CONSULTATION

AFG' s. RESPONSE

**Guidelines ESMA**

**On Crossborder**

**Marketing**

***AFG comments on***

***the draft guidelines***

*8 February 2021*



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## Annex IV: Draft Guidelines

# 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. The aforementioned entities should be responsible to ensure that all marketing communications addressed to investors comply with the requirements set out below regardless of the issuer of these marketing communications and/or who distributes the units or share of the relevant AIF or units of the relevant UCITS.

##### What?

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

* 1. 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
  2. Messages broadcast 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, etc.) or discussion forums, accessible by any means (in particular electronic means, via a computer or mobile applications for example).
  3. 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.).
  4. 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.
  5. 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.
  6. 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*:

1. Legal and regulatory documents 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.
2. Corporate communications broadcast by the fund manager describing its activities or some recent market developments and 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.
3. Short messages broadcast on-line, in particular on social media platforms such as Facebook or Twitter, 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.

##### When?

These guidelines apply from whichever is the latest between 2 August 2021 and the date of their publication.

# Purpose

1. As specified in Article 4(6) of the Regulation**14**, 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, on 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 on the fair, clear and not-misleading character of marketing communications, taking into account on-line aspects of such marketing communications. However, the Guidelines do not intend to replace existing national requirements on the information to be included in marketing communications (such as those relating to the fiscal treatment of the investment in the promoted fund) to the extent these are compatible with any existing harmonised EU rules (e.g. rules on disclosure of costs or performance in the KIID should not be contradicted or diminished by different national disclosure requirements on costs or performance in marketing communications).
2. In accordance with Article 4(6) of the Regulation, these guidelines will be updated periodically.

# Compliance and reporting obligations

### Status of the guidelines

1. This document contains guidelines issued under Article 16 of the ESMA Regulation**15**. 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.

### Reporting requirements

1. 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, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.

# Guidelines on the identification as such of marketing communications

1. 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 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.
2. 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*” such that any person looking at it, or listening to it, can identify it as a marketing communication. Additionally, marketing communications should include a disclaimer such as the following:

“*This is a marketing communication. This is not a contractually binding document. 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)] and do not base any final investment decision on this communication alone.*”

1. 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. We propose that in that latter case the disclaimer be put at the start, but in small (by reference to website, etc.).
2. 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).

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

1. Including information on risks and rewards in marketing communications is not mandatory. However, when a marketing communication includes such information on risks and rewards, the following requirements should be met.
2. 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. This equally prominent disclosure of risks and rewards should be assessed in relation to both the presentation and the format of these descriptions.
3. When disclosing relevant risks and rewards information, the font and size used to describe the risks should be at least equal to those used to describe the rewards 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– although not to be made mandatory - of how risks and rewards can be presented in an equally prominent manner.
4. 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.
5. Both the risks and rewards should be mentioned either at the same level or one immediately after the other.

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

## General requirements

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

1. 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 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.
2. When promoting a fund open to retail investors or potential retail investors, marketing communications should be considered clear for the target audience of the promoted fund if they are written in the official language(s), or one of the official languages, of the Member State in which they are provided. However, when promoting a fund open to professional investors only, marketing communications may be considered clear for the target audience of the promoted fund if they are written in a language customary in the sphere of international finance. Additionally, the information should be seen as not misleading when it is consistently presented in the same language throughout all marketing communications that are provided to each investor or potential investor, unless the investor or potential investor has agreed to receive information in more than one language.

*Consistency with other documents*

1. The information presented in the marketing communication should be consistent with the legal and regulatory documents of the promoted fund, as applicable, in particular:
   1. 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,
   2. 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,
   3. The KID or KIID,
   4. The information disclosed on the websites of UCITS management companies, AIFMs, EuVECA managers and EuSEF managers under Regulation (EU) 2019/2088, and
   5. The annual and half-yearly reports.
2. 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.
3. Consistency between the marketing communication and the information 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.
4. 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 figuresused in the information documents of the fund.

*Description of the features of the investment*

1. When a marketing communication describes some features of the promoted investment, the following requirements should be met.
2. The information on the features of the investment should be kept up to date.
3. 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.
4. 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.
5. 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.For further details, it may refer to the regulatory documents
6. 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.
7. When marketing communications describe the investment policy of the promoted fund, in order to assist investors’ understanding, the following is recommended practice:
   1. In the case of index-tracking funds, the words “passive” or “passively managed” should be included in addition to the words “index-tracking”;
   2. 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;
   3. Active funds which are not managed in reference to any benchmark index should also make this clear to investors.
8. 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.
9. 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.
10. 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.
11. 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”, , 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.
12. 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.

## Information on risks and rewards

1. 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.
2. 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.
3. Marketing communications that mention the risks and rewards of purchasing the units or shares of the promoted fund should refer at least to the material 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.
4. The representation of a ranking in a marketing communication should include the reference to the relevant period (at least 12 months or its multiple) and the funds’ risk classification.
5. 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.
6. 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.

## Information on costs

## Information on past performance and expected future performance

*Information on past performance*

1. In accordance with paragraph 20 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.
2. Information on 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 in a clear manner.
3. Any change that affected significantly the past performance of the promoted fund, such as a change of the fund manager, should be prominently disclosed.
4. When displaying cumulative performance, the communication should also display the performance of the fund on a yearly basis for 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.
5. When information on past performance is presented, this information should be preceded by the following statement:

“*Past performance does not predict future returns*”.

1. 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.
2. 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:
   1. 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 class, provided the two classes do not differ materially in the extent of their participation in the assets of the fund; and
   2. A 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.
3. Simulated 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 five years. In every case that simulated past performance information should be based on complete 12-months periods.
4. Information on simulated past performance should satisfy, *mutatis mutandis*, the requirements set out in paragraphs 41 to 46 above.

*Information on expected future performance*

1. When a marketing communication refers to the expected future performance and to the reward profile of the promoted fund, the following requirements should apply.
2. Expected future performance should be based on reasonable assumptions supported by objective data.
3. Expected future performance may be disclosed only per fund and no aggregate figures should be allowed.
4. Expected future performance should be disclosed on a time horizon which is consistent with the recommended investment horizon of the fund.
5. 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.*”

1. 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.
2. 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.
3. 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.

## Information on sustainability-related aspects

1. When a marketing communication refers to the sustainable-related aspects of the investment in the promoted fund, 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 sustainable-related aspects are provided pursuant to Regulation (EU) 2019/2088 in relation to the promoted fund may be included in the marketing communication.
2. 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.
3. 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 also 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.