Frankfurt am Main,
8. February 2021

BVI[1] response to ESMA's Consultation Paper on Guidelines on marketing communications under the Regulation on cross-border distribution of funds (ESMA34-39-926)

Q1: In light of the fact that the Guidelines should apply to all marketing communications relating to investment funds and that distribution of funds is often carried out by distributors, the requirements set out in the Guidelines were inspired by those set out in Article 44 of the Commission Delegated Regulation (EU) 2017/565. Against this background, please specify whether:

a) You agree that the requirements set out in the Guidelines are in line with those set out in the provisions of Article 44 of the Commission Delegated Regulation (EU) 2017/565;
b) You see any gap between the guidance provided under the Guidelines proposed in this consultation paper and the rules applying under the provisions of the aforementioned Article. If so, please justify the reasons and specify which gaps you have identified, including if you consider that the guidance provided under the proposed Guidelines is more comprehensive than the rules applying under the provisions of the aforementioned Article; and
c) Any requirements of the proposed Guidelines should be further aligned with the provisions of the aforementioned Article.

We welcome that ESMA intends to design a regulatory standard substantially equivalent to Art. 44 Commission Delegated Regulation (EU) 2017/565. The requirements of Art. 44 are practicable, have proven to be a suitable standard and must be complied with anyway in the case of distribution via MiFID firms. However, the draft Guidelines partly go beyond these requirements and should therefore be adapted.

We appreciate that a Delegated Regulation is usually more principle based than Guidelines. We nevertheless ask ESMA to keep the Guidelines as principle based as possible. As ESMA rightly points out in its consultation paper, investment funds are usually distributed through MiFID firms. NCAs, however, have their own standards for MiFID firms in implementing Art. 44 (see for instance BaFin's "Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency pursuant to Sections 31 et seq. of the Securities Trading Act (Wertpapierhandelsgesetz – WpHG) for Investment Services Enterprises" which give guidance on marketing materials of MiFID firms [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Rundschreiben/2018/rs_18_05_wa3_macomp.html]). NCAs might not be inclined to adapt such own standards in order to ensure compatibility with new guidelines for fund managers, thus making alignment a distant prospect.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 113 members manage assets more than 3.6 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

BVI
Bundesverband Investment und Asset Management e.V.

Kontakt
Fon +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brüssel
Rue du Trône 14–16
1000 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Geschäftsführung
Thomas Richter Hauptgeschäftsführer
Rudolf Siebel Geschäftsführer

Regarding the differences between the Guidelines and Art. 44 Commission Delegated Regulation (EU) 2017/565 we refer to the following questions.

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

An asset manager can in principle only be responsible for marketing communications that either prepared itself or which it commissions a third party to prepare them. We therefore consider the statements on page 6 paragraph 8 of the consultation paper problematic: *"Hence, they should be responsible for ensuring compliance of all marketing communications addressed to investors even when they are being addressed by distributors. This concerns, for example, situations where the authorised fund manager delegates the marketing function for the funds that it manages to a distributor. In such a situation, the fund manager should ensure that the relevant requirements for marketing communications are complied with by the distributor."* Art. 44 Commission Delegated Regulation (EU) 2017/565 acknowledges the responsibility of the third party in such cases. This principle should be adhered to and not be overruled by an ESMA Level 3 measure, in particular since - according to our understanding - the wording of Art. 4 (1) Regulation (EU) 2019/1156 does not allow for such an understanding.

This problem ultimately arises for all types of marketing communications mentioned under section1, Scope/ What/(a). Even press articles might be considered as covered by this rule. If such an article is not published by the asset manager itself, but e.g. by an independent newspaper, this cannot be attributed to the asset manager. This also applies if the newspaper has obtained relevant information from the asset manager before publication.

The approach taken in the draft Guidelines could also lead to the situation that in case of discrepancies between the Guidelines and Art. 44 Commission Delegated Regulation (EU) 2017/565 the asset manager would have to comply with requirements for marketing communications of distributors, which would not be mandatory for the distributor creating the marketing communication itself.

Finally, the draft Guidelines do not sufficiently differentiate between marketing communications addressed to retail investors and such addressed solely to professional investors. A clearer differentiation should be made in the Guidelines, e.g. in the presentation of opportunities and risks, and the use of disclaimers. See also our response to question 6.

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.

We agree that the Guidelines should provide a non-exhaustive list of marketing communications. However, the approach outlined in the Draft Guidelines under section 1, (e) with regard to the definition of marketing communications is too broad and not in line with Art. 44 Commission Delegated Regulation (EU) 2017/565.

Asset managers must continue to be able to communicate with distributors and provide them with information without having to comply with marketing communications requirements. For example, distributors will be provided with advance information for funds not yet in distribution, or they will receive further background information. This is necessary so that distributors can set up their advisory processes and their distribution processes in general. Such information is no marketing communication,

and this is also made clear between the parties involved. If distributors then use this information nevertheless towards (potential) investors, the responsibility lies with them. **Section 1, (e) should therefore be deleted without replacement.**

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.

Online marketing communications are already an important advertising tool and will continue to gain in importance in the future. We therefore welcome the fact that they are explicitly accounted for in the Guidelines. However, we are of the opinion that the different types of on-line marketing communications are not considered in a sufficiently differentiated manner in the Guidelines. We refer to Art. 44 (2) (g) Commission Delegated Regulation (EU) 2017/565 which acknowledges taking into account the "means of communication" as a differentiation criterion.

In addition, see also our answer to question 6.

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.

A non-exhaustive negative list, as suggested on page 30 of the consultation paper, would be helpful for defining the scope of marketing communications. In this regard, ESMA essentially focuses on the legal fund documents, but the legal obligations regarding fund-related information go beyond those of the legal fund documents. For example, Art. 10 SFDR stipulates that certain information must be published on the website for funds within the meaning of Art. 8 and 9 SFDR. Also here there could well be a risk of confusion with marketing communications. The same applies to regular reports to (already invested) investors.

We therefore suggest that the negative list should be preceded by a note stating 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 non-exhaustive examples.

We welcome the notion that certain references to websites broadcast via social media do not qualify as marketing communications. Section 6.1 paragraph 29, on the other hand, clarifies that there may also be marketing communications on such social media channels. The decisive criterion must be whether it is really an element of marketing communication for a specific fund. Pure image advertising of an asset manager is in any case not sufficient to be considered marketing communication. This applies in general - regardless of the advertising channels.

We also suggest adding media interviews to the non-exhaustive list: These should not be considered as 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?

Art. 4 (2) Regulation (EU) 2019/1156 already requires a reference to the prospectus and the KIID in marketing communications.

A disclaimer to identify communications as marketing communications can only be necessary if there is a risk that marketing communications will not be recognised as such. If the promotional character is clearly evident, such a disclaimer is superfluous. This should always be examined on a case-by-case basis. This approach corresponds to the implementation of the MiFID II requirements in Germany and has proven successful. Should ESMA come to the conclusion that a disclaimer is always necessary, the different types of marketing communications (print advertising, radio, social media) and the resulting scope of the disclaimer must be taken into account. The disclaimer provided as an example in section 4, paragraph 6 is in any case not suitable for all types of marketing communications.

The basic idea of Art. 44 (2) (g) Commission Delegated Regulation (EU) 2017/565, already mentioned in our answer to question 4, should be leading. Depending on the type and scope of the marketing communication, it is necessary to give the asset manager leeway to implement the requirements.

Section 4, paragraph 7:
We do not share ESMA's view that "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." . The German supervisory authority BaFin has expressly clarified that a risk notice at the end of an advertisement video is sufficient to meet the requirements of Art. 44 Commission Delegated Regulation (EU) 2017/565 (https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Auslegungsentscheidung/WA/ae_040518_faq_mifid2_wohlverhaltenregeln.html;jsessionid=8C2A9639FA5B48D6FF5F400C4F4822A0.2_cid393?nn=9450992#doc10849298bodyText8) . A fortiori, such a presentation of the disclaimer must be sufficient for identifying a marketing communication. Moreover, it is also unclear what exactly is meant by "embedded in the video"

Regarding the proposed disclaimer itself, section 4, paragraph 6:
The disclaimer can only be regarded as a non-binding example and must be aligned to the specificities of a marketing communication. The extensive disclaimer can at best only be used for classic print marketing communications (with several pages). Ads on Facebook, LinkedIn or Twitter or marketing banners on webpages, on the other hand, do not offer this space. Even brief marketing messages in text form (e.g. ads in a newspaper or one-page flyers) are not suitable for displaying a comprehensive disclaimer. In order to emphasise the promotional character, a short form (e.g. "marketing message") would be conceivable.
In addition, we would like to point out that in the proposal for the disclaimer, the second sentence "This is not a contractually binding document" should be deleted, as in combination with sentence 1 it sounds as if the prospectus and the KID are contractual documents, but they are investor information documents.

Section 4, paragraph 5:
ESMA states that marketing communications may only be published once the approval of the promoted fund has been granted by the national competent authority. This proposal can only be supported if the term "marketing communication" is not interpreted too broadly, see also our answer to question 3. In addition, it must be ensured that pre-marketing communications do not fall under the term "marketing communications". If pre-marketing is carried out in accordance with Art. 4 (1) (aea) AIFMD, the approval is not necessary.

The same applies to press releases about funds that have not yet been launched, e.g. the announcement that a new fund is to be launched. Contrary to the statements in paragraph 5, this is also not a marketing communication.

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.

If an asset manager wants to provide information about opportunities and risks in marketing communications, we consider it appropriate to present them in a balanced way, but a certain amount of leeway is necessary in the presentation (see our answer to question 8).

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).

When presenting risks and rewards, a differentiation should be made between the various types of marketing communications. The actual space available must be the leading factor. It is already in the nature of things that space is extremely limited for short online marketing communication. Therefore, in the case of online marketing communications such as banners, ads on LinkedIn, etc., it should be possible to refer to a separate document containing the required information by means of a link or other reference. The same applies to marketing videos. Due to the variety of marketing communications, fixed specifications are not useful, and it practically impossible to provide conclusive requirements for all cases. The guiding principle of Art. 44 (2) (g) Commission Delegated Regulation (EU) 2017/565 already mentioned in our answer to question 4 should also be leading here.

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?

All marketing communications must be fair, clear and not misleading. This naturally applies irrespective of the investor categories addressed. However, there are differences in the assessment of what is fair, clear and not misleading according to the different investor categories and their understanding and knowledge of funds. A marketing communication may meet the requirements for professional investors, but not for retail investors. If the promoted fund is not a retail fund, the marketing communication is also only directed to professional investors. The standard to be applied is therefore different. Overall, the Guidelines should make a clearer distinction between marketing communications aimed at professional investors and those (also) aimed at retail investors. For example, the proposed disclaimer on marketing communications (section 4, paragraph 6) is always superfluous for professional investors. See also our answer to question 14.

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

In principle, we are of the opinion that the information in marketing communications must of course not contradict the information in the legal information documents or relativise statements in these

documents. However, since marketing communications are not legal information documents, it must also be possible to present information differently at certain points. See also our answers to questions 12 and 14.

More specifically, we believe that marketing communications need not provide the same information as information documents. Otherwise all fund-related client information would be limited to the content of prospectus and KID. In consequence, this means it would be prohibited to provide any additional information on a fund which cannot be found in prospectus or KID. Neither the asset manager nor a distributor could provide additional information (such as key figures, e.g. sharpe ratio, VaR or max drawdown) or information on the current investments (e.g. top ten of the financial instrument the fund holds currently). The wording of the guideline and, hence, the limitation of information even applies to neutral information providers (e.g. internet information platforms). We think that it is not intended to cut off investors from such useful information. **We, therefore, strongly recommend amending the wording to "consistent information" or "non-contradictory information" instead of "same information".**

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?

We agree that no minimum set information on the characteristics of the promoted fund should be required. As ESMA correctly points out, the inclusion of such information depends largely on the scope and form of the marketing communication. Mandatory inclusion would significantly limit the possibilities of short and concise marketing communications. This information can be obtained by (potential) investors from the legal information documents.

Note on section 6, paragraph 21:
ESMA stipulates that information on the features of the investment must always be kept up to date. We agree with this requirement, but would like to clarify that the adaptation of marketing communications - depending on their form - may take a certain amount of time (e.g. in the case of printed marketing communications). Incidentally, Art. 44 (2) (g) Commission Delegated Regulation (EU) 2017/565 provides for this in general for marketing communications. The Guidelines should also be based on this provision.

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

Section 6.2

Paragraphs 34/35: The risk classifications under the PRIIPs Regulation differ from those under the KIID regulation. For example, the PRIIPs Regulation provides for risk indicators from 1 - 7, whereas the KIID Regulation provides for risk/reward indicators from 1 - 5. In practice, even if PRIIPs KIDs are already prepared, these classifications are not included in the prospectus of the relevant fund. The use of these different indications in marketing communications must not be mandatory, as it is misleading for the investor in case of doubt.

As a rule, other risk classifications are used for marketing purposes, which are more tangible and easier to understand for investors. This approach is and must remain permissible.

The wording "marketing communications .... should refer at least to the material risks mentioned in the KID, KIID, the prospectus..." in paragraph 35 is too broad. A marketing communication cannot refer to all of the risks presented in the legal information documents. This information is too far-reaching and the requirements for marketing communication are therefore far too extensive. The same applies to the wording in section 5, paragraph 10, which states: "...give a fair and prominent indication of any risks".

Paragraph 35, sentence 1 should also be adapted for another reason: It prescribes a reference to “material risks” mentioned in the KID / KIID or the prospectuses. Such “materiality” of risks is notdefined for purposes of the prospectuses. In fact the prospectuses do only list any possible risks, without any quantification.

Paragraph 37 provides that marketing communications for funds with non-(immediately) liquid investments („illiquid nature of the investment“) should include a note stating that only a small amount should be invested. This is clearly too far-reaching for requirements for marketing communications and **should be deleted**. The investor receives essential information on the funds in the legal information documents. Whether a fund is suitable for him/her or not, the investor must decide for himself/herself - if necessary with the help of an investment advisor. For example, open-end real estate funds, which by their nature cannot immediately sell the properties held in the portfolio, can be a very reasonable choice for investors depending on their individual circumstances. The required notice discourages investors from looking into the various investment options.

Paragraph 38 in conjunction with paragraph 47 are unclear. Paragraph 38 refers to recently launched funds, but no explanation is given as to which period is covered by this. Furthermore, it is unclear what is meant by the statement "for which no past performance records are available". According to paragraph 47, in these cases apparently only simulated past performance should be presented. In our opinion, however, past performance data for other share classes or internal comparison portfolios should also be included. In the case of actively managed funds, the past performance of a benchmark referred to in the legal documents is not suitable as a proxy for past performance (paragraph 38).

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

We consider section 6.3, paragraph 40 too far-reaching, as information "of the currency involved, the applicable currency conversion rates and costs, and the arrangements for payment or other performance" would be disproportionate in range. Instead, we suggest including a general note that exchange rates may fluctuate and that this may affect the investment.

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

Section 6.1, paragraph 19:
It is stipulated that, among other things, the past and future performance information must correspond to that in the information documents of the fund. The regulatory requirements of the PRIIPs Regulation and the KIID Regulation are different. In particular, the calculation method for performance scenarios to be shown in the PRIIPs KIDs is currently highly controversial and more misleading than helpful for investors. Moreover, some retail AIFs are subject to different rules when distributed cross-border, i.e. have to provide a UCITS-like KIID in one Member State and a PRIIPs KID in another.

The requirements go beyond Art. 44 (5) Commission Delegated Regulation (EU) 2017/565. There, a link of the performance to PRIIPs-VO/KID-VO is not provided for. The requirements in connection with MiFID II are practicable and should be transferred to the Guidelines instead in a comparable manner.

Section 6.4, paragraph 44:
It is not clear whether past performance, when displaying cumulative performance, is to be determined on the basis of a calendar year or a twelve-month period. The wording "on a yearly basis" allows both interpretations.

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

Section 6.5 should be entirely deleted. The term "sustainability-related aspects" is not sufficiently specified. It is not clear whether only products that promote environmental or social characteristics should be covered or whether any consideration of sustainable aspects (e.g. minimum exclusion criteria) should fall under this rule. The reference to the SFDR is not sufficiently clear. In addition, Art. 13 SFDR already provides that marketing communications must not contradict the information published under the SFDR.

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?

Apart from the requirements going beyond those in Art. 44 Commission Delegated Regulation (EU) 2017/565, the draft Guidelines largely summarise what is already observed by asset managers today. A synchronisation of the requirements not only leads to a level playing field for market participants, but also makes marketing communications more comprehensible for investors. Ultimately, however, all marketing communications will have to be reviewed on the basis of the Guidelines. In our view, the period between publication of the Final Guidelines and the start of application of Art. 4 Regulation (EU) 2019/1156, August 2, 2021, is too short. Therefore, we advocate a period of at least 6 months for the review of already existing marketing communications.

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.

******