



BaFin issues guidelines on marketing communications of investment firms

Investment firms have to ensure that their marketing communications are fair, clear and not misleading. On 11 February 2010 the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) published a set of guidelines that will affect marketing by investment firms.

On 11 February 2010 the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) published guidelines on marketing communications of investment firms (Wertpapierdienstleistungsunternehmen). According to section 31 paragraph 2 of the German Securities Trading Act (Wertpapierhandelsgesetz – WpHG) all information and marketing communications an investment firm makes available to clients must be fair, clear and not misleading. Additional requirements for marketing communications addressed to retail clients are set out in section 4 of the German Regulation on the Rules of Conduct and the Organisational Requirements for Investment Firms (Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung – WpDVerOV).

Addressees

The guidelines apply to German investment firms subject to the WpHG, German branches of foreign investment firms and those foreign investment firms domiciled outside the European Economic Area (EEA) that provide investment services on a cross-border basis to clients in Germany. The guidelines are also of interest to domestic investment companies (Kapitalanlagegesellschaften) and foreign investment companies. Investment companies frequently engage investment firms to distribute their fund units. Consequently, investment firms acting as distributors of fund units frequently require confirmation that marketing communications prepared by the investment company comply with the aforementioned statutory provisions.

Relevant marketing communications

The statutory provisions apply to any information (including marketing communications) that relates to financial instruments, investment services and ancillary services. The guidelines clarify that ‘marketing communication’ means information intended to induce the recipient to purchase a financial instrument or request certain investment services, ie information for the purpose of promoting sales.

Marketing communications prepared by third parties

On occasion, investment firms make available marketing communications prepared by a third party. In such cases, the investment firm has to ensure that the marketing communication complies with the statutory requirements. However, BaFin ‘softens’ this obligation if the third party is an investment firm domiciled in the EEA. In this case, the investment firm can in good faith assume that the marketing communication has been prepared in accordance with the relevant statutory requirements.

Sufficient and understandable presentation

Marketing communications targeting retail clients must be presented in an understandable way and must be fair, clear and not misleading. Essential information must not remain undisclosed.

The scope of information provided must be sufficient and be presented in a manner understandable for those clients who are the intended or likely recipients of the marketing communication.

Important criteria are that:

- the information must be sufficient and understandable in light of the expected comprehension and knowledge of the average client addressed;
- important issues, statements or warnings must not be obscured or toned down; and
- information presented must be up-to-date. The necessary degree of timeliness is interpreted in light of the required fairness and the prohibition to be misleading and varies between different media (eg more timeliness is required for information that is electronically available than for hardcopy material). Information should contain a clear reference to the date of issuance.

Presentation of benefits and risks

Possible benefits of a financial instrument or investment service may only be emphasised (by way of language, typographically or in any other way) if possible risks associated with the instrument or service receive equal attention. The presentation of benefits must be proportional to that of risks and a well-balanced presentation is required. Risks must not be hidden in footnotes if benefits are displayed in the main text of the document.

Benefits and risks must be described at the same time and in the same document. It is not permissible to present the benefits in the marketing communication and merely refer to risks that are laid out in another document or on a website.

Indication of past performance

Presentation of past performance must clearly state the reference period and a disclaimer stating that past performance, simulation or forecasts are not reliable indicators of future performance is required.

Further rules have been introduced by BaFin regarding past performance, including:

- performance data must relate to the actual performance during a 12-month period (eg '50 per cent increase in value between 10 January 2008 and 10 January 2009' or 'Value on 10 January 2008: €40/value on 10 January 2009: €50');
- accumulated data for the total time period in question is not permissible (eg '500 per cent increase in value over the last 10 years');
- annualised average of performance data is generally not permissible (eg 'average increase in value of 5 per cent per annum over the last five years');
- performance data must relate to the immediately preceding five years (ie five 12-month periods):
 - an exemption is granted if data is only available for a shorter time period. In this case, performance data may be used if it is presented for the total time period for which data is available;
 - if data could be provided only for a period of less than 12 months, a performance statement (other than stating the current value) may generally not be made;
- further to the information requirements set out by law, additional performance information may be given, provided that the supplementary information is not displayed more prominently than the legally required information; and
- if performance data is presented based on gross values, the effect of commissions, fees and any other charges must be indicated. Such commissions, fees and other charges include all costs incurred by the client in relation to the purchase, holding or sale of a financial instrument, or for the investment services, eg sales charges for investment fund units, transaction costs such as order fees, broker fees and depositary bank fees.

BaFin realises that it is practically impossible to specify the effect of commissions, fees and other charges for all clients. Therefore, the guidelines recommend relying either on the fees charged by the investment firm in such instances or on average fee amounts (which are researched by the investment firm or supplied by professional associations or other third parties) and providing a model calculation of net performance values.

Simulation of performance

- Simulated past performance may exclusively refer to existing financial instruments, underlying assets of a financial instrument or a financial index.
- The simulation is only permissible based on identical instruments, for which data for the whole time period of simulation is available.
- The simulation must indicate the effect of commissions, fees and any other charges.
- An indication of future performance must not be based on, or refer to, simulated past performance.

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