

ESMA GUIDELINES ON PERFORMANCE FEES IN UCITS AND CERTAIN TYPES OF AIFS

5 January 2021

On 5 November 2020, the European Securities and Markets Authority (hereinafter, ESMA) published the “Guidelines on performance fees in UCITS and certain types of AIFs” (ESMA34-39-992). These guidelines were first published on 2 April 2020 (ESMA34-39-968) and enter into force on 5 January 2021.

The guidelines are aimed at establishing consistent, efficient and effective practices within the European System of Financial Supervision (ESFS), and to ensure the common, uniform and consistent application of Union Law. The objective is to promote greater convergence and standardisation in the field of performance fees and promote convergent supervision by competent authorities. In particular, the guidelines seek to ensure that performance fee models used by management companies comply with the principles of acting honestly and fairly in conducting their business activities and acting with due skill, care and diligence, in the best interest of the fund that they manage, in such a way as to prevent undue costs being charged to the fund and its investors. Also, they aim at establishing a common standard in relation to the disclosure of performance fees to investors.

The paper contains five guidelines applicable to managers and competent authorities. These guidelines are applicable to performance fees in Undertakings for Collective Investment in Transferable Securities (UCITS) and in Alternative Investment Funds (AIFs). They contain details, inter alia, of the following issues: elements related to the performance fee calculation method; criteria to be borne in mind for consistency between the performance fee model and the fund’s investment objectives, strategy and policy; frequency for its crystallisation; payment limitations; and transparency requirements in respect of investors.

The Guidelines have been issued under Article 16 of Regulation 1095/2010 of the European Parliament and of the Council, of 24 November 2010, regulating the creation of ESMA, which establishes that the competent authorities and financial market participants will do everything possible to adhere to these guidelines. Additionally, the ESMA Regulation also establishes the obligation incumbent upon competent authorities to confirm whether they comply with the guidelines published by ESMA.

In this regard, the Spanish National Securities Market Commission has informed ESMA that it intends to comply with the Guidelines except in relation to the reference period contained in paragraphs 40 and 41 of guideline 4, as national legislation establishes a period and system that differs from that referred to in such guideline. According to such paragraphs, the reference period for calculating the performance, when the performance reference period is shorter than the whole life of the fund, would be at least five years. In the case of the high-water mark model, it would be on a rolling basis. Spanish legislation (Art. 5 of the CIS Regulation) establishes a static period of three years for the high-water mark model. In view of

the foregoing, the CNMV will promote the amendment of the national regulatory framework to achieve overall compliance.