EFAMA

European Fund and Asset Management Association

EFAMA RESPONSE TO ESMA'S CONSULTATION PAPER ON GUIDELINES ON MARKETING COMMUNICATIONS UNDER THE REGULATION ON CROSS-BORDER DISTRIBUTION OF FUNDS

08 February 2021

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EU transparency register: 3373670692-24

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EXECUTIVE SUMMARY

EFAMA believes that ESMA's draft 'marketing communication' Guidelines still require important clarifications to ensure full alignment between them and MiFID II's Commission Delegated Regulation Article 44. This alignment is essential to ensure coherent rules for fund management companies and distributors. Unfortunately, parts of the proposed Guidelines are overly prescriptive and may unintentionally make some marketing materials vaguer or even inconsistent with local MiFID requirements for distributors.

In general, we believe that more clarity is needed regarding the specific responsibilities for fund distributors and management companies. The latter cannot assume responsibility for a distributor's marketing documents over which it has no formal control or influence.

That being said, the draft Guidelines are also not yet sufficiently calibrated for social media marketing (LinkedIn, Twitter, Facebook, etc.). The current rules require lengthy disclaimers that do not work when size and word count are severely limited.

Also, we strongly disagree with ESMA that marketing communication must always be the 'same' information as provided by other legal documents. There is a crucial difference between providing the "same" information or simply consistent information that does not contradict other information sources. Marketing communication should not turn into de-facto prospectuses or Key Information Documents.

In its reply, EFAMA is not only providing answers to ESMA's questions but is also making concrete drafting suggestions to ensure consistency between the draft Guidelines and MiFID II's Commission Delegated Regulation Article 44.

ANSWER TO QUESTIONS

3 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;

EFAMA agrees that the Guidelines on marketing communications should be aligned with the provisions of Article 44 of the Commission Delegated Regulation (EU) 2017/565. However, the current draft Guidelines still require a number of important clarifications and changes to ensure full alignment with Article 44.

We would, in particular, welcome further clarifications regarding the specific responsibilities for fund distributors and management companies. Regarding the management company, its own responsibility must be limited to the one given through its license and scope of activities. Fund distributors must bear

their own responsibilities governed by their license as well as bilateral agreements with the management company (if any). In essence, the management company cannot assume responsibility for the third party's marketing documents over which the former has no formal control or influence (i.e. it is the distributor who actively develops his own marketing strategy). In such cases, Article 44 of the Commission Delegated Regulation is clear that the sole responsibility lies with the third party, and it does not apply to UCITS and AIF management companies. It is imperative to stress this principle in the Guidelines.

Furthermore, it is outside the scope of the Guidelines to define the effective scope of responsibilities between management companies and distributors, as this goes beyond the wording of Art. 4(1) Regulation 2019/1156. Doing so would create diverging obligations between these management companies and distributors, as the latter are only bound by Article 44 of the Commission Delegated, and would run counter to ESMA's intentions.

In light of the above, we find para. 8 particularly problematic as it states that *'In order to do so, [the management company] should contractually impose to the distributor(s) to comply with the applicable marketing requirements the manager is subject to'*. ESMA must take into consideration that a number of Member States already have in place additional, national rules for distributors (going beyond the Article 44 requirements) which will make it impossible for distributors to apply diverging rules 'imposed' by the management company.

With that in mind, the Guidelines appear to lack sufficient proportionality between retail and professional investors. This differentiation should be made clearer throughout the Guidelines given the differences of those distribution channels.

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

We see certain gaps that would need to be addressed. These are, in particular:

- Generally speaking, the Guidelines should more thoroughly incorporate Article 44(2)(g) of the Commission Delegated Regulation (EU) 2017/565 (i.e. "the information is up-to-date and relevant to the means of communication used"). This is essential to distinguish between, in particular, social media campaigns compared to more traditional types of marketing communications.

- Article 44(2)(b) and (c) require fair and prominent indication of any relevant risks. While Article 44 is silent about the exact location of risk information, paragraph 11 of Section 5 of the Guidelines notes that it should have equal positioning. We recommend that the Guidelines should not specify exactly where risks should be positioned because this varies by content, ensuring prominence and balance, as well as overall clarity of the communication. The same applies for paragraph 13 of Section 5 (*Guidelines on the description of risks and rewards in an equally prominent manner*) detailing that "risks and rewards should be mentioned either at the same level or one immediately after the other". The introduction of these additional requirements by the Guidelines goes beyond the Guidelines' stated purpose (Section 2) to align with Article 44 as well as Article 4(1) of the Regulation (EU) 2019/1156.

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

We invite ESMA to have a look at our responses to the questions below which highlight gaps in each of the annexed draft Guidelines' sections in relation to Article 44.

c) Any requirements of the proposed Guidelines should be further aligned with the provisions of the aforementioned Article.

Yes, further alignment with Article 44 is needed. We provide specific examples in our subsequent responses.

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

We generally agree with an all-encompassing approach regarding the definition of marketing communications. However, such an approach can only succeed if there is an explicit clarification that other information materials, such as pre-marketing and ex-post documentation/reporting are clearly outside the scope of the Guidelines.

That being said, we believe that the Guidelines should also more thoroughly incorporate Article 44(2)(g) of the Commission Delegated Regulation (EU) 2017/565 (i.e. "the information is up-to-date and relevant to the means of communication used"). This is essential to distinguish between, in particular, social media campaigns compared to more traditional types of communications that allow for more information to be displayed. For more information, please also consider our response to Q6.

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.

Yes, we agree with a positive non-exhaustive list of marketing communications. However, we have serious concerns with regards to paragraph (e) of the positive list which is too broad and not aligned with Article 44.

In essence, management companies must be able to communicate with distributors and provide them with information outside of the marketing communication requirements. For example, distributors will be provided with advance information for funds not yet in distribution, or they will receive further background information not intended for public use. This is necessary to ensure that distributors establish their advisory and distribution processes. Such information is not marketing communications and this is also made clear between the parties involved. If distributors, nevertheless, use this information towards (potential) customers, the responsibility lies with them. **We would, therefore, ask for the outright deletion of paragraph (e).**

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.

No, the Guidelines do not adequately take into account the on-line aspects of marketing communications.

As stated previously, the Guidelines fail to incorporate Article 44(2)(g) which ensures that "the information is up-to-date and relevant to the means of communication used". Indeed, the plethora of marketing communications channels must be considered individually as each carries its distinct technical disadvantages in terms of the number of characters, space, layout and general format. These include, but are not limited to, LinkedIn, Twitter or Facebook, advertising banners on media websites, or even audio marketing through podcasts or radio.

We are aware that a disclaimer must be visible on the communication, but its wording, size and format must be adapted according to technical constraints the communication medium and the content of the marketing communication. In cases where the purely promotional character of the communication is clearly visible, the expression "advertisement" on a prominent position should be regarded as sufficient or even no such disclaimer should be necessary.

We, therefore, recommend supplementing the Guidelines with further, detailed provisions in respect of all means of communication. First, some more guidance such as a (non-exhaustive) list of online activities could be helpful. Second, in line with our previous comments, there needs to be a clear separation between marketing activities by the management company and those by distributors promoting UCITS/AIFs without the direct involvement of the former.

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.

In our view, the non-exhaustive negative list is helpful to understand the scope of marketing communications. We agree with ESMA that this should include all regulatory documentation and regulatory reporting of the fund (such as (but not limited to) the prospectus, fund rules or instruments of incorporation, KIID and KID) as well as non-regulatory reporting (e.g. fact sheets, periodic reporting to clients).

That being said, we note that ESMA focuses on the legal fund documents, but the management company's legal obligations go much further. For example, Art. 10 Sustainable Finance Disclosure Regulation (SFDR) stipulates that certain information must be published on the website for funds within the meaning of Art. 8 and 9 SFDR. The Same is true for the revised Shareholders Rights Directive and reports for pooled funds. For those examples, we can see that this information could be confused with marketing communication. As already mentioned above, we see the same for regular reporting.

We suggest that the negative list is preceded by a statement clarifying that all publications and information required by law (including regular reporting) do not constitute marketing communications. The references to the prospectus and the other fund documents could then follow as examples.

We would, therefore, strongly recommend the inclusion of the following documents, in no particular order:

- in person, telephone and oral conversations and correspondence used in the ordinary course of business (provided the correspondence is not based on a communication to be used with more than one client). This should include 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 (i.e. what is considered as pre-marketing);

- requests for information (“RFIs”), requests for proposal (“RFPs”) and due diligence questionnaires (“DDQs”);

- client reporting documents including portfolio reviews (provided the documents do not otherwise promote new products or services).

- The documentation or information when providing information or communication, direct or indirect, relative to investment strategies or investment ideas, to potential professional investors domiciled or registered in the EU, in order to verify their interest in an Alternative Investment Fund (AIF) or a sub-fund thereof, provided this is carried out under the terms established by Article 30 bis of Directive 2011/61/EU;

- shareholder reports (i.e., annuals and semi-annuals), prospectuses, private placement memoranda, offering documents, agreements and other legal documents or other mandatory client information (e.g. according to Art. 10 SFDR);

- 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 Delegated Regulation (EU) 2016/958.

- Information content for the contracting products or for carrying out an operation 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. Likewise, the information sent to clients or published on the web 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.

- corporate press releases relating to corporate transactions (e.g. acquisitions and strategic partnerships) or issued according to regulatory requirements (e.g. regulatory requirements under securities or disclosure laws and regulations), quarterly earnings, dividend announcements, organizational announcements/senior management staff changes, and regulatory filings (e.g. annual reports and shareholder letters); and

- media interviews (except infomercials);

- communications relating to recruiting and talent management, inclusion and diversity, culture/philanthropy.

We would like to stress the inclusion of the press releases in the negative list, as ESMA is currently suggesting that they should be considered as marketing communication (Section 4, para. 5). Indeed, press releases must be considered as pre-commercial documents not subject to the guidelines as long as they specify that these documents are subject to approval by the regulator.

The above list is, of course, not comprehensive nor exhaustive, and the intention is that the typical use of such documents should not be altered.

4 Guidelines on the identification as such of marketing communications

Q6. Do you agree that a short disclaimer is the most appropriate format to identify marketing communications as such and that the disclaimer should mention the existence of the prospectus of the fund?

Generally speaking, a short disclaimer seems appropriate.

However, we are aware that in some Member States it is the current regulatory practice to only necessitate a disclaimer if the marketing communication's promotional nature is not self-evident and there is a risk that it will not be recognised as such.

In any case, we stress that the disclaimer should be kept short and proportional, as marketing communications cannot become prospectuses that include all necessary disclaimers. Also, the specific wording of the disclaimer should not be binding to avoid situations where the disclaimer could be misleading. Furthermore, in line with incorporating Article 44(2)(g) of the Commission Delegated Regulation (EU) 2017/565 market participants should be allowed to tailor the content of such short disclaimer to the particular means and content, in particular with regards to social media.[1]

This means the mandatory content of such short disclaimers can vary depending on the form (e.g. printed or online) of the document as well as on the type of social media platform (e.g. Twitter, LinkedIn, YouTube, Instagram etc, if any.) used to publish the actual content. However, neither paragraph 6 nor paragraph 7 of Section 4 covers any such cases. Thus, we recommend supplementing this section with clear guidance on the content of the short disclaimer in respect of every social media appearance (e.g. LinkedIn; Twitter; Instagram; YouTube etc.).

Also, the wording of the short disclaimer (paragraph 6 of Section 4) is only appropriate when used either in printed materials and in online communication channels which do not have any space restrictions. For other communication channels operating with limited space to deliver the content (e.g. LinkedIn, Twitter, Instagram etc.), it is not appropriate and cannot be used. For the sake of clarity, we urge ESMA to clarify this in the Guidelines. A solution could be a very short and generic disclaimer (appropriate for such communications channels) and to allow the potential investor to access further information in a single click via a link inserted into the communication.

Furthermore, with regards to the actual content of the mandatory short disclaimer, we have the following observations:

- In line with our previous comments, we generally agree with the proposed disclaimer for printed materials and in online communication channels which do not have any space restrictions. In other cases where space restrictions exist, an even shorter disclaimer stating "advertisement" or "ad" may be sufficient.

- We agree with the first sentence stating that "This is a marketing communication"

[1] For example, marketing communications that are for professional clients could include less information than those that are targeting retail clients. This would be consistent with the 'fair, clear and not misleading' principle which in other parts of the guidelines are being proposed to be assessed differently for marketing communications promoting funds open to retail investors and for marketing communications promoting funds open to professional investors only. For marketing communications to professional clients, it may be sufficient to only include the first sentence stating that "This is marketing communication". Professional clients would have the required knowledge to refer to regulatory documents and for them not to base any final investment decision on a marketing communication alone.

- We believe that the second sentence ("This is not a contractually binding document") is misleading. Read in conjunction with the third sentence, it indicates that the prospectus is a contractual document. While this might be the case in some EU member states, it is not in all of them. Rather, the prospectus is a legal disclosure document. The information provided herein is not legally binding. Hence, this sentence should be deleted.

- The third sentence could be more concisely worded; for instance "Please refer to the [prospectus of the [UCITS/AIF/EuSEF/EuVECA]/Information document of the [AIF/EuSEF/EuVECA] and to the [KIID/KID](delete as applicable)] before making any investment decision."

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

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

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.

We generally agree with ESMA's approach, keeping in mind that marketing communication, and therefore, in particular, the presentation of risks and rewards should be tailored to the particular type of investor being targeted.

However, as mentioned previously, special consideration must be given to online marketing communication (such as advertising banners) due to their inherent space constraints. In such cases, we could envisage a rule allowing the potential investor to access this information in a single click via a link inserted into the communication.

That being said, Section 5 is overly detailed. Whilst risks and rewards should appear in a fair and balanced manner, explicit directions stipulated in paragraph 13 (e.g. "risks and rewards should be mentioned either at the same level or one immediately after the other") are overly prescriptive. The "fair, clear and not misleading" general guidelines concerning the character of marketing materials will suffice. We believe that Article 44 is already sufficient in this context, in particular since MiFID refers to 'relevant' risks rather than any risks as stated in paragraph 10 of Section 5 (i.e. "Marketing communications that reference any potential benefit of purchasing units or shares of an AIF or units of a UCITS should be accurate and always give a fair and prominent indication of any relevant risks.").

Also, we feel that Section 5 should acknowledge concepts found in Section 6, in particular, that the needs of retail investors and professional investors may differ concerning the presentation of risks and rewards. Thus, we recommend supplementing the Guidelines with further provisions setting out such guidance to ensure proportionality of the guidelines.

Please also consider our comments in relation to the fair and prominent indication of any relevant risks Q1(b) above.

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).

Please consider the below response in conjunction with our comments to Q7.

As previously stated, it is essential to align the draft Guidelines in line with Article 44(2)(g) of the Commission Delegated Regulation regarding the description of risks and rewards depending on the communication channel used.

However, as set out in our response to Q6, the diverging nature of online and offline communication (e.g. paper-based versus non-paper-based media) should be considered when drafting specific requirements as to the description of risks and rewards applied in different means of communication channels. The actual space limitation to deliver the particular content should be the determining factor. Whilst we agree that, regardless of communication type, firms need to ensure that all communications are compliant, it is important to retain the necessary flexibility in how the requirements are applied. For example, a printed marketing material (being an offline communication) and any YouTube content (being an online communication) have unlimited space to deliver information to investors, even though one is an online and the other is an offline communication channel. In contrast, materials distributed via LinkedIn/Instagram/Twitter accounts have only very limited space available to deliver information to investors.

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

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

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?

Yes, we agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications relating to funds open to retail investors and marketing communications relating to funds open to professional investors only. However, a fund open to retail investors should not oblige ‘retail’ marketing communication vis-à-vis the professional investors deciding to invest in such a fund. But, ESMA should consider more proportionality in case of communication towards professional investors only which could disapply some of the proposed rules aimed more towards the protection of retail investors.

In addition, we have some concerns around ESMA’s suggestion that retail investors should receive “additional wording to ensure that the meaning of all terms describing the investment are clear” (second sentence of paragraph 27 of Section 6). While we agree that different knowledge and understanding must be assumed when communicating to retail investors, it would be onerous to explain ‘all’ terms in

further detail. ESMA should either restrict the scope in referring to “technical terms” (i.e. not usually understood by retail investors) or simply delete the whole sentence.

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

We do not agree with ESMA, as there is an essential difference between providing consistent vs the “same” information. The purpose of marketing communication is to give the most important information concerning a promoted fund rather than necessarily all information, in the same way, that a KIID concisely gives key information, e.g. a KIID will include the most important risk information rather than every risk factor as listed in the prospectus or information memorandum of a fund. **We, therefore, strongly believe that marketing information should simply not contradict other information documents.**

In light of the above, we have some concrete suggestions for Section 6:

- The understanding of paragraph 18 could benefit from further clarification of what could be considered as consistent “presentation used in the marketing communication”. For example, it should be possible only to mention a fund’s risk classification (e.g. medium risk) without direct reference to its UCITS KIID’s SRRI/PRIIP KIID’ SRI indicator of (e.g. 3 out of 7).

- With regards to paragraph 19, we strongly disagree with ESMA that the “same indicators, simulations or figures [must be used] as those used in the information documents of the fund.”. In a marketing communication the indicators, simulations or figures may not always be strictly identical in all cases to those mentioned in the funds' information documents. It must be possible to adapt them according to the constraints of marketing communication or provide supplemental information not found in other legal documents. We, therefore, propose to specify that the indicators, simulations or figures must be consistent with those mentioned in the funds' disclosure documents and not necessarily identical.

In addition, we also have additional comments on the “description of the features of the investment”:

- We would need further clarification on the interplay of paragraphs 24 and 36. The former refers to the “characteristics of the promoted fund”. For example, is it is sufficient to describe the investment policy according to paragraph 24(b) (“include a short description of the investment policy of the fund and an explanation on the types of assets into which the fund may invest”) or would the management style (e.g. active/passive and the management or not in reference to a benchmark) also need to be described as described in paragraph 26 (“requested when there is a description of the investment policy of the promoted fund”)?

- Also, paragraph 24(a) requires information 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". This information is too detailed. A reference to the legal documents of the fund explaining its investment policy seems clearer and sufficient. We, therefore, suggest deleting paragraph 24(a).

- Paragraph 30 prohibits the use of the term "high yield" in marketing communications if this term is not accompanied by further explanation. This term, according to the draft Guidelines, could imply to the investor that the fund would generate high returns in all situations. However, the term "high yield" is commonly used in finance as it corresponds to a commonly recognised

specific segment of the fixed-income market that does not necessarily imply a high fund return as such . We, therefore, suggest deletion of the end of the second sentence of paragraph 30.

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?

Yes, we 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 overall marketing communication. The level of information contained in a marketing communication should correspond to the size and format of the marketing communication and not be a copy-paste of the KID/KIID.

As evidenced in our detailed comments to Q10, there are some inconsistencies in ESMA's approach in producing these Guidelines. In some instances, such as this one, ESMA's approach is proportionate, while, in some other areas, it appears overly prescriptive. We would welcome this proportionate approach for other aspects of the guidance where space constraints will be a real issue.

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

In line with our previous comments, we want to underline that consistent information rather than the same information (compared to other legal documents such as the prospectus) is key. This is for instance the case regarding risk classifications. Distributors often use risk classifications from the investors rather than from the product perspective.

While we support risk and reward information that is fair, clear and not misleading, we have serious concerns regarding the currently proposed wording of paragraphs 33 to 38 of the draft Guidelines:

- We do 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. As their reference could be misleading for the certain type of investor (which do not understand their nature and intent), we are against the mandatory disclosure of the SRI or SRRI in marketing communication instead of more targeted information about risk towards these type of investors.

- Staying with paragraph 35, the first sentence prescribes a reference to "material risks" mentioned in the KID/KIID or the prospectuses. Such "materiality" of risks is neither defined in the KID/KIID nor the prospectuses. In fact in the KID / KIID and prospectuses do only list any possible risks, without any quantification. Insofar this sentence should be deleted.

- Paragraph 36 is 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." In line with our comments regarding paragraph 31, ESMA must keep in mind 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 management companies to provide investors with complete information and their use should not be restricted. We propose to delete paragraph 36 entirely.

- Paragraph 37 introduces a mandatory warning notice in case of AIF open to retail investors which are more illiquid by its very nature. Such warning notice should alert possible investors that "they should invest in the fund only a small proportion of their overall investment portfolio".

This sentence may confuse investors because management companies generally do not have any knowledge of the investor's preferences or portfolios. Therefore paragraph 37 should be deleted.

- Paragraph 38 (disclosure of the risk/reward profile for funds recently set up by reference to the benchmark's past performance) is not in line with the requirements of Article 18(2) of the UCITS KIID Regulation. We would assume that the guidelines should only refer to the characteristics of the benchmark (without past performance) and the type of management.

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

We have some observations on the proposed approach regarding the presentation of costs.

First, the disclosure of the "overall impact of costs on the amount of their investment and on the expected returns" is not clear. We understand that at least as long as the UCITS KIID exists, information on costs may be expressed on a qualitative basis only. The Guidelines should therefore not create any additional requirements that are not in line with the current legal frameworks.

With that in mind, the guidelines should be clearer in terms of how firms can achieve the requirement to allow investors to understand the overall impact of costs on the amount of their investment and on the expected returns. Certainly, we wouldn't want to pre-empt the requirement to provide ex-ante disclosure. As such, paragraph 33 should be amended as follows:

> *33. Accordingly, when a marketing communication mentions the costs associated with the investment in the promoted fund, it should at least allow investors to understand the overall impact of costs on the amount of their investment and on the expected returns* ***without pre-empting other regulatory requirements to provide this information (e.g. MiFID ex-ante disclosure requirements).***

By making these clarifications, it may be possible to delete paragraphs 39 and 40 entirely. If this is not feasible, we would like to make the following clarifications:

- With regards to paragraph 39, we would also like to point out that information documents such as the UCITS KIID and PRIIP KID require the maximum amount of one-off costs (such as subscriptions fees) to be disclosed. In case a targeted marketing campaign which makes it possible to assert the exact subscription fees for the targeted investors, this amount should be used instead of the maximum amount prescribed for the KI(I)Ds.

  With that in mind, we also suggest a small drafting change to paragraph 39. Rather than talking about "when referring to the costs", we believe "when disclosing the costs" is more accurate.

- There are issues with paragraph 40 in relation to the disclosure of exchange rates. The current proposal is very cumbersome, in terms of providing exact details regarding "the currency involved, the applicable currency conversion rates and costs, and the arrangements for payment or other performance". We understand that investors must understand the currency risks involved. However, the level of details required is disproportionate to the other information being presented. We believe a simplified and more general warning concerning the variability of rates and their effect on the investment may be more suitable and achieve the same effect.

In addition, with regards to information regarding performance fees, we would like to see closer alignment in particular with paragraph 46 of ESMA's existing "Guidelines on performance fees in UCITS and certain types of AIFs". Please also see our response to Q10 in relation to paragraph 26(c).

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

We generally agree with the approach to information on past performance (paragraphs 35 to 41 of Section 6.4 of the Guidelines). However, In line with our response to Q10, we must reiterate the need to rectify paragraph 19 (Section 6.1) which currently requires performance information to be the same as in the fund documents. Paragraph 19 should rather ensure that no conflicting information is presented to investors.

To ensure consistency with Article 44 of the Commission Delegated Regulation, we believe that marketing communications of a fund with a UCITS KIID should have the flexibility to communicate performance over the last 5 years, or less depending on the situation rather than having to only provide 10-year past disclosures. This will allow for more targeted communication allowing better comparability between all financial products. Of course, management companies should be free to communicate the 10-year historical performance if they wish to do so. In particular, paragraph 48 of the Guidelines requiring 10-year simulated past performance is directly contradicting Article 44(4)(b) of the Commission Delegated Regulation which only required that "the information must include appropriate performance information which covers the preceding 5 years". We, therefore, believe that Article 48 should be brought in line with the Commission Delegated Regulation.

Furthermore, we ask to delete the second sentence of paragraph 42 in section 6 of the draft Guidelines in the Annex, which states that the source of past performance must be "clearly" mentioned in marketing communication and not in a footnote. Today's practice is to mention it in a footnote (e.g. the name of the asset management company; the date: these footnotes are used to give references as sources) and the client can consult the management company's website if he wants more information. With regards to online communication, this can be achieved through a simple hyperlink. The content of the marketing communication in its main body should not be burdened with this information. Moreover, the idea of footnotes is not to make reading documents heavier and more difficult to read and understand by investors. This is why footnotes are used in the majority of written documents that we all consult daily – which is also the case when ESMA issues documents, including this Consultation Paper.

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

We do not agree with ESMA's proposal. First, sustainability-related disclosure aspects should be handled in the Sustainable Finance Disclosure Regulation rather than in the cross-border legislation – at least until the SFDR RTS have been implemented. Second, the same holds true for the outstanding MiFID II delegated acts on the inclusion of ESG suitability. Both pieces of legislation should be in place before ESMA provides concrete guidance on sustainability-related information in marketing materials.

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?

There is a very clear risk of (1) additional administrative, organisational and costs burden for fund managers, which in daily practice outsource all marketing activities to distributors and (2) overregulating practices, that already are regulated such as outsourcing rules or MiFID requirements and practice. As currently drafted and in line with our previous replies, we can see the following negative. Practical consequences for management companies:

- Management companies would be responsible for the marketing documents issued by the distributors even though they would have no knowledge of these documents and would not have validated them in any way.

- Factual reporting would now be considered as marketing documentation and would have to be revised to meet the requirements of the guidelines;

- Commercial communications would lose their value as too many mandatory statements would have to be made. This would undermine the message. Especially for short and constrained communication formats such as posts on social networks or videos;

- Marketing documents could lose clarity in their message if they have to include the same information as the information included in regulatory documents. In our view, marketing materials should simply not contradict the information mentioned in the regulatory documents;

- ESG-specific rules would need to be implemented before there is sufficient legal clarity (e.g. upcoming MiFID delegated acts on the integration of ESG considerations).

More generally speaking, parts of the proposed Guidelines are overly prescriptive in some areas (see Q6 and Q7 above for instance) and may have the unintended consequence of potentially making some marketing materials less clear when proscribed formats are adhered to or providing difficulties if inconsistent with local requirements for distributors under MiFID. Distributors should also be accountable for materials which they have written if they acted beyond the control of and/or by breaching the instructions of the fund managers. It should be clearly stated in the proposed Guidelines that management companies do neither review nor approve or control marketing material established by third parties and accordingly the former do not assume any liability for any such marketing material not explicitly approved or produced by themselves and established under Art. 44 of the Commission Delegated Regulation.

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

Last but not least, ESMA should also consider the internal implications of these Guidelines, as many management companies also follow international standards, such as GIPS. It is important that the ESMA Guidelines correctly align with such existing standards to avoid the creation of further red tape.

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.

It is very difficult for EFAMA to quantify these costs at a pan-European level. However, we can foresee very significant costs to update communications in line with ESMA's current draft Guidelines due to the sheer number of marketing documents needing to be updated. Anecdotal evidence by our members points to the cost of several hundred euros for updating fact sheets being used in several jurisdictions.

We, therefore, ask ESMA to make the necessary changes to the current draft Guidelines to ensure that the eventual changes are proportional to the gain in investor protection.

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About EFAMA

EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 57 Corporate Members and 23 Associate Members. At end Q3 2020, total net assets of European investment funds reached EUR 17.6 trillion. These assets were managed by more than 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,400 AIFs (Alternative Investment Funds). At the end of Q2 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 24.9 trillion.

More information is available at www.efama.org.

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