

## Questions

**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;**

Initially the Swedish Investment Fund Association (SIFA) agrees with the approach to align the Guidelines to said Article but notes that the Article is more comprehensive and principled based in its design than these overly detailed Guidelines. We believe that ESMA should, not least for the sake of fair competition, have followed this approach also in designing the present Guidelines.

SIFA wishes to stress that the responsibilities of the fund manager vis-à-vis the distributors is restricted to situations where the latter carries out marketing on behalf of the fund manager. Fund distributors bear their own responsibilities governed by their license as well as the delegated authority, if any, given by the fund manager.

The question of who should be held responsible for marketing communications follows principles of common marketing law. Such responsibility must be considered on a case-by-case basis. Normally the producer may be held responsible. However, marketing of funds may take place by actors that have no agreement with the fund manager. In those cases the fund manager would not be held responsible. Where there is an agreement stating that the distributor should not produce any marketing communication, should have the approval of the fund manager before any such action is taken or stating terms for the marketing, the responsibility would be considered case-by-case depending on the circumstances. SIFA therefore suggests that ESMA refrains from conclusions regarding the responsibility of marketing communications (see point 8 on page 6 of the Consultation paper).

- 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**

SIFA believes that there is a gap in the respect that the Guidelines should be more aligned with the Regulation in that it states that information should be "relevant to the means of communication". This is one example of the differences in approach

commented on above and is particularly relevant as regards requirement on social media and other on-line communications. SIFA takes note of the legal mandate to develop Guidelines which specifically states that on-line aspects of marketing communications should be taken account of. We do not think that on-line aspects generally have been taken account of in the Guidelines.

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

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

Initially, SIFA notes that the proposed guidelines shall not replace existing national requirements and believes that this also means existing guidelines issued by national trade associations. SIFA agrees with many of the proposals and notes that in quite a few cases they are in conformity with established business practices in Sweden. Those business practices are founded in an agreement between SIFA and the Swedish Consumer Agency and dates from 2008. They are adhered to, not only by members of SIFA, but also by other fund managers and form the base for the Agency's assessment of "best practice" as regards marketing activities on the fund market.

SIFA agrees in principle with the all-encompassing approach. It should however be noted that the notion of marketing is defined in common marketing law. We suggest that ESMA clarifies how the Guidelines relate to principles of common marketing law. SIFA believes that the former should be seen as "lex specialis" in relation to such principles. It would be beneficial with a statement to this effect.

The Guidelines should, in SIFA's view, also be further tailored to differ between retail and professional investors.

**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, this might be helpful. We wish however to comment on the example stated under P 1 a) regarding "press articles". For the sake of clarity, we take it that the guidelines obviously cannot restrict freedom of expression or other fundamental rights.

P 1 e) in the Guidelines goes too far. In cases where information provided to the distributor, not intended for the end customer, still reaches the end customer (due to the distributor handing it down) the distributor, not the fund manager, should bear the responsibility.

**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. SIFA wishes to emphasize that there should be a distinction between the media as regards the different requirements. SIFA believes that ESMA should analyse further, and clarify, whether information in certain media, where there are space and technical restrictions, could be presented in a briefer manner with reference to information on a webpage or elsewhere. In the draft Guidelines such a possibility is explicitly mentioned in some cases but should be further clarified as regards the different set of requirements in the Guidelines. Otherwise, there might be a risk that the fund manager abstains from giving information on the factors that are not mandatory, a result that in SIFA's view would be counterproductive.

SIFA believes that extensive information on risks, cost, sustainability policies and adherence to benchmarks is better suited in legal documentation than in short marketing messages, and that a possibility to refer to this information should be explicitly provided for in the guidelines. The suggestion that the marketing message shall be "neutral" and may refer to other documents by using a link (Guidelines p 29) is welcome but SIFA wishes to stress that the different requirements must also be tailored to modern media. Otherwise it would be practically impossible to market funds in such media, thus creating a prohibition to market funds in such media. This would have significant implications. Considerations regarding on-line marketing of funds should be aligned with common marketing law which states that the marketing requirements should be adhered to taking into account the media used.

**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.**

Yes, this could be helpful. Once again, communications tailored by a distributor shall not be included if not authorised by the fund manager, please see our comments under Q 1 a)

Example a) – It is doubtful whether a prospectus could never be considered as containing marketing communication. However, the mandatory legally based information should not be considered as marketing.

Example b) – It is concluded that corporate communications are in principle exempt, "unless the activities of the fund managers are limited to one or a small number of funds which are implicitly identified in such corporate communication". Such a delimitation can have a random effect and could lead to a competitive disadvantage. There could be large management companies where the communication, even when tailored as a corporate one, could be identified as referring to one or a small number of funds. This exception should in SIFA's view be deleted. Whether a marketing communication is considered as corporate or referring to a specific fund must be decided on a case-by-case basis and should not be determined by the size of the fund manager.

Example c) - A matter of uncertainty is whether the name of a fund in itself constitutes "information on a specific UCITS". This is particularly important when the

name of the fund relates to sustainability. Does the name in itself trigger the requirement on information on sustainability?

**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?**

Such a disclaimer could be appropriate but must be adjusted to the type of media where the marketing communication is presented. In cases where there is no risk that the communication will not be recognised as marketing communication a disclaimer would be superfluous. This goes i.a. for social media, a fund manager's website, short banners and TV commercials. In those cases it is apparent and obvious that the communication is made for marketing purposes and such a requirement goes too far. The marketing itself makes it "identifiable as such".

As ESMA points out in page 9, point 16, of the Consultation paper, a disclaimer is most needed where the marketing takes place in documentation that could actually be confused with the regulatory documentation, that is the KIID or the prospectus. Even so, the text "This is not a contractually binding document" is superfluous. It is not particularly helpful and could be inaccurate. The wording "This is marketing communication" would suffice.

SIFA also believes that market participants should be permitted to tailor any disclaimer to the media used as well as the placement of the disclaimer.

There is uncertainty as to whether, and to what extent, the requirements on mandatory disclaimers on e.g. the nature of the communication apply as regards some on-line media i.a. short messages. P 29 of the proposed guidelines indicates that, in the case of short marketing communications, it is possible to refer to a webpage for detailed information. SIFA understands the proposal so, that this possibility is only applicable when some features of the fund are described. Would it be possible to only mention the fund and still use this possibility? The reference to a webpage is, according to P 58 of the proposal also possible, "may be included", as regards sustainability aspects. Does this mean that it would be possible to describe these aspects in a summary form and refer to information on the webpage?

SIFA also questions the requirement in P 5 of the Guidelines, regarding the prohibition of marketing of a UCITS or AIF before approval is granted by the national competent authority. We believe that this follows from the relevant legislation and is ill suited to be a requirement in marketing rules.

**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.**

Yes, SIFA agrees and notes that ESMA does not prescribe that information on reward and risk be mandatory. SIFA further thinks that the difference between the needs of retail and professional clients regarding description of risk is one example where the requirements should differ. Please also see our comments under Q 4 as

regards on-line communications. We believe that this is a case where the potential investor should be able to access the information by a “click” via a link.

SIFA further thinks that Section 5 i.a. paragraph 13 is too detailed and inflexible, in the description of the exact placement of the risk information versus the reward information. This could be noted as a good example but should not be an absolute requirement. In general, SIFA believes that ESMA should refrain from being too descriptive when it comes to the presentation of marketing communication. The general purpose of the marketing law could be reached in different ways and too detailed requirements would hamper the development of good practice. We note that Article 44 of the MiFID 2 Regulation does not require the position and font, size etc. of risk information to be exactly the same as for the "rewards" information. Instead, it seems to indicate that the location should be "prominent", which is more flexible and better.

**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).**

In SIFA's view also the inclusion of proposed text regarding risks and rewards and sustainability aspects, should the fund manager wish to include such information in the communication, merits further consideration. As an example of foreseen difficulties SIFA wishes to point to the requirement in paragraph 35 of the guidelines, that marketing communications, mentioning 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 KIID and other relevant legal documentation. Does this imply that the whole description of these risks should be introduced in all marketing communication, where risk and reward is presented?

SIFA believes that the requirements must be adapted to the media and suggests that in short communications the Risk and Reward figure as presented in the KIID should suffice, as reference shall be made to legal documentation.

**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, SIFA agrees. However, distinction should rather be made between funds, addressed to retail clients, and those addressed to professional clients. If a “retail” fund is only targeting professional clients, they should qualify for the “professional group” if there is a guarantee that no retail clients can invest.

We also think that the proposal (in P 26) to give retail investors “additional wording to ensure that the meaning of all terms describing the investment are clear” is unclear and could be burdensome without providing additional value.

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

Yes, providing that “same” means consistent. This is how SIFA has understood it, as a requirement to introduce “the same” information is clearly not feasible.

In P 19 of the guidelines it is mentioned that indicators etc. relating to costs should be the same as those used in the information documents. SIFA believes that costs should be presented using the same figure as in the KIID, that is the on-going charges, and not only the management fee which would be misleading. We would prefer a clarification of this.

In relation to P 26 of the Guidelines SIFA wishes to remark on the suggested use of the definition “passive” funds for index tracking funds. SIFA believes that the expression “passive” is often not recognized by a consumer and that the label “index tracking funds” is sufficient to describe such funds. The notion of “passive” is not a legal concept, but “index-tracking” is. At least in the Swedish market “index fund” is a well-known concept, while “passive fund” is not and would only be confusing. In the debate “passive” is often used for describing active funds that are managed in a passive way, that is resembling an index fund. Also, in Sweden funds that are tracking an index but exclude certain investments due to sustainability screening, are not allowed to describe themselves as index funds. However, it would neither be appropriate to describe them as actively managed, as proposed in the consultation. It is also unclear what the wording “recommended practice” would add when it comes to status of the guideline.

SIFA further wishes to state that no requirement to provide additional disclosure on the use of the benchmark index and indicate the degree of freedom from the benchmark should be upheld in the marketing communication, as this information is to be found in the legal documents and as the investor will be referred to these documents. SIFA does not believe that it is beneficial to investors to give the same information in all communications. This would lead to an information overload.

We further wish to question the requirement I P 26 c) for active funds to state that they are not managed in reference to a benchmark. The wording “actively managed” or “active” should suffice.

Also, the information that an investment in a fund does not entail direct investment in the underlying is too detailed and superfluous as an investor should always be referred to the legal documents (see paragraph 24 a) of the guidelines.

**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?**

SIFA notes the view that marketing communication does not contain all the information necessary to make the investment decision. SIFA believes that the

format and size of the communication should play a more decisive role in the proposed guidelines overall and welcomes this approach.

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

SIFA notes that there is no requirement to include information on risk and reward and concurs with ESMA in this respect.

We wish to comment on P 30 of the Guidelines where it is stated that the communication should restrain from using expressions as “the best fund” etc. SIFA takes it that those expressions could be used in case of nominations by an objective and well-reputed source.

The proposed warning notice (P 37) that the investor, in case of illiquid AIFs open to retail should only invest a small portion of their overall portfolio, might be confusing and should be deleted. Any requirement to restrict investments in certain types of funds should be done in applicable legislation – not in marketing Guidelines. In addition to this we wish to stress that the fund manager often does not know the investor’s economic situation.

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

Another area of concern is the requirement on disclosure of the “overall impact of costs on the amount of their investment and on the expected returns”, p 39.

SIFA has not found legal grounds for requiring yet another and additional description of cost, and it is not clear how such a requirement could be satisfied or how the information could be included in short on-line messages. Yet again, this is an example where a requirement could be counterproductive and lead to the omission of any reference to cost. SIFA suggests that the information on ongoing charges, in line with applicable legislation, suffice.

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

SIFA is of the opinion that a requirement to present performance in the same way as in the KIID does not provide added value, as the investor should always be referred to the latter. It will imply changes in the marketing communication where, on certain markets and to this date, other periods have been applied, e.g. for mixed or interest-bearing funds.

As previously stated, there are industry guidelines on the Swedish market. They require i.a. the following when presenting past performance. We cite:” The return earned during a particularly successful period must not be highlighted in a way that gives a distorted overall impression of the performance of the fund. The account must provide a balanced picture of its actual performance. When information on previously achieved return is provided in the marketing, information on the return for, at a minimum, the period that corresponds to the fund’s investment horizon

must be included and presented prominently. "SIFA proposes to add a similar requirement in the Guidelines instead of the proposed.

SIFA further wishes to draw attention to the fact that, at least on the Swedish market, the NAV: s of the fund are always presented after deduction of the management fee. We believe that any other presentation would be misleading. This could well be stated also as a requirement by ESMA.

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

SIFA agrees that the information on sustainability related aspects should be based on, and naturally not contradict, the content of the prospectus, but it is not clear to SIFA the extent to which such information has to be disclosed in all types of marketing communication or whether a reference to the relevant documents e.g. by mainly introducing a link to a webpage as stated in p 58, will suffice in some cases. Otherwise, this will create a very narrow field for short, on-line marketing communications and could be counterproductive.

SIFA has understood the requirement in P 59 so, that sustainability aspects must not be "exaggerated" in marketing. However, the example given in paragraph 46 of the Consultation document is not relevant and is misleading. The example suggests that the object of providing a high return cannot coexist with a goal of providing sustainability. The important factor must instead be that sustainability aspects are not highlighted in a way that is not proportionate to the role that such aspects play in the management of the fund. The example in the Consultation document should be deleted.

**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?**

SIFA believes that some marketing documentation has to be changed and, depending on the outcome as regards on-line marketing, the models will have to change. Too far-reaching requirements regarding such media could lead to a distortion on the market where fund managers relying on on-line marketing are disadvantaged.

**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.**

There is, as previously stated, some ambiguity regarding the requirements of the Guidelines. Uncertainty in itself leads to costs as the fund industry strives to apply new requirements. Change of communication will also in itself entail cost.