respondents argued that the "materiality" of risks referred to in paragraph 35 was neither defined in the KID/KIID nor the prospectuses. According to them, the KID/KIID and prospectuses only draw a list of any possible risks without any quantification of such risks and therefore asked that the requirement to display "material risks" in marketing communications is deleted.

55. Several stakeholders found paragraph 36 too restrictive concerning (external) fund rankings which must be "based only on a representative sample of similar funds in term of investment policy and risk/rewards profile." These respondents pointed out that rating providers use proprietary metrics, in many cases with additional risk/reward elements, to create fund rankings. This is why these rankings are used by all fund managers to provide investors with complete information and their use should not be restricted. These respondents therefore proposed to delete paragraph 36 entirely.

56. In addition, many respondents were of the view that paragraph 37 of the draft Guidelines<sup>14</sup> was too far-reaching and should be deleted. According to these respondents, investors receive essential information on the funds in the legal information documents. Whether a fund is suitable should be left to the discretion of investors – if necessary with the help of an investment advisor. For example, open-end real estate funds, which by nature cannot immediately sell the properties held in the portfolio, can be a very reasonable choice for investors depending on their individual circumstances. Therefore, paragraph 37 could discourage investors from looking into the various investment options.

**ESMA's response:**

ESMA took note of the responses on the fair, clear and not misleading character of the information on risks and rewards, which served as a basis to make certain amendments to the Guidelines.

In particular, ESMA agreed that the Guidelines could better reflect the fact that certain AIFs do not have a KID or a KIID, or that it is not appropriate to require marketing communications to invite retail investors to have a certain investment behaviour. ESMA also agreed that marketing communications should not have to indicate all risks, as the information should be limited to the “relevant risks”, which also Article 44(2)(b) of the MiFID II Delegated Regulation refers to. Finally, ESMA agreed that consistency with the KIID Regulation is appropriate as regards the disclosure of past performance in relation to a benchmark for funds which were recently set up. Hence, ESMA amended the Guidelines as suggested by respondents on these points.

ESMA also removed from the Guidelines that the provision according to which, in the case of illiquid AIFs open to retail investors, the marketing communications should inform investors that they should invest a small proportion of their assets. However, ESMA kept the requirement that retail investors should be informed about the illiquid nature of the AIFs when it is applicable.

However, ESMA believed that certain requirements should be kept. In particular, the use of the same risk classification as that included in the KID or KIID is appropriate, as it is important to ensure consistency between marketing communications and the legal and regulatory documents of the promoted fund. Similarly, ESMA's view is that the requirement set out in paragraph 39 of the Guidelines, concerning the rankings that may be disclosed in marketing communications, aim at ensuring that the comparison with other funds is relevant; hence, ESMA believes that this requirement should be maintained as such in the Guidelines.

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

57. Several respondents agreed that marketing communications should have information allowing investors to understand the overall impact of costs on the amount of their investment and on expected returns. A few respondents asked ESMA to further specify how fund managers would achieve this requirement.

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<sup>14</sup> Par. 37 of the draft Guidelines read as follows: “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 and inform investors that they should invest in the fund only a small proportion of their overall investment portfolio.”

58. Certain comments were made specifically regarding one-off costs, ongoing charges and cross referencing. For example, a consumer representative believed it was important that the same type of costs was disclosed in all marketing communications and noted that the ongoing charges should always be mentioned when costs are disclosed. Some respondents believed it should be possible to disclose the real one-off cost instead of the maximum one-off cost. Lastly, some respondents were of the view that it should be possible to cross refer to legal documents to get more detailed information on costs.
59. Many respondents did not agree with the requirement to provide information on currency rates and costs where the information on costs is presented in a currency different from the currency of the Member State in which the target investors are residents. It was argued that it was too difficult to provide actual currency conversion rates as most marketing documents are published with a delay. The draft Guidelines were also found too far-reaching given future fluctuations of a relevant rate. Several respondents believed a more general obligation to clearly state the currency together with a warning of currency fluctuations, similar to article 44 of the MiFID II Delegated Regulation, was more appropriate.
60. Finally, a handful number of respondents advocated for a closer alignment to paragraph 46 of the ESMA Guidelines on performance fees in UCITS and certain types of AIFs<sup>15</sup>.

**ESMA's response:**

While ESMA saw merit in the call for specifying what the “overall costs” refer to, the risks of providing the exact costs that should be mentioned in marketing communications is that the Guidelines become overly detailed or that they are interpreted as omitting certain costs. ESMA, therefore, stuck to the approach to include an all-encompassing phrase such as “*overall impact of costs*”. In this context, ESMA agreed to add a cross-reference to the guidelines on performance fees.

Based on the feedback from respondents, ESMA simplified the requirement concerning the impact of currency fluctuations on the overall costs, but it added a warning according to which the marketing communications 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.

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

61. Several respondents disagreed with the disclosure of past performance over 5 years for funds with a KID and over 10 years for funds with a KIID. According to these respondents, requirements should be aligned across funds and information disclosed in marketing

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<sup>15</sup> Par. 46 of the guidelines on performance fees in UCITS and certain types of AIFs reads as follows: “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.”

documentations should be consistent with regulatory documentations and not necessarily identical.

62. Some respondents also believed that marketing communications of a fund with a UCITS KIID should have the flexibility to communicate performance over the last 5 years or less rather than having to provide 10-year past disclosures. This would allow for more targeted communication with better comparability between all financial products. However, these respondents mentioned that fund managers should be free to communicate the 10-year historical performance if they wish to do so.
63. In addition, several respondents asked to delete the second sentence of paragraph 42, which states that the source of past performance should be "clearly" mentioned in marketing communication and not in a footnote. According to these stakeholders, such requirement is in contradiction with current market practices and the use of footnotes for the source of past performance should be permitted.
64. Finally, some respondents suggested deleting the word 'prominent' in paragraph 44 to be consistent with the MIFID II Delegated Regulation.
65. Regarding expected future performance, respondents either did not comment or expressed their support for the approach.

**ESMA's response:**

While ESMA took note of respondent's views on the alignment of the period for which past performance should be disclosed in marketing communications, ESMA preferred maintaining 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.

For the time being, ESMA aligned the requirements for past performance and simulated past performance which 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 five years. In addition, in order to ensure comparability between funds, 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.

As regards the drafting suggestions made by respondents, ESMA agrees that it would be disproportionate to impose disclosing the source of past performance in the main body of a marketing communication and therefore amended the Guidelines accordingly. Similarly, ESMA agreed that the word "prominent", which related to the requirement to disclose any change that affected past performance, could be deleted.

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

66. Whereas several respondents agreed with ESMA's proposed approach, a majority believed information on sustainability-related aspects should be regulated by other legislation, such as Regulation (EU) 2019/2088 only. These respondents wanted ESMA to at least delay, or remove altogether, any requirement on sustainability-related aspects at least until the regulatory technical standards under Regulation (EU) 2019/2088 and the

MiFID II delegated acts on the inclusion of ESG suitability have been implemented. Respondents feared that imposing rules on marketing of sustainability-related aspects in the Guidelines would lead to a complicated regulatory landscape as rules on such issues would be scattered in different regulations. It was especially pointed out that article 13 of Regulation (EU) 2019/2088 sufficiently covers marketing communications that include sustainability-related aspects.

67. Some respondents that agreed to include rules on sustainability-related aspects in the Guidelines (including a consumer representative association) believed such rules could aid the prevention of greenwashing. Some respondents that did not agree with ESMA's approach pointed out that national legislation was already responding to issues of greenwashing. However, some stakeholders highlighted the importance of uniform rules in this area, or at least that there should be a level of minimum convergence.
68. Furthermore, respondents noted that the term "sustainability-related aspects" was not sufficiently specified. For example, for some respondents it was not clear whether only products that promote environmental or social characteristics should be covered or whether any consideration of sustainable aspects (e.g. minimum exclusion criteria) should fall under this rule.
69. Furthermore, several stakeholders expressed concerns in relation to the example provided for in paragraph 46 of the background section of the consultation paper<sup>16</sup>. Whereas respondents agreed that sustainable aspects included in a marketing communication need to be proportionate in relation to the actual role these aspects play, they did not agree that the example reflects this reasoning. In their view, the example gives a misleading indication that funds primarily pursuing financial performance cannot also have an investment strategy that promotes sustainability.

#### **ESMA's response:**

In ESMA's view, it is important to integrate requirements on the sustainability-related aspects of the investments in the Guidelines. The Guidelines do not contradict the disclosure requirements of Regulation (EU) 2019/2088 but provide guidance regarding their practical implementation in marketing communications for funds.

Based on the feedback received, ESMA decided not to amend this part of the Guidelines. However, should the ESAs develop the ITS on marketing communications in Article 13 of Regulation (EU) 2019/2088 in the future, ESMA will analyse the content of that ITS to ensure the Guidelines are consistent with the ITS.

#### **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?**

70. A majority of respondents mentioned that the Guidelines would require adjusting existing marketing communications, as well as the models to be used for future marketing

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<sup>16</sup> This paragraph read as follows: "The 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. For example, if the investment strategy of a fund is primarily pursuing financial performance, any sustainability-aspects of the investment in the promoted fund should not be the main information of a marketing communication."

communications. Hence, it was the majority view that the Guidelines would have a strong impact on fund managers' activities, while only one respondent mentioned that the Guidelines would have minimal impact on its activities. However, several respondents mentioned that addressing the concerns raised in their responses could help reducing the costs associated with compliance with the Guidelines. To help reduce the adverse impact for fund managers, one respondent suggested that the Guidelines are applicable only to marketing communications addressed to professional investors. Another respondent asked that a period of at least 6 months is granted as of the publication of the Guidelines to comply with them.

71. Some respondents also mentioned that the Guidelines will have a great impact for fund managers, in particular those operating on an "affiliate-based model", which have different models of marketing communications depending on the distribution channel: the Guidelines will impact the organisation of these fund managers, who will have to ensure harmonisation of marketing communications in all distribution channels.
72. Some respondents mentioned some specific requirements of the Guidelines that may have an impact on the activities of fund managers, in particular:
- The responsibility to ensure that all marketing communications comply with the requirements set out in the Guidelines;
  - There is a risk that commercial communications would lose their values or clarity in case too many statements are made mandatory, in particular in the case of messages designed to be short (e.g. posts on social media);
  - Implementing ESG-specific rules now would potentially generate different and consecutive updated to marketing communications, which would be detrimental to fund managers;
  - In their current state, the Guidelines may lead to a distortion on the market where fund managers relying on on-line marketing are disadvantaged.

**ESMA's response:**

ESMA agrees that some adjustment to the draft Guidelines could help reduce the cost of implementation for fund managers. However, it should be reminded that the Guidelines only aim at clarifying the requirements set out in the level 1 Regulation, which necessarily 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 issue is not explicitly addressed by the Regulation and hence is not covered by the Guidelines.

Bearing this in mind, ESMA took into consideration the various comments raised by respondents as regards the changes that could be made in the Guidelines to alleviate the burden for fund managers, while ensuring sufficient investor protection. The changes are detailed in the responses to the previous questions.

**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?**

73. As regards the costs associated with the implementation of the Guidelines, one respondent indicated the following costs that would be charged by external service providers for the revision of marketing communications:

- The revision of a few pages would be charged between €500 and €1500;
- The update of a factsheet for 3 countries would be charged between €1000 and €2000.

74. This respondent also reminded that these costs would have to be added to the human and IT development costs, while another respondent mentioned the costs relating to legal or compliance advice. This showed that the costs associated to the implementation of the Guidelines would be proportional to the activity of fund managers and could therefore be significant in some cases.

**ESMA's response:**

ESMA acknowledged the general difficulties raised by respondents to determine the precise costs associated with the implementation of the Guidelines, while taking note of the figures mentioned by one respondent, which help better understand the impact of the Guidelines.

In order to reduce the costs associated with the implementation of the Guidelines, ESMA agrees that some changes were necessary, in particular to ensure better consistency with the existing requirements set out in the MiFID II Delegated Regulation, with which fund managers are already familiar. In this context, ESMA made some amendments to the Guidelines, taking into account the feedback received from the responses, as detailed in the responses to the previous questions.

### **3.2 Annex II: Legislative mandates to develop guidelines**

The Regulation (EU) No 1095/2010 establishing ESMA empowered the latter to develop Guidelines to ensure the common, uniform and consistent application of Union law.

In addition, Article 4(6) of the Regulation provides that:

*“By 2 August 2021, ESMA shall issue guidelines, and thereafter update those guidelines periodically, on the application of the requirements for marketing communications referred to in paragraph 1, taking into account the on-line aspects of such marketing communications.”*

### 3.3 Annex III: Cost-benefit analysis

#### Introduction

The Regulation, together with Directive (EU) 2019/1160, aims at abolishing the barriers stemming from divergent regulatory and supervisory approaches concerning the cross-border distribution of funds. In this context, the Guidelines aim at setting common standards for the marketing communications promoting UCITS and AIFs, including when these funds are set up as MMFs, EuSEFs or EuVEECAs, to facilitate marketing of funds throughout EU Member States.

In this context, the following options were identified and analysed by ESMA to address the policy objectives of the Guidelines. In identifying the options set out below and choosing the preferred ones, ESMA was guided by the requirements set out in Article 4 of the Regulation.

This CBA is qualitative in nature. Responses to the public consultation provided ESMA with very limited quantitative data on the costs associated with the implementation of the Guidelines by fund managers.

#### Technical options

The following options were identified and analysed by ESMA to address the policy objectives of the Guidelines required by the Regulation. In identifying the options set out below and choosing the preferred ones, ESMA was guided by the relevant rules of the Regulation.

#### 1. Guidelines on the identification as such of marketing communications

Policy Objective	Under Article 4(1) of the Regulation, marketing communications should be identifiable as such.
<b>Baseline scenario</b>	The baseline scenario should be understood for this CBA as the lack of prescriptive standards allowing the identification as such of marketing communications, in particular compared to other legal and regulatory documents relating to a fund, such as the prospectus, the KIID or the KID. This situation allows fund managers to develop marketing communications which are presented in such a way that some investors may believe they constitute legal or regulatory information on the promoted fund, and make an investment decision based on this document only, although it may not contain all the relevant information on the promoted fund.
<b>Technical proposal</b>	In order to ensure that marketing communications are identifiable as such, the Guidelines require that: <ul style="list-style-type: none"> <li>- Any reference to a fund in advertisements made by third parties is published only after the home competent authority of the promoted fund has granted its approval,</li> </ul>

	<p>where such approval is required, and, if applicable, has notified that the promoted fund may be marketed;</p> <ul style="list-style-type: none"> <li>- Marketing communications include a prominent disclaimer, the length and content of which may be adapted to the size and format of the marketing communication, indicating that the document is only a marketing communication and should not be sufficient to take a decision to invest in the promoted fund.</li> </ul> <p>Marketing communications should avoid making excessive reference to legal or regulatory provisions.</p>
<b>Benefits</b>	<p>The requirements proposed in the Guidelines aim at ensuring that all marketing communications issued by fund managers in respect of the funds they manage can be identified as such by all investors or potential investors.</p> <p>ESMA considers that this will enhance investor protection by allowing a better comparability of investments in UCITS and AIFs, and inciting investors or potential investors to consult the promoted fund's prospectus, KIID or KID. This should help investors base their investment decisions on the relevant information of the promoted fund, and not only on a marketing communication, which may not contain sufficient information on all aspects of the investment.</p> <p>Also, a lack of harmonisation in the identification of marketing communications may result in maintaining barriers to marketing, as Member States may maintain divergent standards on the identification of marketing communications, increasing the cost for fund managers and reducing investors' understanding of the documents with which they are provided before making an investment in a fund.</p>
<b>Cost to regulators</b>	<p>The Guidelines may imply additional supervisory actions from NCAs to verify that fund managers have correctly met the requirements set out in these Guidelines when developing marketing communications.</p> <p>However, this is not expected to add significant costs to NCAs, as the verification of marketing communications can be made on an <i>ex-ante</i> and voluntary basis pursuant to the powers conferred to NCAs by the Regulation. Hence, the supervision costs incurred for NCAs should not be seen as an obstacle for the implementation of the Guidelines.</p>

<p><b>Compliance costs</b></p>	<p>Additional costs to comply with the new requirements set out in the Guidelines are expected for fund managers. In particular, it is expected that these fund managers will have to review any existing template for marketing communications relating to UCITS and AIFs they manage in order to ensure that they are identifiable as marketing communications. According to one stakeholder, the costs for reviewing existing marketing communications should be comprised between €500 and €1,500, while the update of a factsheet for 3 countries would be charged between €1,000 and €2,000. In addition to the costs relating to the review of marketing communications, stakeholders indicated that the costs of human and IT developments, or the cost of legal and compliance advice, should be taken into account but stakeholders did not provide any estimates of these costs.</p> <p>However, it is expected that the costs of compliance with the Guidelines will be incurred only during a short period of time after the entry into force of these Guidelines. Indeed, the introduction of these requirements could have a beneficial effect in terms of standardising practices in developing marketing communications, in particular as consistent requirements will be applicable in all EU Member States, thus reducing the compliance costs over time.</p>
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**2. Guidelines on the description of risks and rewards in an equally prominent manner**

<p><b>Policy Objective</b></p>	<p>Under Article 4(1) of the Regulation, marketing communications should disclose the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner</p>
<p><b>Baseline scenario</b></p>	<p>The baseline scenario should be understood for this CBA as the lack of prescriptive standards relating to the disclosure of risks and rewards of purchasing units or shares of an AIF or units of a UCITS in marketing communications promoting such investments. Under this scenario, fund managers may be inclined to develop marketing communications which overemphasize the rewards of investing in an AIF or a UCITS, or underemphasize the risks of such investment, or a combination of both. An unbalanced presentation of the risks and rewards of the investment is detrimental to investors and potential investors, who may base their investment decisions on insufficient or misleading information.</p>

<p><b>Technical proposal</b></p>	<p>In order to ensure that the risks and rewards of purchasing units or shares of an AIF or units of a UCITS are disclosed in an equally prominent manner in marketing communications, the Guidelines require that:</p> <ul style="list-style-type: none"> <li>- The description of any benefit is accurate and give a fair and prominent indication of any relevant risks.</li> <li>- The equal prominence of the risks and rewards is assessed in relation to both the presentation and the format of their presentation in a marketing communication.</li> <li>- The font, size and position used to describe risks is the same as those used to describe the rewards.</li> <li>- Risks and rewards are both presented in the same document and are mentioned either at the same level or one immediately after the other.</li> </ul>
<p><b>Benefits</b></p>	<p>The requirements proposed in the Guidelines aim at ensuring that the risks and rewards relating to the investment in a promoted fund will be disclosed in an equally prominent manner in all marketing communications issued by fund managers in respect of the funds they manage.</p> <p>ESMA considers that this will enhance investor protection by ensuring that the information on the risks and rewards of purchasing units or shares of an AIF or units of a UCITS is presented in a balanced manner and does not incite investors or potential investors to make an investment decision on overoptimistic information.</p> <p>Also, a lack of harmonisation in relation to this requirement may also result in maintaining barriers to marketing, as Member States may maintain divergent standards on the presentation of risks and rewards, increasing the cost for fund managers and reducing investors' understanding of the documents with which they are provided before making an investment in a fund.</p>
<p><b>Cost to regulators</b></p>	<p>As for the Guidelines on the identification as such of marketing communications, these Guidelines on the disclosure of risks and rewards in an equally prominent manner may imply additional supervisory actions from NCAs to verify that fund managers have correctly met the requirements set out in these Guidelines when developing marketing communications.</p>

	<p>However, this is not expected to add significant costs to NCAs, as the verification of marketing communications can be made on an <i>ex-ante</i> and voluntary basis pursuant to the powers conferred to NCAs by the Regulation. Hence, the supervision costs incurred for NCAs should not be seen as an obstacle for the implementation of the Guidelines.</p>
<b>Compliance costs</b>	<p>As for the Guidelines on the identification as such of marketing communications, these Guidelines on the disclosure of risks and rewards in an equally prominent manner should incur additional costs for fund managers to comply with the new requirements set out in the Guidelines. In particular, it is expected that these fund managers will have to review any existing template for marketing communications relating to UCITS and AIFs they manage in order to ensure that they are identifiable as marketing communications.</p> <p>However, it is expected that the costs of compliance with the Guidelines will be incurred only during a short period of time after the entry into force of these Guidelines. Indeed, the introduction of these requirements could have a beneficial effect in terms of standardising practices in developing marketing communications, in particular as consistent requirements will be applicable in all EU Member States, thus reducing the compliance costs over time.</p>

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

<b>Policy Objective</b>	Under Article 4(1) of the Regulation, the information included in marketing communications should be fair, clear and not misleading
<b>Baseline scenario</b>	The baseline scenario should be understood for this CBA as the lack of prescriptive standards relating to the characteristics of the information included in marketing communications. Under this scenario, marketing communications may contain information which is not sufficiently clear to investors and potential investors to make informed investment decisions.
<b>Technical proposal</b>	In order to ensure that the information included in marketing communications is fair, clear and not misleading, the Guidelines require that the information contained in marketing communications is presented in such a way that meet these requirements. In particular, the Guidelines require that:

	<ul style="list-style-type: none"> <li>- The marketing communication is presented in a way which is suitable to the target investors or potential investors;</li> <li>- The information contained in marketing communications is consistent with the information contained in the legal and regulatory documents of the promoted fund, such as the prospectus, the KID or the KIID. This implies that any indicators, simulations or figures used in marketing communications should be consistent with those included in such documents;</li> <li>- Certain requirements are met for the description of the features of the investment: marketing communications should include sufficient information on the key features of the promoted fund, provide accurate details on the characteristics of the investment, avoid using certain terms that can be misleading to investors, or refrain from referring to the name of national competent authorities in such a way that could imply any endorsement or approval of the promoted fund;</li> <li>- The information on risks and rewards is consistent with the same information contained in the promoted fund's prospectus, and is relevant to the situation of the promoted fund;</li> <li>- The information on costs allows investors or potential investors to understand the overall impact of costs on the amount of their investment and on the expected returns and contains a warning on the risks deriving from the use of a foreign currency;</li> <li>- The information on past performance is consistent with the same information which is included in the promoted fund's legal and regulatory documents or may include simulated past performance in certain circumstances. It should also give sufficient information to reconcile the indications on past performance included in the marketing communication with the actual past performance of the promoted fund, and be presented in such a manner that it will not be the key element on which an investment decision is based;</li> <li>- The information on expected future performance should be based on reasonable assumptions supported by</li> </ul>
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	<p>objective data and presented in a way making it clear that it is only an objective.</p> <ul style="list-style-type: none"> <li>- The information on the ESG-related aspects of the investment is consistent with the information included in the legal and regulatory documents of the promoted fund, should not overemphasize the extent to which the investment strategy of the product integrates sustainability-related characteristics or objectives, and should clarify that the decision to invest in the promoted fund should also take into account the other characteristics or objectives of the promoted fund.</li> </ul>
<p><b>Benefits</b></p>	<p>ESMA considers that the lack of harmonisation of the standards that the information contained in marketing communications related to UCITS and AIFs throughout Member States constitutes a barrier to the development of cross-border marketing.</p> <p>Hence, the requirements set in the Guidelines aim at fostering investment in products available in all EU Member States by setting high quality standards for all marketing communications issued by fund managers, which should enhance the protection of investors and ensure their confidence in the quality of the information contained in marketing communications.</p> <p>The Guidelines also aims at encouraging cross-border marketing by setting high-quality standards for marketing communications, which are consistent in all EU Member States.</p>
<p><b>Costs to regulators</b></p>	<p>As for the Guidelines on the identification as such of marketing communications and on the disclosure of risks and rewards in an equally prominent manner, these Guidelines on the fair, clear and not misleading character of the information included in marketing communications may imply additional supervisory actions from NCAs to verify that fund managers have correctly met the requirements set out in these Guidelines when developing marketing communications.</p> <p>However, this is not expected to add significant costs to NCAs, as the verification of marketing communications can be made on an <i>ex-ante</i> and voluntary basis pursuant to the powers conferred to NCAs by the Regulation. Hence, the supervision costs incurred for NCAs should not be seen as an obstacle for the implementation of the Guidelines.</p>

<p><b>Compliance costs</b></p>	<p>The guidance on the fair, clear and not misleading character of the information included in marketing communications should incur additional costs for fund managers to comply with the new requirements set out in the Guidelines. In particular, it is expected that these fund managers will have to review any existing template for marketing communications relating to UCITS and AIFs they manage, and verify that all categories of information included in such marketing communications comply with the specific requirements set out in the Guidelines, in order to ensure that they are identifiable as marketing communications.</p> <p>However, it is expected that the costs of compliance with the Guidelines will be incurred only during a short period of time after the entry into force of these Guidelines. Indeed, the introduction of these requirements could have a beneficial effect in terms of standardising practices in developing marketing communications, in particular as consistent requirements will be applicable in all EU Member States, thus reducing the compliance costs over time.</p>
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#### 4. Conclusions

In light of what has been illustrated above, ESMA believes that the overall supervisory and compliance costs associated with the implementation of the Guidelines are fully justified by the objectives described above and will be largely compensated by the benefits for market participants. In particular, it is expected that the Guidelines will enhance the clarity of the information addressed to investors and potential investors in relation to investments in UCITS and AIFs and will encourage such investments. It is also expected that the Guidelines will reduce the existing barriers for cross-border marketing which are faced by fund managers, by developing a harmonised regulatory framework relating to the content of marketing communications in all EU Member States.

ESMA is also of the view that the costs incurred for NCAs due to the implementation of the Guidelines are limited, necessary and ensue directly from their new power to carry out *ex ante* verifications of marketing communications.

## 3.4 Annex IV: Guidelines

### 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 EuVECA, EuSEF, 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<sup>17</sup>, 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).

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<sup>17</sup> [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.](#)

2. In accordance with Article 4(6) of the Regulation, these guidelines will be updated periodically.

### **3 Compliance and reporting obligations**

#### **3.1 Status of the guidelines**

3. This document contains guidelines issued under Article 16 of the ESMA Regulation<sup>18</sup>. 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:

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<sup>18</sup> [Regulation \(EU\) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority \(European Securities and Markets Authority\).](#)

*“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.”*

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<sup>19</sup>.
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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<sup>19</sup> 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.