THE VOICE OF PRIVATE CAPITAL
VENTURE CAPITAL
PRIVATE EQUITY
INFRASTRUCTURE
LONG TERM INVESTORS

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

8 February 2021

Response to the ESMA Consultation Paper on "Guidelines on marketing communications under the Regulation on cross-border distribution of funds"

SECTION I - SCOPE OF THE GUIDELINES

Question 1 - 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.**

Answer:

Option b).

We agree that Article 44 is a good starting point for the development of the Guidelines. However, we do not think it should be used slavishly as the template because the Guidelines will apply in a very different commercial context. We therefore argue both for further alignment in certain areas and divergence in one important respect.

Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20
F +32 2 725 07 04

www.investeurope.eu
info@investeurope.eu

European Transparency
Register: 60975211600-74

Further alignment

We have spotted a few divergences between the proposed Guidelines and Article 44 of the Commission Delegated Regulation (EU) 2017/565, which ought to be aligned: (i) (the scope of) marketing communications; (ii) information on risks and rewards; and (iii) information on costs. More details are set out in the relevant sections in this consultation response.

Our concern, which warrants some divergence from Article 44

We are concerned that ESMA has not taken proper account of the differences between the overwhelmingly institutional alternative investment fund industry (which includes venture capital, private equity and infrastructure funds), on the one hand, and the retail fund industry, on the other, with respect to their respective distribution models.

In that context, we are concerned that ESMA has made an assumption about the application of MiFID rules in the institutional marketplace which is not necessarily correct. Whilst we agree that Article 44 of Regulation 2017/565 is a good starting point for the development of the Guidelines, because of this mis-assumption, we believe that ESMA has gone too far in treating it as a template, and we suggest some modest departure from it in response to Question 14 below concerning past performance.

Context of institutional fund distribution

In the institutional fund distribution context, the AIFM clearly and unequivocally has an arm's length sales-relationship with the prospective investor, as opposed to an advisory relationship. AIFMD imposes a duty to treat investors (including prospective investors) fairly (Article 12(1)(f) and Article 23(1)(j)). However, before the investor subscribes to the fund, the AIFM is trying to persuade the investor to invest in its AIF, in preference to other AIFs (managed by different AIFMs) in the market pursuing similar strategies and/or in preference to different investment opportunities. Thereafter, the duties of the AIFM towards the investors are shaped by the contractual terms of the AIF (as well as regulatory duties under AIFMD). During the sales phase, the AIFM is not providing a personal recommendation to the investor, for example by taking its particular circumstances, investment strategy, or other existing investments, into account in recommending a product which is most suitable for the investor. As ESMA notes in paragraph 6 of the draft Guidelines, marketing communications have a purely marketing purpose. Provided this is made explicitly clear (as the draft Guidelines will require), the investor protection features of the Guidelines could and should be made more proportionate in certain limited respects.

If ESMA is concerned that this context might not be sufficiently clear to prospective investors, the example disclaimer in paragraph 6 of the Guidelines could be expanded as follows (additions in bold, underlined):

"This is a marketing communication. This is not a contractually binding document. Please refer to the [prospectus of the [UCITS/AIF/EuSEF/EuVECA/Information documents 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. ***The [UCITS Manco/AIFM] is not advising you on the merits of the [UCITS/AIF/EuSEF/EuVECA] and you should take your own independent investment, tax and legal advice as you think fit.****"*

Application of MiFID in the context of institutional fund marketing

In the venture capital, private equity and infrastructure fund industry, AIF interests are typically marketed by: (a) the AIFM itself; (b) an affiliate of the AIFM, acting as a service provider to, and in the best interests of, the AIFM; and/or (c) a third party specialist institutional marketing firm. In our industry, in some cases, AIF interests may also be distributed by (d) a "distributor", in the sense in which we believe ESMA uses the term in the consultation paper, in a situation more similar to the typical retail fund distribution model.

Marketing by the AIFM itself

Where an AIFM markets interests in an AIF it manages, it is clear that this does not amount to the provision of a MiFID investment or ancillary service and, even if that were not the case, the exemption in Article 2(1)(l) MiFID would apply because the AIFM is by definition the manager of a collective investment undertaking, acting as such. It is in this context in which the present Guidelines are being developed.

Marketing by an affiliate of the AIFM

However, it is not uncommon that the AIF or the AIFM will appoint an affiliate either: (a) to undertake marketing on its behalf (which may amount to the delegation of the marketing function within Article 20 AIFMD); or (b) to provide support services with respect to the AIFM's own marketing.

Such affiliates may be appointed, for example, because staff working for them are located in a different Member State or third country to the AIFM. As ESMA is aware, fund management groups are highly international.

Such affiliates will act first and foremost in the best interests of the AIF and the AIFM. In particular, they will be financially incentivised (typically on a cost-recovery basis plus a tax transfer-priced margin, but sometimes also with performance-related fees) to persuade prospective investors to invest in the AIF (in preference to other AIFs in the market which may pursue a similar strategy or different investment opportunities). The affiliate may also have indirect financial interests in the AIF reaching a larger size because the affiliate may provide (or expect to provide) other services (such as transaction arrangement services) to the AIF, or the AIFM, after it is raised, which fees will scale by AUM.

Marketing by a third party specialist marketing firm

These firms perform a function similar to that of the AIFM's affiliate described above. They may be appointed particularly by smaller AIFMs (perhaps relatively newly established) who may not be able to afford the overhead of their own internal marketing function. Such specialist firms will invariably be incentivised on a performance or sales-based fee model. Such firms will invariably consider themselves to be providing their services to the AIF or AIFM (as opposed to the investors) with whom they enter into their contract and by whom they are paid.

(Investors are often represented across the table by different advisory firms, who specialise as consultants to the providers of capital.)

Marketing by a more traditional distributor

Where a more traditional "distributor" is involved, this could be a credit institution or investment firm operating as a "private bank" or "wealth manager" which may distribute interests in the AIF to its underlying clients (typically high net worth or possibly mass affluent investors). The commercial nature of these arrangements vary. The distributor may consider itself to be providing a service to the AIF or the AIFM, or to the underlying investors, or both. This is the exception, not the rule.

ESMA's assumption about the application of MiFID to marketing in the institutional marketplace

As noted above, we are concerned that ESMA has made an assumption about the application of MiFID rules in the institutional marketplace which is not necessarily correct. ESMA seems to have assumed that the firm engaged in the marketing will always be a MiFID firm, and that the investor is always or necessarily the "client" of the MiFID firm engaged in the marketing.

In our view, the marketing activities described above should not be regulated under the MiFID framework, since "marketing" of AIFs is neither a MiFID investment service nor investment activity. This is true most clearly in respect of the affiliates of the AIFM. Pursuant to recital 44 MiFID, "the business of reception and transmission of orders should also include bringing together two or more investors, thereby bringing about a transaction between those investors". However, we do not think that this properly characterises the functions performed (as further set out below, the fund is not an investor but rather an issuer).

Even if that were wrong, and the marketing service amounts to a MiFID investment service, we believe strongly that the "client" to whom such service is provided is the affiliated AIFM, or the AIF (depending on the facts and circumstances) as opposed to any actual or prospective investor. "Client" is defined in Article 4(9) MiFID as "any natural or legal person to whom an investment firm provides investment or ancillary services" (although MiFID duties can apply, we acknowledge, also to a prospective client).

The alternative view (that the marketing firm is a MiFID firm, and that the investor is the client of the firm engaged in the marketing) creates a situation where the affiliate, which has been appointed to act on behalf and in the best interest of the fund, will find itself under the obligation to comply with MiFID investor protection rules when dealing with its supposed "client", the investor in the fund.

Furthermore, providing these types of services to fund investors would put these firms in a position that would raise an acute conflict of interest, given they have been appointed by the AIF or the AIFM in order to act in the AIF or the AIFM's interests. This will be in direct tension with the duty of an investment firm (under, for example Article 16(3) MiFID) to prevent conflicts of interest from adversely affecting the interests of its clients. The arrangements would also be directly in tension with the AIFM's duty in Article 12(1)(d) AIFMD to avoid conflicts of interest in its business (and otherwise to manage them).

We agree with ESMA's statement in paragraph 6 of its consultation paper that "distributors, *such as* investment firms... ***may*** have to apply other rules governing the information issues to investors or potential investors, such as" Article 44 of Regulation 2017/565 (our emphases). A more traditional distributor is very likely to be a credit institution or investment firm treating prospective investors as underlying clients, to whom it would owe those duties. But this will not always be the case and it is an inappropriate assumption upon which to design the Guidelines in certain limited respects (identified below).

Request for ESMA Q&A

A marketing firm (a fortiori, an affiliate of the AIFM) should be able to inform a prospective investor to whom it markets an AIF, that **it is not a client to whom the firm performs a MiFID service and owes regulatory obligations provided the firm**:

- does not provide investment advice or personal recommendation (a tailored investment recommendation based on consideration of the investor's existing portfolio or circumstances) to the investor, rather it is acting on behalf of the AIF or AIFM; and

- does not take steps to execute the investor's order to invest in the fund, either by executing the order as the investor's agent or by conducting "reception and transmission of orders", which is taking responsibility for the investor's order by transmitting it to the fund on the investor's behalf. In practice, marketing firms will usually direct the investor to submit its subscription agreement to the AIF or the AIF's administrator. We appreciate that there is a broader meaning to this activity of "bringing together two or more investors and thereby bringing about a transaction" but would submit that in this context the fund should be considered an issuer rather than an investor such that introducing an investor to a fund would not fall into this broader meaning.

We invite ESMA to clarify in the MiFID Q&A that, in such specific and defined circumstances, marketing of AIFs should not be categorised as a MiFID investment service or activity, as it involves neither giving investment advice nor the reception and transmission of orders.

A distinction between marketing and these two types of MiFID services is also a logical interpretation based on a reading of AIFMD. While *reception and transmission of orders* in relation to financial instruments and giving *investment advice* are **non-core services** of an AIFM which require a MiFID top-up authorisation (Article 6(4)(b) AIFMD), *marketing* of AIFs (including "third party" AIFs with respect to which the AIFM is not performing the portfolio and risk management functions) is referred to as a function that an AIFM may additionally perform under the AIFM authorisation (Annex I, paragraph (2)(b) AIFMD).

We do not see any investor harm arising out of this interpretation, when it is clear to the investor that the firm's marketing activities do not amount to the provision of a service to the investor.

This clarification would also align the position of firms conducting marketing activities on behalf of an AIFM with EU corporate finance firms which act for issuers raising capital. In that circumstance, corporate finance firms will make it clear to investors participating in the capital raising that they only act for the issuer and do not owe any regulatory duties to the investor and are not seen as providing investment services to the investors in line with the analysis above. Corporate finance firms conducting MiFID activities in this context could not observe client relationships on both the buy-side and sell-side, given the conflicts of interest involved.

We would be very happy to detail these views further in a conference call and stay at your disposal if you would have any further questions on this point, outside the context of the present consultation. We propose to raise these same concerns in parallel with the European Commission (DG FISMA). However, we felt it important to raise these concerns in the context of the present consultation, because they support our requests for some further tailoring of the draft Guidelines, as we expand upon below.

Question 2 - Do you agree with this all-encompassing approach as regards the definition of marketing communications?

Answer:

Pre-marketing materials

We have a key concern with ESMA's all-encompassing approach, particularly in relation to pre-marketing. Concretely, we believe that pre-marketing materials should be treated differently under the Guidelines. In particular, EU AIFMs should be able to 'test the waters' with materials that would **not** be subject to the full set of disclosure requirements applicable to 'advertisements' under the Guidelines.

In the alternative investment fund industry, pre-marketing materials are explicitly recognized by existing regulations (in many EU states in connection with the implementation of Article 42, as well as the present Cross-Border Distribution of Funds package) as a qualitatively 'different animal' than those used by fund managers targeting retail investors.

These existing (or soon to be implemented) regulations recognize that the typical alternative fund investor who is reviewing any such pre-marketing materials is a sophisticated investor, and, in particular, that such materials are typically of an introductory, preliminary and/or 'test the water' nature. These earlier-adopted regulations recognize that such materials provide managers the ability to gauge potential interest by sophisticated investors in a potential offering – or even to hone/tweak strategies – without the burden and cost of full Article 42 compliance. If adopted as proposed, the Guidelines would create two potential competitive disadvantages (at least for the near future): (i) non-EU AIFMs marketing into the EU under Article 42 would not be subject to the advertisement requirements of the Guidelines and would, accordingly, be able to continue to 'pre-market' (in accordance with the respective EU states' Article 42 implementation requirements) using marketing materials that are not subject to or compliant with the more restrictive disclosure requirements of the Guidelines; and (ii) smaller EU AIFMs, including those raising a first time fund, will face greater barriers to market since they will find it harder to informally 'test the water' compared to larger and more established EU AIFMs, who have internal resources to produce marketing materials which are fully Article 42 compliant at an earlier stage in the fundraising and without regard to the costs of doing so.

The dynamics and timelines of a private fund offering have a particular impact here, and Invest Europe would be very happy to discuss this topic in more detail with you.

In line with the above, we also recommend that the text of the Guidelines regarding scope (Annex IV of the consultation, page 29) should be made clearer, by repeating in Part 1 the detail on intended scope, based on Article 4(1)(x) AIFMD and referred to in paragraphs 10 and 11 of the consultation paper ("*In this context, the notion of "marketing communications" to which these Guidelines apply should encompass all communications, regardless of the medium used, which contain a direct or indirect offering or placement of units or shares of a fund to or with investors domiciled or with a registered office in the Union.")*, as follows:

"***What?*** *The Guidelines should apply to all marketing communications [regardless of the medium used, which contain a direct or indirect offering or placement of units or shares of a fund] addressed to [prospective] investors [domiciled or with a registered office in the Union,] 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:*"

In addition, we have a few other concerns, which we have set out in more detail below:

- **Communications for which the AIFM is not responsible**

The proposed Guidelines specify that they apply "regardless of the issuer of these marketing communications and/or who distributes the units or shares of the relevant AIF or units of the relevant UCITS". In paragraph 8 of the consultation paper, ESMA contends that "Article 4 of the Regulation specifies that fund managers are responsible for all marketing communications addressed to investors in relation to funds that they manage… even when they are being addressed by distributors".

We disagree with this interpretation of Article 4 as a matter of law. We think it is a question of fact whether the AIFM is responsible for particular marketing communications. We think the test ought to be whether the AIFM has made the communication itself or caused the specific communication to be made (for example, by drafting it and making it available to the distributor or asking the distributor to make it).

Where an AIFM uses a distributor, it will often be the case that the distributor requires additional information about the AIF, over and beyond (or in more detail than) an end investor would expect to receive. The distributor will wish to put itself in a position to answer detailed questions about the AIF from its underlying clients or investors. At its simplest, the distributor (if it is a MiFID firm) may seek a target market assessment from the AIFM in order to discharge the distributor's obligations under MiFID product governance rules. The AIFM may have no legal obligation to provide this (because it is unlikely to be an in-MiFID scope manufacturer) but may have a commercial desire or need to do so. But information provided could be more complicated than in this example. Such information is unlikely to be intended for the underlying investor and we would not expect it to be drawn up with a view to compliance with the Guidelines. The AIFM would expect to mark it as strictly confidential and not to be shared with any person other than the distributor.

In these circumstances, the draft Guidelines are unfair to contemplate in Section 1 (Scope), para (f) (page 30) that in scope are "communications…handed down to distributors by…an AIFM…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".

At the most extreme, the distributor could make an oral communication to its client about an AIF, in the context of a meeting or other interactive dialogue, which the AIFM has no way of controlling.

If ESMA disagrees with our legal interpretation, alternatively or in addition, ESMA might specify in the Guidelines that an AIFM can discharge its obligations under the Guidelines completely by requiring any distributor to have regard to and to use reasonable endeavours to comply with the Guidelines or, if applicable to the distributor, Article 44 of Regulation 2017/565.

We also note that Article 44 of the Commission Delegated Regulation (EU) 2017/565 sets out that "investment firms shall ensure that all information they address to, or disseminate in such a way

that it is likely to be received by, retail or professional clients or potential retail or professional clients [satisfies the conditions in those articles]".

In our opinion, the requirement in the proposed Guidelines goes beyond the obligations of Article 4 of the Regulation on Cross Border Fund Distribution and is not consistent with Article 44 of the Commission Delegated Regulation (EU) 2017/565.

We believe that managers should only be responsible for materials, relating to the relevant fund, that they issue and disseminate. Managers should not be liable for marketing communications that are issued or disseminated by others (except in the context of a delegation). For example, AIFMs should not be responsible for the material provided by entities which distribute funds placed in insurance contracts or personal equity plans (e.g. French *Plan d'Epargne en Actions* - PEA).

In this context, we propose to re-word the proposed Guidelines as follows:

"The aforementioned entities should be responsible to ensure that all marketing communications ~~addressed to~~ ***they address to, or disseminate in such a way that it is likely to be received by****, 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.*

The Guidelines should apply to all marketing communications ~~addressed to~~ ***managers address to, or disseminate in such a way that is likely to be received by****, investors for UCITS and AIFs."*

- **Communications to non-EU investors**

We suggest that the Guidelines should be applicable to communications **only to investors who are established or resident in the Union**. An AIFM will owe a duty to treat all investors (which would include non-EU investors) fairly: this will place a natural limit on the degree to which marketing communications addressed to non-EU investors may differ from those provided to EU investors. However, the commercial, legal or regulatory context of a third country market (such as applicable securities offering laws in that jurisdiction) may make it practically difficult or impossible to comply with the Guidelines in that context, or put EU AIFMs at a competitive disadvantage in their marketing efforts.

AIFMs should be released from observing the EU requirements in marketing their funds outside of the EU/EEA where this would be incompatible with local rules issued by third countries on marketing communications. While the standard for fair and not misleading marketing communications should not normally raise any issues of compliance with local law, more specific requirements could present a conflict.

It should also be noted that the AIFMD defines marketing as "*direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with* ***investors domiciled or with a registered office in the Union***" (Article 4(1)(x) AIFMD – emphasis added). In compliance with this definition the Guidelines should not be expanded to non-EU investors which are not subject to marketing under AIFMD.

- **Oral communications**

ESMA should be clearer about its expectations about oral marketing communications during meetings or virtual meetings, in particular in the context of an interactive dialogue with an investor or prospective investor. We suggest that, in these circumstances, the Guidelines should not apply, since basic AIFMD duties should be sufficient to protect the investor.

- **Communications in relation to funds closed for subscription**

We call for the liability of managers to be limited to marketing communications relating to funds that are open for subscription. Reporting on performance of existing funds should not be considered an instance of marketing.

Question 3 - 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 Section 1 of Annex IV.

Answer:

We agree in principle with the inclusion of a non-exhaustive list. However, please refer to our answer to Question 2 above.

Question 4 - 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.

Answer:

We agree.

Question 5 - 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.

Answer:

We agree that the Guidelines should include a negative list of the documents that should **not** be considered as marketing communications. Indeed, this would contribute to increasing legal certainty for market players.

In our industry, an AIF's limited partnership agreement, management agreement, private placement memorandum (or "issuing document") and subscription document would be amongst the regulatory documents which are **not** marketing communications.

SECTION II - GUIDELINES ON THE IDENTIFICATION AS SUCH OF MARKETING COMMUNICATIONS

Question 6 - 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?

Answer:

We agree that a short disclaimer is the most appropriate format to identify marketing communications.

However, we believe that there is unnecessary duplication in requiring both the disclaimer and the use of the label "marketing communication". That term is already included in the disclaimer proposed in the Guidelines and will therefore be clearly displayed in marketing communications.

Please also refer to our suggestion above to add to the example disclaimer a clear statement that the AIFM is not advising the investor on the merits of the AIF and that the investor should take its own, independent, investment, tax and/or legal advice as it thinks fit.

SECTION III - GUIDELINES ON THE DESCRIPTION OF RISKS AND REWARDS IN AN EQUALLY PROMINENT MANNER

Question 7 - 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.

Answer:

- Relevant risks

We agree that risks and rewards should be described equally prominently in marketing communications. However, it will not be possible to disclose *all* the risks attached to purchasing units or shares of an AIF (or units of a UCITS). More importantly, investors will get confused if they are faced with too much information.

We therefore propose to re-word the Guidelines, in line with Article 44 of the Commission Delegated Regulation (EU) 2017/565, as follows:

"*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*".

- Font and size

In addition, the proposed Guidelines set out that "when disclosing risks and rewards information, the font, size and position used to describe the rewards should be the same as those used to describe the risks" [emphasis added]. This requirement seems more restrictive than that set out in the Commission Delegated Regulation (EU) 2017/565. For instance, it would not be possible to highlight the risks in red, bold or larger font.

In this context, we propose to re-word the proposed Guidelines as follows:

"*when disclosing risks and rewards information, the font* ***and*** *size ~~and position~~ used to describe the ~~rewards~~* ***risks*** *should be ~~the same as~~* ***at least equal to*** *those used to describe the ~~risks~~* ***rewards and its position should ensure such indication is prominent***."

Question 8 - 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).

Answer:

We have nothing to add.

SECTION IV - GUIDELINES ON THE FAIR, CLEAR AND NOT MISLEADING CHARACTER OF MARKETING COMMUNICATIONS

Question 9 - 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?

Answer:

We support ESMA's approach. We agree that the fair, clear and not misleading character of information must be assessed differently as between marketing communications to retail versus only professional investors. We would like to highlight that investors need relevant information in order to make sound investment decisions and reasoned choices. For instance, retail investors will not need as much detailed information as professional investors, as they will not be able to process it and will get confused. Conversely, professional investors will probably request very specific information during their negotiations with managers (e.g. internal rate of return of the fund, managers' CV, etc.).

In addition, we would like to note that the AIFMD is dealing only with marketing of funds to professional investors. The CBDF package does not change that. In an AIF context, ESMA should be careful about setting rules on marketing to retail investors, for which the CBDF package does not provide it with competence.

Question 10 - Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund?

Answer:

We agree that the marketing communication should be consistent with, and not contrary to, the legal and regulatory documents of the promoted fund, as stated in paragraph 25 of the consultation paper. It is important to bear in mind that, in the context of private equity and venture capital, marketing communications to professional investors will frequently make extensive cross-reference to the key legal documents constituting the AIF, such as the private placement memorandum.

We are however of the view that the use of the word "same", as proposed in Question 10, should be omitted. This concept would put any manager at risk as it is too narrow and not suitable in the context of marketing information which may be factual and multi-faceted while being entirely consistent with and not contrary to the information contained in the legal and regulatory documentation. In other words, a fund manager could not update, add new or more granular information to the marketing communication that is not comprised in the legal and

regulatory documents even though such new or additional communication is consistent with and not contradictory to such legal and regulatory documents. It should be noted that the fundraising process in the private equity context often extends over twelve months or sometimes longer and updates of marketing documentations will most certainly be required in those cases.

With the current wording, the fund manager would thus be obliged to strictly limit the use of any additional information in its marketing information or be under the obligation to constantly update its legal and regulatory documentation with even the slightest additional information which does not seem very practical.

We do however agree that the terms "*consistent and not contrary to*" leave the possibility to add new information to the marketing communication, which is not comprised in the legal and regulatory documents but which is consistent and not contrary to legal and regulatory documents of the fund.

Question 11 - 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?

Answer:

We agree with the proposed approach. We agree strongly that no minimum set information on the characteristics of the promoted investment should be required. It would be impractical to be specific.

INFORMATION ON RISKS AND REWARDS

Question 12 - What are your views on these requirements relating to the fair, clear and not misleading of the information on risks and rewards?

Answer:

We agree with the proposed Guidelines in general.

However, in paragraph 34, it should be made clear that this guideline applies if there is a KID or KIID, but not otherwise. Not every AIF is subject to PRIIPS-KIID because interests are not made available to retail investors. This possibility is reflected, by contrast, in paragraph 37 of the draft Guidelines.

Paragraph 38 of the draft Guidelines should be read subject to our response to Question 14 below.

INFORMATION ON COSTS

Question 13 - Do you agree with this approach on the presentation of costs?

Answer:

The proposed Guidelines require marketing communications to show "the applicable currency conversion rates". This requirement is not appropriate in practice, as relevant conversion rates depend on the specific situation of investors. We suggest removing it and replicating the wording used in Article 44 of the Commission Delegated Regulation (EU) 2017/565, as follows:

"where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations".

Moreover, this wording would be more consistent with point 46 of the proposed Guidelines, which states that "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 prominent warning indicating that returns may increase or decrease as a result of currency fluctuations".

INFORMATION ON PAST AND EXPECTED FUTURE PERFORMANCE

Question 14 - Do you agree with this approach relating to the information on past and expected future performance?

Answer:

We are very concerned that these proposals are too prescriptive and are inappropriate for the marketing of interests in closed-end AIFs such as venture capital, private equity and infrastructure AIFs. Please refer to our response to Question 2 for more context.

We suggest that paragraphs 44 and 47 to 49 of the draft Guidelines should be substantially revised to reflect these concerns, or qualified by the addition of a new paragraph dealing specifically with closed-end AIFs, to reflect the following points.

A venture capital or private equity AIF will typically have a fixed life (generally around ten years). The fund may take several months or more to raise, during which period there may be

one or several “closings” on which dates groups of investors will subscribe to the fund by making binding commitments of capital to be drawn by the AIFM on a future, as-needed basis, when suitable investment opportunities have been identified. Following first closing there will be an “investment phase” during which the fund will make investments (typically 3-5 years). Each investment will be held for a period of years and then sold during the AIF’s divestment phase. It is typical for an AIFM to raise several sequential funds pursuing the same or very similar strategies, each AIF being a different fund “vintage”. It is typical for the AIFM to start raising a new vintage following the end of the investment phase of the previous vintage, so that the divestment phase of ‘Fund 1’ will overlap with the investment phase of ‘Fund 2’. For example, ACME Capital Partners BV (an AIFM) may have raised ACME Capital Fund 1 in 2014, ACME Capital Fund 2 in 2018, and may intend to raise ACME Capital Fund 3 during 2021 (subject, from August, to the Guidelines).

A fund will typically exhibit performance on a J-curve (a trend line which shows an initial loss in the early investment phase (when costs are being incurred and any investments held at book value) followed by a relatively steep gain). The performance of each fund will ultimately be determined based on actual, realised disposals of portfolio assets, at the end of the life of the fund. In the interim, it may be measured based on accounting valuations, and (in either case) will typically be expressed as an internal rate of return and/or multiple of cost (of investments plus expenses), over the life of the fund to date.

Given the nature of closed-ended funds (as described above) it is extremely rare to include detailed past performance information about the AIF being marketed. By definition, there will be no such past performance until after first close and even where the fund makes some investments between first and final close, it is rare for there to be meaningful performance data for those investments prior to final close. It is typical – and wholly appropriate, clear and fair – for the AIFM to refer in marketing the latest vintage to the interim or ultimate performance of some or all predecessor vintages, over their respective lives to date. (Data may be (expressly) excluded for the most recent predecessor vintage if it is too early in its life to give a meaningful indication of performance, for example where one fund has been deployed much quicker than expected in an active market.)

As we interpret the draft Guidelines, this is an instance of the presentation of past performance data, as opposed to marketing based on expected future performance (or, for that matter, simulated past performance).

However, the Guidelines appear to be predicated on the assumption that past performance will necessarily be past performance of the same AIF being marketed (presumably assuming that it is an open-ended AIF).

Given the impact of the investment, hold and divestment periods - including the J-curve effect - it is not appropriate to present data on a yearly basis (paragraph 44 of the draft Guidelines) or based on complete 12-month periods (paragraph 48).

It will also be impossible for the fund to display the "past performance of the promoted fund…over a period of 5 years" (paragraph 42 of the draft Guidelines, paragraph 37 of the consultation paper, applicable where PRIIPS-KID or no KIID nor KID is prepared) since, by the fifth year of the life of the fund, it will no longer be open to new investors and will not be marketed any longer.

We believe that this is too slavish an approach to following Article 44 of Regulation 2017/565 in a wholly different commercial context (see immediately above) and legal context (see our response to Question 2 above).

In paragraphs 47 and 48 the draft Guidelines, the default position in respect of a new fund is to present data based on "a new share class of an existing fund" (not relevant to our industry) or simulated past performance (which would involve omitting more relevant and appropriate real data).

In our industry, the most useful data to present to investors concerning past performance is the actual past performance of predecessor vintages (which is what they expect to see and analyse) and/or track record data in relation to the performance of the team who are responsible for the management of the funds/advice as to the management of the fund over a materially relevant and complete period. This should be expressly contemplated and permitted in the final Guidelines.

Finally, we believe that point 46 of the proposed Guidelines goes beyond the requirements of Article 44 of the Commission Delegated Regulation (EU) 2017/565. We therefore suggest re-wording it, as follows:

"a ~~prominent~~ warning that the return may increase or decrease as a result of currency fluctuations".

INFORMATION ON SUSTAINABILITY-RELATED ASPECTS

Question 15 - Do you agree with this approach relating to the information on the sustainability-related aspects of the investment in the promoted fund?

Answer:

We agree, with some caution. As identified in the joint ESAs' recent letter to the European Commission, the categorisation of a product as an SFDR Article 8 product or not is an issue of significant legal uncertainty, on which we would welcome every opportunity to engage with the European Commission and ESMA.

We would also like to highlight the need for a smooth articulation and consistency of the Guidelines with other existing regulations applicable in this field (in particular, the Disclosure and Taxonomy Regulations).

SECTION V - COST-BENEFIT ANALYSIS

Question 16 - 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?

Answer:

We anticipate that the practical impact of the proposed Guidelines on the presentation of past performance information could be extremely significant unless our concerns expressed in our response to Question 14 are addressed.

Otherwise, we expect that the financial impact of the proposed Guidelines will be quite significant. Most venture capital, private equity and infrastructure firms have established templates for marketing communications used repeatedly in relation to successive vintages of fund products, with iterative, periodic updating. These also reflect international norms, which are quite different from the Guidelines. Many such templates will need to be substantially revised. Some firms will need to hire specialist lawyers or compliance professionals, or external consultancy support.

Question 17 - What additional costs and benefits would compliance with the proposed Guidelines bring to the stakeholder(s) you represent? Please provide quantitative figures, where available.

Answer:

If ESMA were able to address the legal uncertainty issue identified in our response to Question 1, there could be considerable saving in legal and other fees grappling with current issues of legal uncertainty.

Contact

For further information, please contact Martin Bresson (martin.bresson@investeurope.eu) or Erika Blanckaert (erika.blanckaert@investeurope.eu) at Invest Europe.

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.
For more information please visit www.investeurope.eu.