

New Year, New Marketing Guidelines

January 2022

ESMA's guidelines for funds' marketing communications, developed within the framework of the regulation for the cross-border distribution of investment funds and issued under article 4 of the CBDF Regulation, come into force on **2 February 2022** (the **Marketing Guidelines**).

Given their imminent application, in this article we focus on what a fund manager needs to do when reviewing its marketing communications to ensure compliance. First though, by way of reminder, here is a quick summary of the 'who', 'what' and 'why' of the Marketing Guidelines. For a more detailed discussion of their purpose and intended application, see our [previous article](#).



Who?

While the Marketing Guidelines refer only to them applying to European fund managers, it is expected that they will apply to others issuing communications relating to UCITS/AIFs on behalf of such managers. The application to third country managers marketing in Europe is less clear-cut in that application depends on the position taken at individual Member State level.

They apply irrespective of the category of investor being marketed towards however, the level of information and the way that information is presented should be adapted depending on whether the fund is open to retail or professional investors.

What?

The Marketing Guidelines apply to all marketing communications addressed to investors or potential investors in UCITS and AIFs (including those set up as EuVECAs, EuSEFs, ELTIFs and money market funds) i.e. marketing communications advertising for a UCITS or an AIF, addressed both individually or to the public.

In absence of a definition of what constitutes a “marketing communication” the Marketing Guidelines instead provide non-exhaustive examples of what may and may not qualify . Note that pre-marketing is on the “negative” list and therefore pre-marketing communications will not be subject to the Marketing Guidelines.

Notably all mediums, including paper printed documents or information made available in electronic format, interviews, advertisements, documents made available on the internet, as well as webpages (including messages broadcast on any social media platform), video presentations, live presentations, radio messages or factsheets are within scope.

Why?

The purpose of the Marketing Guidelines is to specify the application of the requirements for marketing communications set out in Article 4(1) of the Regulation. These requirements establish 3 core principles:

- marketing communications be **identifiable as marketing material**.
- marketing communications must **describe the risks and rewards** of purchasing units or shares of an AIF, or units of a UCITS, in an **equally prominent manner**.
- all information included in marketing communications must be **fair, clear and not misleading**.

Key takeaways on content requirements

Unlike many EU documents, the Marketing Guidelines are relatively short (10-11 pages). We therefore recommend that firms read them in their entirety. Click [here](#) to access a copy. Below we set out a summary of some of the key ways to address the requirements contained in the Marketing Guidelines.



Marketing Purpose

- Do the marketing materials make it clear that they have a purely marketing purpose, are not contractually binding and are not sufficient to take an investment decision?

Prominent use of the terms “Marketing communication” (even when this is preceded with a # on social media) can help satisfy this requirement.

- Have you included appropriate disclaimer language, such as the following:

“This is a marketing communication. Please refer to the *[prospectus of the [UCITS/ AIF/ EuSEF/EuVECA]/Information document of the [AIF/EuSEF/EuVECA] and to the [KIID/KID] before making any final investment decisions.*”

Note that where the medium does not allow for the above, a shorter disclaimer can be used such as “Marketing communication” or #MarketingCommunication.

Consider carefully where this disclaimer is displayed. In particular, in the case of video presentation, it should be embedded in the video (not just at the end).

- Avoid excessive cross-reference to legal or regulatory provisions, unless appropriate.



Risks and Rewards

- Are the descriptions of the risks and rewards of the promoted fund disclosed in an equally prominent manner?

Consider the following:

- The risks and rewards of the fund should be equally prominent in relation to the presentation and the format of the description. The use of a two-column table or lists on a single page is cited as a good example of presentation in an equally prominent manner.
- Avoid small print, illegible font types and footnote references when disclosing risks.
- Risks and rewards should be detailed at the same level or one immediately after the other.
- The disclosure of the risk profile of the promoted fund should refer to at least the relevant risks mentioned in other key documents and should have the same risk classification as included in the KID or KIID.
- The representation of a ranking can be based only on similar funds in terms of investment policy and risk/rewards profile.



Proportionate

The information included in a marketing communication should be proportionate to the size and format of the communication.



Costs

- An explanation to allow investors to understand the impact of costs on the amount of the investment and on expected returns should be included.
- Where any part of the total costs is to be paid in a foreign currency, the marketing communication should include a warning re currency and exchange rate fluctuations.



Fair, clear and not misleading

- It is necessary to consider the level of information and presentation thereof depending on whether the fund is “open” to retail investors. This could be an issue for funds primarily directed at professional investors but which technically could admit retail investors.
- Where the fund is open to retail investors, the marketing communication should refrain from using excessively technical wording, provide an explanation of the terminology used, and ensure communication of the information could be easily read.
- Use objective and verifiable sources for all statements, and quote the sources.
- Actively managed funds should say they are active or actively managed, and passive funds should say they are passive or passively managed in order to make this clear to investors.
- Information on features of the investment should be kept up to date and describe them accurately.
- Comparisons with other funds should be limited to funds characterised by a similar investment policy and similar risks and rewards profile unless an explanation on the differences is included.



Past and Future Performance

The Marketing Guidelines include detailed guidance on how information on past performance and expected future performance should be presented. Time periods for disclosure requirements and sample statements are just some of the specifics included. Care is required here, particularly in determining whether a 5 or 10 year reference period applies.



Sustainability-related aspects

When a marketing communication refers to sustainability-related aspects of the investment in the promoted fund the following should be borne in mind:

- Is the information consistent with that in the legal and regulatory documents of the fund?
- The information on sustainability-related aspects should not outweigh the extent to which the investment strategy integrates sustainability-related characteristics or objectives.
- Do the marketing communications indicate that the decision to invest in the fund should take into account all the characteristics or objectives of the promoted fund?



Language

The marketing communication should be written in the official language (or one of the official languages) of the Member State where the fund is distributed (or another language accepted by the NCA of such Member State). In practice, this requirement could be potentially quite burdensome.



Social Media

Social media posts should be as neutral as possible and can link to a webpage with marketing materials/information documents of the fund on it.

Some concluding thoughts

ESMA's main purpose for developing the Marketing Guidelines is to ensure that the Member States apply the specified requirements in a uniform and coherent manner so in theory the content of marketing communications around the EU27 should be standardised in time. Although the Marketing Guidelines are already broadly in line with equivalent MiFID standards, compliance with them will require some changes to current industry practice, especially when marketing to professional investors. All marketing communications should be reviewed firstly to determine whether they are in scope and secondly to ensure compliance.

Most national competent authorities have already adopted the Marketing Guidelines by incorporating them into their supervisory practices, policies and regulatory approaches, with only a handful not likely to meet the application date. Progress of adoption across the Member States can be tracked via [ESMA's Compliance Table](#).

Keeping you on track with compliance

aosphere's *Rulefinder Marketing Restrictions – Asset Management* service provides practical guidance applicable to the marketing of open and closed-ended funds and managed accounts, covering the position for institutional and retail investors across 80+ jurisdictions.

Firms will need to put in place procedures to ensure that they are able to track any changes across all documents relating to a particular fund. The Marketing Guidelines emphasise the importance of consistency between any marketing communications and the legal and regulatory documentation/information of the fund (including the prospectus and any KID/KIID).

It should be noted that the Marketing Guidelines are not intended to replace existing national requirements for information that should be included in marketing materials, insofar as these are compatible with existing harmonised EU rules, so attention still needs to be paid to any specific jurisdiction-specific requirements.

Fund managers should also have regard to whether the regulator of the target jurisdiction has opted to require ex-ante approval of the marketing communications, as provided for by article 7 of the CBDF Regulation. We have been tracking the various regulators' positions on this in our **CBDF Retail Issues tracker** (available on the EU Member States page) and so far most have not yet exercised this requirement.

Key features of the service include a useful comparison tool, allowing you to compare across jurisdictions and regions, daily monitoring and email alerts and disclaimer language.

To learn more about *Rulefinder Marketing Restrictions – Asset Management* visit www.aosphere.com/aos/mr-am or email info@aosphere.com to request a free trial.