ASIC

Australian Securities & Investments Commission

DRAFT FOR CONSULTATION

ASIC Guide on the Use of Past Performance in Promotional Material

September 2002

This draft Guide was attached as Appendix 3 to the ASIC Discussion Paper: The Use of Past Performance in Investment Advertising (September 2002).

It is released for consultation only and is not a final document. Comments are welcome by 15 November 2002.

Important notice

This Guide is a summary designed to provide the basic information you need. It does not cover all legal issues and is not a substitute for professional legal advice.

Guides inevitably involve some generalisations about the application of the law. Some matters considered have important exceptions or qualifications. The particular circumstances of any conduct (including its context) need to be taken into account when determining exactly how the law applies to that conduct.

Contents

What this Guide is about

This publication provides general guidance to the financial services industry on the appropriate use of past performance information in promotional material.

The standards set out in the Guide will:

(a) assist industry to comply with legal requirements;

(b) encourage fair and efficient competition within the industry;

(c) facilitate consumer comparisons between financial services and products; and

(d) enhance consumers' understanding of sound investment principles.

Past performance information is used frequently in investment-related promotional material and it is therefore important that it is used appropriately. This Guide covers a wide range of issues, reflecting the diversity of examples ASIC has encountered in reviewing promotional material over recent years.

In many aspects, the Guide reflects documented industry standards from both Australia (especially the Investment & Financial Services Association)[1] and overseas jurisdictions.[2] ASIC would encourage industry bodies to refer to these guidelines and adopt them as appropriate.

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[1] For example, IFSA Guidance Note No 1"Australian Investment Performance Standards"; IFSA Standard No 6 "Fund Performance – Calculation and Presentation of Returns"; IFSA Standard No 10 "Promotional Statements & Advertising". References are to the versions as at June 2002.

[2] References are included to other jurisdictions where there are similar (or in some cases contrasting) provisions or proposals. Only the Australian references will appear in the final version of the Guide.

1. Status of the Guide

1.1 This Guide provides general guidance to the financial services industry for promotions which use past performance information. The Guide covers both issues of legal compliance and issues of good practice.

1.2 The main legal requirements come from the ASIC Act and the Corporations Act. Key obligations include:

(a) ensuring that promotions are not likely to mislead potential investors,[3] and

(b) for holders of an Australian financial services licence, doing all things necessary to ensure that the financial services are provided efficiently, honestly and fairly.[4]

The sections of these guidelines dealing with legal standards (wherever "**misleading**" is mentioned) reflect some of the factors ASIC may take into account when considering enforcement action.

1.3 In addition, the Guide sets out standards of good practice. ASIC encourages industry bodies to refer to these standards and, where appropriate, to mirror them in their own standards for members or adopt them by cross-reference.

2. Scope of application

2.1 This Guide applies where past performance information is used in the promotion of a financial product or service.

2.2 This Guide covers promotions which use specific information about past performance or which make more general representations about good or superior performance.

2.3 Financial products and services that are sometimes promoted with past performance information include:

- managed funds (including superannuation funds);
- margin loans;
- stockmarket tip sheets and investment research software; and
- investment advice services.

[3] ASIC Act, ss12DA, 12DF(1); Corporations Act, ss1041E, 1041F, 1041H,
[4] Corporations Act, s912A(1)(a).

2.4 **The Guide covers promotions to potential retail clients.**[5] Care needs to be taken where retail clients are accessing wholesale funds indirectly (eg via master trusts). Industry will need to assess the extent to which the same principles apply to promotions aimed at wholesale clients or financial advisers.

2.5 The Guide does not cover instances of personal investment advice.

2.6 **The Guide does not cover the contents of formal offer documents** (notably "Product Disclosure Statements"). Formal disclosure documents are subject to very specific legal requirements. However, we recognise that many of the same principles may apply to these documents.[6]

3. Guidelines and commentary

3.1 The function of each section in the Guide is indicated by the font style.

3.2 **Guidelines** are in plain font, like this. They may relate to compliance with legal requirements (wherever "**misleading**" is discussed) or to good practice standards.

3.2.1 **Commentary** is in indented grey font, like this. It may be used to explain the implications of requirements, to give examples or to indicate possible means of compliance. Commentary is designed to expand on a particular subject, not to necessarily cover all possible situations.

4. Definitions

4.1 "Promoter" is used to refer to the entity responsible for the promotion of a financial product or service. The relevant entity can be a natural person, a body corporate, a partnership or a trust (including the trustee of the trust).[7] It should be remembered that a licensed entity is responsible for financial promotions communicated by its appointed representatives.

4.2 "Misleading" is used to include "likely to be misleading". In many instances the law makes no distinction between material which actually misleads and material which is likely to mislead.

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[5] Corporations Act, s761G
[6] Comparable principles from ASIC Policy Statement 168 are discussed at para 5.2
[7] See Corporations Act, s64A

4.3 "Promotion", in the context of these guidelines:

(a) is restricted to a communication which uses past performance information to promote a financial product or service;

(b) means any statement (including advertising) intended, or which would reasonably give the impression that it was intended, to induce a person to acquire, hold or vary a Financial Product or Service;[8]

(c) covers a communication by any medium, for example:[9]

- advertising via magazines, newspapers, radio, television or websites
- direct mail (eg by post, facsimile or email)
- telemarketing activities (eg telephone calls made by call centres)
- written correspondence, emails and telephone calls
- client newsletters
- sales aids
- presentations to groups of individuals, and
- tip-sheets.

(d) does not include personal advice to individuals. This is covered by more specific legal obligations.

[8] IFSA Standard No 10.00, s8.1

[9] FSA COB 3.2.2

The Guidelines

5. Good disclosure principles

5.1 To aid audience understanding and reduce the chance of information being **misleading**:

(a) information should be relevant;

(b) information should be clear, concise and effective;

(c) important information should catch the consumer's attention; and

(d) information should be in a format that makes it easy for consumers to compare financial products and services.

5.1.1 These are some of the "Good Disclosure Principles" from ASIC Policy Statement 168. Although PS168 is about mandatory disclosure documents, these particular principles are applicable to promotional material.

5.1.2 If there is doubt about whether promotional material will be suitable for its audience, promoters are encouraged to conduct consumer testing or use a format that has already been consumer tested.

6. General considerations

6.1 Compliance with these specific guidelines does not preclude all potential liability for **misleading conduct**. It may be necessary to disclose information beyond what is suggested by the guidelines (or stop the promotion) in order to avoid misleading potential investors.

6.1.1 For example, it may be necessary to disclose any special circumstances that substantially reduce the relevance of past performance information to likely future performance.

6.1.2 Compliance with industry standards or common practice, while generally desirable, does not, of itself, necessarily guarantee legal compliance.

6.2 The use of past performance information in promotions may be **misleading** unless it:

(a) takes account of the limitations of the particular communication medium, and

(b) is provided in a manner that is suitable for the full range of its audience.

6.2.1 The communication medium can affect both the opportunity to present information in detail and the audience's ability to comprehend information. For example, broadcast media (such as TV or radio) does not allow material to be to viewed at the audience's own pace or to be reviewed. Material that is acceptable in one medium may be misleading in another.

6.2.2 Close attention needs to be given to the variety within the audience. Information suitable for an industry audience or sophisticated investors may be unsuitable for an average retail audience. Promotions need to be designed for the least sophisticated audience segment that will view the promotion.

6.2.3 In determining whether a promotion is misleading, the promoter's intent is not a relevant factor. Misleading conduct may give rise to a strict liability offence.

6.3 Omission of information may be **misleading** if it leads people to an incorrect conclusion, due to their existing specific knowledge (or lack of it) and general understanding.

6.3.1 This qualification applies to all guidelines.

6.4 A promotion can be **misleading** even if later information corrects a wrong impression created by the promotion.

6.4.1 Each promotion needs to be judged on its own. The fact that a consumer must receive a mandatory offer document (with more detailed information) before investing does not prevent an earlier promotion from being misleading. However, any actual subsequent correction may reduce the actual loss suffered by a consumer.

6.4.2 Where a promotion contains an apparent statement of fact, it is good practice for the promoter to have evidence in its possession that the statement is true.[10]

7. Imbalanced information

7.1 It may be **misleading** to accentuate the potential benefits of a financial product or service without also giving a fair indication of any significant disadvantages that the audience would not be aware of.[11]

7.1.1 This is a general principle. The following provisions give more detail on the more common aspects relating to promotions using past performance information.

[10] IFSA Standard No 10, s9.5

[11] FSA COB Rulebook 3.8.9; Committee of European Securities Regulators ("CESR") 01-014d s 31 and 42; Hong Kong Securities & Futures Commission ("HKSFC"), Code on Unit Trusts & Mutual Funds, Advertising Guidelines, rule 5

7.2 Where past performance information is used to support a claim about an entity's skill or good performance (overall or in a particular sector), it may be **misleading** to use past performance selectively so as to exaggerate the entity's success or disguise its lack of success.[12]

7.2.1 The issue is whether the underlying facts support the broad implication. For example:

"ABC is achieving excellent returns for its clients. For instance, the ABC Australian Share Fund has five-year returns of 18% p.a., 3% p.a. above the sector median."

This promotion would be misleading if most of ABC's funds had five-year returns below sector medians.

7.3 A promotion using past performance information has a greater risk of being **misleading** if it does not adequately describe the nature of the product or service.[13]

7.3.1 If some members of the audience do not know the nature of the product or service, they cannot use prior knowledge about any usual characteristics and may misinterpret information provided.

7.4 Promoters are encouraged to not give disproportionate prominence to past performance in promotions for a product or service.[14]

7.4.1 The prominence of past performance information in a promotion can be compared with the weight that might be given to past performance by a knowledgeable investor when selecting a product or service of that kind.

7.4.2 This good practice guideline is included because many people hold unrealistic beliefs about the predictive power of past performance for individual product or services. In addition, past performance should never be the sole factor considered when selecting a product or service.

7.4.3 The pertinent issue is the appropriate balance of prominence between relevant factors. A disproportionate emphasis on past performance may undermine public understanding about making sound investment decisions.

[12] Monetary Authority of Singapore ("MAS"), Handbook on Unit Trusts, Chapter 7 D(b).
[13] FSA COB Rulebook 3.8.8; Jersey Consultation Paper No 2; CESR 01-014d s34
[14] FSA Conduct of Business Rulebook, 3.8.11R and 3.8.12G

8. Implications about future returns

8.1 A promotion with information about past performance has a greater risk of being **misleading** if it is presented:

(a) in a manner that implies it constitutes a projection illustrating the likely future value of an investment; or

(b) in a way that creates the impression that substantially the same returns will be achieved in the future.

8.1.1 For example, using a verb in the present continuous tense can imply ongoing conduct and that past performance will continue (eg "*we outperform the share index*").

8.2 A promotion with information about past performance has a greater risk of being **misleading** unless it draws attention (unambiguously and without reservation) to the fact that past performance will not necessarily be repeated.[15]

8.2.1 A warning is necessary because people in the audience may hold an unrealistic belief about the predictive power of past performance information.

8.2.2 This warning should be presented legibly or audibly (or both) in the main part of the promotion and in close proximity to the past performance information.[16]

8.2.3 Possible wording for a future performance warning includes:[17]

- "*Past performance is not a reliable indicator of future performance.*"
- "*Past performance is not a guide to future performance.*"

8.2.4 A warning is likely to be ineffective if it:

- might be interpreted as implying a likelihood (though no guarantee) that past performance will be repeated (unless such an implication can be substantiated); or
- does not adequately bring the audience's attention to the issue.

8.2.5 Examples that are less likely to be effective include:

- *"Past performance is not a guarantee of future performance."*
- *"Future returns may vary."*

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[15] FSA Conduct of Business Rule 3.8.11R (1); MAS, Handbook on Unit Trusts, Chapter 7 D (b); CESR 01-014d s31 7 46

[16] FSA Consultation Paper No 132, para 3.11–3.19

[17] The first example is from an actual Australian advertisement, the second from the FSA Consultation Paper No 132, para 3.23

8.3 It may be **misleading** to imply that reliance on simple past performance figures would be a good way to select a financial product or service.

8.3.1 Promotions have a higher risk of being misleading if they focus on past performance as a sole or dominant method of selecting a financial product or service.

8.3.2 The issue here is implications about the significance of simple past performance figures, without any reference to how the returns were achieved or their relevance to future circumstances.

8.3.3 If a promotion implies that some aspect of past performance should be the sole or dominant method of selecting a financial product or service, the promoter should have evidence to substantiate the implication.

9. Time periods

9.1 A promotion may be **misleading** if it uses past performance information from:

(a) an inappropriate or irrelevant investment period;

(b) an inappropriately short time period; or

(c) inconsistent time periods which show better performance by the selection of periods. [18]

9.2 If a promotion contains past performance information, it should include information relating to a relevant and sufficient period (or periods) of past performance to give a balanced indication of past performance.[19]

9.2.1 What is a "sufficient period" to give a balanced indication of past performance will depend on a range of factors, such as:

- the usual holding period for such an investment;
- the volatility of performance in the asset class;
- the volatility of performance in the particular investment; and
- the sensitivity of the investment's performance to different market conditions.

[18] FSA Conduct of Business Rules 3.8.12
[19] FSA Conduct of Business Rules 3.8.11; Malaysian Handbook on Unit Trusts, Chapter 7

9.3 A promotion which refers to past performance should include past performance information for standardised periods: [20]

(a) the previous five-year per annum return; or

(b) the per annum return for the whole period the investment has been available (if less than five years).

9.3.1 Where a reference to past performance includes performance rankings, the rankings should be disclosed over the same standardised period(s).[21]

9.3.2 In this context, "year" means 12 months, not a calendar year or a financial year.

9.3.3 Note that the mere use of a return figure for the standardized period does not provide immunity from being misleading (see especially 9.2). There may be other important performance or contextual information that the audience would not be aware of. For example, a recent dramatic decline in the product's performance relative to the index may be relevant. The promoter has the option of not mentioning performance or giving enough information to avoid being misleading.

9.4 Performance information for standardised periods should be at least as prominent as other performance information.

9.4.1 Non-misleading past performance information can be given for other periods, as long as the figures for standardised periods are also given, and are at least as prominent.

9.5 Information for standardised periods is not relevant for cash-type investments, where it is adequate to give performance information for the most recent period.

9.5.1 For cash-type investments with a fluctuating rate, the "current rate" is an annualised return based on a minimum seven-day average.

9.6 For investments that have been in existence for <u>less</u> than one year, using such a short performance period to promote the investment would usually be inappropriate and may be **misleading** (cash-type investments excluded). An exception is reports aimed at existing clients of the entity (and/or their advisers) that are clearly for information purposes and not promotional purposes.[22]

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[20] FSA Conduct of Business Rules 3.8.13 prescribes five years. In the USA, rule 482 prescribes 1, 5 and 10 years. Canadian NI 81-102, rule 15.8 prescribes 1, 3, 5 and 10 years. Hong Kong rule 9 (b) prescribes 1 or 3 years (as available). Committee of European Securities Regulators 01-014d s47(d) recommends 5 years.

[21] Canada NI 81-102, rule 15.3 (4) (c).

[22] Canada NI 81-102, rule 15.6 (a); Hong Kong rule 10 (c).

9.7 Regular publications such as a periodic fact sheet may contain the latest month, quarter or year-to-date figure, provided such figures are clearly for information purposes and are not displayed more prominently than other figures.

10. Out of date figures

10.1 Promotional material should use the most recent performance data that is available.[23]

10.2 When an investment sector commonly uses a particular performance reporting period (eg end of calendar month), past performance information should be current to the most recent end date.[24]

10.2.1 For funds which only calculate returns annually or bi-annually (such as many superannuation funds), the most recent end date may be many months ago.

10.3 Promotional material has a greater risk of being **misleading** if:

(a) it does not use the most recent information available; <u>and</u>

(b) the most recent information is materially adverse in any respect (in isolation or comparatively).

10.3.1 A difference is adverse "in isolation" if just looked at on its own. A change is adverse "comparatively" if its performance has deteriorated compared to comparable products and services or benchmarks.

10.3.2 There can be a delay between the end of a reporting period and when the information from that period can be incorporated into promotional material. The length of an acceptable delay period is dependent on factors such as:

- the marketing medium and opportunities for incorporating current information;
- the volatility of returns and comparative performance in the particular asset/product class; and
- whether current information is readily available from other sources.

10.4 Performance data in easily updated media (such as daily, weekly or monthly print media, the internet, broadcast media and direct mail advertisements) would be considered out of date if more than three months had elapsed since a more recent end date.[25]

[23] See IFSA Standard No 10, s10.1, 10.5.3
[24] See IFSA Standard No 6, s10.1
[25] In Hong Kong, the period is two months for print advertisements (rule 10).

10.5 Promotions should not contain any statement of fact that the promoter has reason to believe is likely to become untrue while the promotion is still in use. [26]

10.6 Where past performance information is used in a publication with a long circulation period, the promotion should make clear:

(a) where relevant, that the information may not be current; and

(b) if information may not be current, where current information may be found.[27]

10.7 Promotions should show the dates or period that the past performance information relates to.[28]

10.7.1 The following are examples of how performance information may be related to a period or time:

- % for five-year pa to June 2002
- % pa for life of fund (12 years to 30 September 2002)
- % pa for life of fund (1 January 2001 to 30 September 2002)

11. "Non-actual" past performance figures

11.1 To the extent that actual past performance information for a product or service does not exist, promotions can only contain "non-actual" information where the result will not be **misleading**. [29]

11.1.1 "Non-actual" performance covers a broad range of data. Terms used include "hypothetical", "indicative", "simulated" or "modelled" past performance. Sometimes it is derived from an identical fund operated by the same investment manager, but with different fees (eg a new retail fund uses performance from the underlying wholesale fund). Sometimes the data is derived from a mathematical model.

11.2 "Non-actual" performance information will be **misleading** if its true status is not clearly disclosed.

11.2.1 Terms used include "hypothetical", "indicative", "simulated" or "modelled" past performance. These terms and concepts will be unfamiliar to many people outside the industry. For a consumer

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[26] IFSA Standard No 10, s9.5

[27] FSA Consultation Paper 132, proposed COB rule 3.8.12 (7)

[28] MAS, Handbook on Unit Trusts, Chapter 7 D(b).

[29] Banned in Canada (NI 81-102, 15.5(d)); Not allowed by Committee of European Securities Regulators [01-014d s47]; Very limited use allowed in UK (FSA CP 132 p 17); Very limited use allowed in Hong Kong (rules 11 and 15); Wide use allowed by IFSA (Standard No 10, s10.5.4)

audience, care would be needed to ensure people are not misled about the significance of the figures.

11.2.2 The term "indicative" is not recommended, as some people may assume it means indicative of future returns.

11.3 Where the non-actual performance information relies on another existing product or service, it has a greater risk of being **misleading** unless the same entity (or entities) are responsible for achieving the performance in both the promoted product or service and the existing product or service.

11.3.1 Where achieving performance requires skill, it may be misleading to make an implicit assumption that the entity could have achieved the same performance as another entity has actually achieved in the past.

11.3.2 Where the intent is to show the historical performance of an asset class or category of investments, this may be best shown by an index or the median returns for all managers in the category (labelled as such).

11.4 "Non-actual" performance information may be **misleading** if:

(a) it does not accurately represent how the investment would have performed if it had existed in the past; OR

(b) the calculation involves selections, adjustments or assumptions where a favorable result may have been achieved by using the benefit of hindsight; OR

(c) the assumptions and adjustments used to produce the information are not readily available to the audience or unlikely to be understood by the audience.[30]

11.4.1 Many people in a target audience are likely to assume that non-actual past performance information is an accurate reflection of how the investment would have performed if it had existed in the past.

11.4.2 Depending on the investment, the following factors may involve selection with the benefit of hindsight:

- selection of external investment manager(s) (where discretionary);
- asset allocation; or
- adjustments to the mandate that was actually in place during the relevant period.

11.4.3 The methodology for calculating the past performance should be readily available (eg in a Product Disclosure Statement and website). However, where people may be misled without this

[30] See IFSA Standard No 6, s 10.3

information, it should be sufficiently summarised in the promotional material.

11.5 Non-actual past performance that is not based entirely on other existing investments has an even greater risk of being **misleading** and should not be used in promotional material for a retail audience.

The exception is where a modelled investment strategy follows a rigid and predetermined mathematical process (such as index matching), and where prices on the relevant markets are unlikely to have been influenced by the operation of such an investment.[31]

11.5.1 The data covered by this section are usually referred to as "hypothetical", "simulated", "modeled" or "back-tested" past performance.

11.6 When presenting past performance information, actual fund returns should not be blurred with non-actual returns.[32] Once an investment has an actual history, any non-actual returns should be clearly separated from the actual returns and adequately explained.[33]

11.16 Merely attaching footnotes or similar to distinguish non-actual from actual returns within a table is unlikely to be effective in alerting the audience to the distinction.[34] The following is one acceptable method to distinguish between actual and non-actual performance.

Example:
The XYZ Retail Fund has been operating since January 2001. To give a longer term view on our performance in this asset class, we have shown longer returns for the XYZ Wholesale Fund. The Wholesale Fund has identical investments, and we have adjusted returns to reflect fee differences.

	1 year	*3 year*	*5 year*	*10 year*
XYZ Retail Fund	*9%*	*-*	*-*	*-*
XYZ Wholesale Fund	*-*	*11.5%*	*7%*	*12%*

Figures are % pa up to 30 September 2002

[31] FSA CP132, proposed additional guidance to COB rule 3.8.7G
[32] IFSA Standard No 6, s10.2
[33] IFSA Standard No 6, s10.2.1
[34] IFSA Standard No 6, s10.2

12. Treatment of fees

12.1 The use of gross returns may be **misleading**.

12.1.1 Potential investors are interested in the actual returns they receive, ie returns after fees ('net returns'). Many potential investors would assume that returns quoted in promotions are net returns. Also, the use of figures calculated in different ways restricts comparison between products and services from different entities.

12.1.2 In the past, gross returns have sometimes been used to compare investment performance to an index. This practice is discouraged as:

- it may mislead some members of the audience about real returns;
- it reduces comparability between performance information from different sources; and
- it distorts the comparison between active and passive managers by ignoring the higher investment management fees on actively managed funds.

12.2 Returns should be net of fees to the greatest extent practicable.[35]

12.2.1 The standard practice is to not deduct entry and exit fees when calculating percentage returns, as there is no method of doing so that would not be misleading for some investment scenarios and some comparative purposes.

12.3 Where the fee level is variable, the maximum fee should be deducted.[36]

12.4 Where it would be misleading or impracticable to deduct some fees, the existence of undeducted fees should be prominently disclosed.[37]

12.5 Where practicable, the size of undeducted fees should also be disclosed.

12.5.1 The size of such fees could be done by disclosing (in $ or % terms):

- the actual fee (eg “Returns are after deduction of ongoing fees. A 4% entry fee also applies.”)
- the range of fees (eg “Quoted returns do not take account of the entry fee of 2–4%.”)
- the maximum fee (eg “An entry fee of up to 4% also applies.”)

[35] IFSA Standard No 6, s 9.6.1; CESR 01-014d, s47(f)
[36] IFSA Standard No 6, s9.8
[37] IFSA Standard No 10, s9.7; CESR 01-014d, s47(f)

12.6 Where a product or service is offered with multiple fee options, it may be **misleading** to only give returns for the option that shows the highest net returns.

12.6.1 For example, a fund's five-year net returns may be 10% pa for the entry fee option and 9.6% pa for the nil-entry fee option. Acceptable alternatives for quoting net returns are:

- give returns for both options;
- only give returns for the option with the lower net returns; or
- give returns for the option with the lower net returns, and disclose the returns for the other option in a footnote.

12.7 Where a scenario is given for a specific investment period, it may be **misleading** to not deduct entry and exit fees.

12.7.1This special case is like the following example:

"If you had placed $10,000 in the XYZ Fund in 1985, it would be worth $740,000 today."

Such a scenario should be calculated on the basis that the hypothetical investor had bought the investment at the start date and sold it at the end date. Other appropriate assumptions would include:

- all relevant fees should be deducted, including entry, annual, exit and performance fees;
- returns should be calculated on an "offer to bid" or "entry price to exit price" basis; and
- current fees should be applied, even if different fees existed over the relevant period.[38]

13. Foreign currency

13.1 A promotion with past returns calculated in a foreign currency may be **misleading** if it does not also show the returns in Australian dollar terms (if these are materially different).[39]

14. Information on risk

14.1 It is good practice to inform potential investors about the level of risk with various investments.

14.1.1 It is recognised that communicating information about volatility and other risks is not an easy task. There are many possible methods, including:

[38] On retrospective fee adjustments, see IFSA Standard No 6, s9.6
[39] Hong Kong rule 14

- a qualitative comparison with other investments (eg "returns are likely to vary up and down more than the average sharemarket fund");
- a graph of returns from the investment over a substantial period (preferably also showing the relevant benchmark);
- a scatter graph showing return and standard deviation of comparable investments (preferably also showing the sector mean or index);
- separate figures for calendar years with highest and lowest returns to give an indication of the range of returns; and
- graphic presentation showing the location of different investment types on risk/return continuum.

14.1.2 Whether a technique (or any technique) is appropriate will depend on the communication medium and the audience that may view the promotion.

14.1.3 ASIC encourages industry associations to develop standardised ways to communicate the risk of an investment. Risk may be relative to other investments in the asset class or relative to other forms of investment (such as cash).

14.2 Where a standard deviation figure is used, the figure should be expressed as a percentage per annum. This is calculated by annualising returns from shorter periods (eg monthly returns).

14.3 Where standard deviation figures are used, the figures should be given for the same standardised periods as for the return figures.

14.4 A promotion has a greater risk of being **misleading** if it compares the returns of an investment or asset class with those of a significantly lower risk investment or asset class without disclosing the difference in risk.

14.4.1 Overall returns are only one aspect of an investment's performance. Risk and volatility may also be important relevant considerations when making comparisons. For example, it may be misleading to compare returns of a mortgage trust with a bank deposit without noting the difference in risk.

14.5 A promotion has a greater likelihood of being **misleading** if:

(a) it does not disclose the product or service's risk level; and

(b) the product or service has an unusually high risk level, or special risk factors that would not be apparent to the audience.[40]

[40] See FSA COB Rulebook 3.8.8; Jersey proposed Code of Practice, rule 9.7; CESR 01-014d s34

15. Calculations

15.1 A promotion has a greater risk of being **misleading** if it uses a non-standard methodology without clearly disclosing the deviations and their implications.[41]

15.2 Figures should be calculated in accordance with industry standards and common industry practices. To aid comparison and avoid **misleading** the audience, divergent methodologies should be avoided.

15.2.1 Relevant standards include:

- IFSA Standard No 6.00 Fund Performance – Calculation and Presentation of Returns (for retail clients)
- IFSA Guidance Note No 1.00 Australian Investment Performance Standards (for wholesale clients).

15.3 Returns for periods of one year or more should be annualised.

15.4 Returns for periods less than one year should not be annualised. An exception is cash-type investments.[42]

15.3.1 Investment values and distributions can vary considerably, so annualising short-term returns may give a misleading impression.

16. Presentation issues

16.1 A promotion using past performance information may be **misleading** if necessary qualifications, warnings or conditions are not given sufficient prominence or legibility.[43]

16.1.1 Information is unlikely to be received by the audience if it is in small print, within a dense text block, only shown on TV for a brief period or where there is distracting simultaneous content.

16.1.2 It is the promoter's responsibility to ensure essential information comes to the audience's attention. It is not the audience's responsibility to seek it out.

16.2 Complicated or ambiguous graphical presentations have a greater risk of being **misleading** if some members of the audience are likely to draw incorrect impressions from the material.

[41] See for example IFSA Standard No 10, s9.6
[42] IFSA Standard No 6, s 6.2.3
[43] IFSA Standard No 10, s 9.1; Canada s 15.2, Hong Kong rule 17

16.3 Graphs and other diagrams should be to scale, and what is being depicted should be a fair representation of the position with all relevant information provided.[44]

16.4 A linear scale should be used for each axis of bar charts and line graphs. Graphs rotated on an angle or using a logarithmic scale are likely to be **misleading** (unless directed at an audience that is familiar with them).

16.5 Where a graph of past performance is presented, it is good practice to:

(a) use a hypothetical $10,000 investment (unless the minimum investment amount is higher, where a $100,000 or $1 million would be more appropriate);

(b) show the comparative performance of the assumed investment amount in a relevant market sector index (if one exists) or the median for the investment category (if one exists); and

(c) set out key assumptions, such as where the graph:

(i) does not take account of entry and exit fees;

(ii) assumes distributions are reinvested; and

(iii) does not take into account any taxes payable by the investor.

17. Comparisons

17.1 Where promoters use past performance information in promotional material, they are encouraged to use comparisons with a benchmark or the average for a class of similar products or services.

17.1.1 If a comparison is with an index for a dissimilar class of products or services as a contrast, this point should be clearly communicated if some members of the audience may misunderstand the intent of the comparison.

17.2 A comparison of returns has a greater risk of being **misleading** if it is not shown on a current, complete and accurate basis.[45]

17.2.1 Where the past performance of an investment is compared to only a sub-set of comparable investments, the selection of other investments should have a fair and objective basis. For example, it is likely to be misleading to exclude investments that had a better past performance record in terms of return and/or risk.

[44] IFSA No 10, s 9.1
[45] IFSA No 10, s10.1; FSA COB Handbook rule 3.8.5

17.2.2 Some comparisons are produced by external third parties (eg research houses) and only produced at infrequent intervals (e.g. annually). Care should be taken to ensure the comparison is not outdated and therefore potentially misleading (see section 9).

17.2.3 A third party source for comparisons, while generally desirable, is no guarantee of legitimacy. There may be limitations in the original comparison. The way it is used in a promotion may make it misleading.

17.3 Comparisons of returns should clearly explain all factors necessary to ensure the comparison is not **misleading**.[46]

17.4 A promoter should take reasonable steps to ensure that:

(a) the facts on which any comparison or contrast is made are verified, and

(b) any relevant assumptions are disclosed.[47]

17.5 A promotion has a greater risk of being **misleading** if it compares the performance of an investment with any benchmark or investment which is different in terms of:

(a) investment objectives,

(b) types of investments made, or

(c) countries or markets covered,

unless the differences are clearly disclosed.[48]

17.5.1 Where the implications of the differences may not be obvious to the audience, these should also be presented in terms the audience would understand.

17.6 Where a comparison is made for a short period, the limitations of such a comparison should be clearly disclosed.

17.12 For equity linked investments, a period under three years would be considered short.[49]

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[46] Canada NI 81-102, rule 15.3 (c), USA, Malaysia
[47] FSA COB Handbook rule 3.8.5
[48] Canada NI 81-102, rule 15.7 (b); Singapore bans comparisons between dissimilar investments. MAS Handbook on Unit Trusts, Chapter 7 D (c).
[49] MAS, Handbook on Unit Trusts, Chapter 7 D (c).