

Report on Retail Distribution and Digitalisation

Consultation Report



IOICU-IOSCO

**The Board
OF THE
INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS**

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Foreword

The Board of the International Organization of Securities Commissions (IOSCO) has published this Consultation Report with the aim to set out a toolkit of proposed policy and enforcement measures with guidance to help IOSCO members mitigate potential risks of retail investor harm posed by online and cross-border marketing and distribution, and digital offerings.

How to Submit Comments

Comments may be submitted by one of the three following methods **on or before 17 March**. To help us process and review your comments more efficiently, please use only one method.

Important: All comments will be made available publicly unless anonymity is specifically requested. Comments will be converted to PDF format and posted on the IOSCO website. Personal identifying information will not be edited from submissions.

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- Send comments to consultation-02-2022@iosco.org
- The subject line of your message must indicate *IOSCO Consultation Report on Retail Distribution and Digitalisation*.
- If you attach a document, indicate the software used (e.g., WordPerfect, Microsoft WORD, ASCII text, etc.) to create the attachment.
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Your comment letter should indicate prominently that it is a “Public Comment on *IOSCO Consultation Report on Retail Distribution and Digitalisation*”.

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Chapter 1 – Executive Summary and Introduction

Executive Summary

1. The rapid growth in digitalisation and use of social media is changing the way financial products are marketed and distributed. Online domestic and cross border offerings of financial services and products provide new opportunities for firms to reach potential clients and for investors to access to financial products.
2. Nonetheless, increased digitalisation and cross border offerings bring various new risks for investors, and challenges for IOSCO members. This has been particularly evident in the retail OTC leveraged product sector, where firms have utilized social media, online marketing and internet-based trading platforms to market, sell and distribute products on a cross-border basis. In this increasingly digitalised environment, a big challenge for IOSCO members becomes how to adapt their regulatory and enforcement approaches to the rapidly changing trends of digitalisation and online activities and the regulatory challenges they may bring.
3. This Consultation Report is part of IOSCO's efforts to be proactive and forward looking in building trust and confidence in markets which are facing new and emerging opportunities and risks, including those posed by digitalisation and the development of new products such as crypto assets.
4. The Consultation Report analyses the developments in online marketing and distribution of financial products to retail investors in IOSCO member jurisdictions, both domestically and on a cross-border basis. It presents proposed toolkits of policy and enforcement measures. The policy and enforcement toolkits include seven and five measures, respectively, that would help in addressing the issues and risks associated with online marketing and distribution.
5. The proposed policy toolkit measures relate to:
 - Firm level rules for online marketing and distribution;
 - Firm level rules for online onboarding;
 - Responsibility for online marketing;
 - Capacity for surveillance and supervision of online marketing and distribution;
 - Staff qualification and/or licensing requirements for online marketing;
 - Ensuring compliance with third country regulations; and
 - Clarity about legal entities using internet domains.

The proposed enforcement toolkit measures relate to:

- Proactive technology-based detection and investigatory techniques;
 - Powers to promptly take action where websites are used to conduct illegal securities and derivatives activity and other powers effective in curbing online misconduct;
 - Increasing efficient international cooperation and liaising with criminal authorities and other local and foreign partners;
 - Promoting enhanced understanding by and collaboration with providers of electronic intermediary services with regard to digital illegal activities; and
 - Additional efforts to address regulatory and supervisory arbitrage.
6. Furthermore, developments in online marketing, including social media will likely continue to rapidly evolve. IOSCO members should continue to observe and consider changes in their respective markets.

Introduction

7. The IOSCO Board identified “retail distribution and digitalisation” as a priority.¹ Recent and rapid developments in online marketing and distribution are changing the way in which financial firms interact with prospective clients and financial products are offered to retail investors. Such developments span across the whole distribution chain, online marketing techniques, such as targeting methods and psychology based selling techniques, and onboarding procedures.
8. Digitalisation trends are evolving faster than some jurisdictions’ underlying regulatory framework, which brings various regulatory challenges to cope with this evolving environment accompanied by technological advancements.
9. While the online environment has the potential to improve investors’ access to financial services and products, it may also enable fraudsters to target potential victims around the world and obtain illegal profits at a relatively low cost and with little effort. Furthermore, it also provides opportunity to hide one’s identity through the use of sophisticated advertising targeting technology, encrypted and private messages, fake accounts and anonymity. Perpetrators may try to exploit jurisdictional differences and the online environment may enable concealing legal identity and/or changing it rapidly and easily within a short span of time. Some constraints on regulatory powers and ability to timely cooperate on a cross border basis may be further challenges related to activity occurring in the online environment. This in turn may make investigations and enforcement particularly challenging, especially when new products, such as crypto assets, are offered.²
10. In response to these challenges, the IOSCO Board jointly mandated the Committee on Regulation of Market Intermediaries (“Committee 3”) and the Committee on Enforcement and the Exchange of Information (“Committee 4”) to build on IOSCO’s Report on Retail OTC Leveraged Products³ and tasked the two Committees to review the recent trends and developments in “*online marketing and distribution to retail investors (including cross-border aspects)*” and develop a proposed toolkit of policy and enforcement measures with guidance for IOSCO members to consider in their regulatory and supervisory frameworks.
11. The Committee 3 portion of this Consultation Report and the policy toolkit draws on IOSCO members’ experiences and practices as obtained through a survey conducted among IOSCO Committee 3 members, as well as a comprehensive firms’ survey, which covered quantitative and qualitative aspects.⁴ The regulators’ survey aimed to understand the current regulatory frameworks in place related to online marketing and distribution, along with regulatory, supervisory and cross-border challenges of online marketing techniques.
12. The Committee 4 portion of this Consultation Report and the enforcement toolkit draws on IOSCO members’ experiences and practices as obtained through a survey conducted among IOSCO

¹ See *IOSCO Board Priorities - Work Program 2021-2022*, 26 February 2021, available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD673.pdf>.

² In light of retail investors’ interest in crypto-assets across the globe, crypto-assets are an area of increasing focus for IOSCO. Ongoing IOSCO efforts include the work of Committee 2 on the regulation of platforms trading crypto-assets (*Report on Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms*, February 2020, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD649.pdf>), the work of Committee 5 on the regulation of investment funds with exposures to crypto-assets, the work of Committee 8 on relevant methods of providing investor educational material about crypto-assets to retail investors (*Report on Investor Education on Crypto-Assets*, cited above), and the continuing efforts of the Fintech Network, Initial Coin Offering (ICO) Support Framework, by drawing on the resources of the ICO Consultation Network.

³ [FR17/2018 Report on Retail OTC Leveraged Products \(iosco.org\)](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD673.pdf), September 2018.

⁴ Twenty-five IOSCO members participated in the regulators survey (see Annex 2 for the list of the responding IOSCO members) and 93 licensed/regulating firms responded to the firms’ survey (see Annex 4 for the regional breakdown of the participating firms). Due to a variety of reasons, including the rapid development of the COVID-19 crisis and the resulting market disruption, U.S. and Canadian firms did not participate in the survey. As a result, references to the “firms’ survey” and the “Americas” does not include any North American firms. References to “firms” and results from the firms’ survey in the “Committee 3” portions of the

Committee 4 members. The survey aimed to explore the investigatory and enforcement challenges posed by online marketing and distribution of financial services and products, as well as specific investigatory techniques, enforcement approaches, potential strategies and actual experiences, including in international enforcement cooperation, in connection with both authorised and non-authorised businesses.⁵

THE PROPOSED POLICY TOOLKIT

Measure 1: Firm level rules for online marketing and distribution

IOSCO members should consider requiring that firms have proper internal rules, policies, processes and tools for their online marketing and distribution, and review them on a regular basis. This should include that any use by firms of targeting, behavioural techniques and gamification elements should be done in a way that ensures fair treatment of financial consumers and aims to avoid potential financial consumer harm.

Measure 2: Firm level rules for online onboarding

IOSCO members should consider requiring that firms apply appropriate filtering mechanisms, policies and procedures for financial consumer onboarding in line with the laws and regulations of the firms' jurisdiction, the financial consumers' jurisdiction, and the jurisdiction where the products or services are being marketed or distributed. During the onboarding process, the information provided should be clear, fair and non-misleading.

Measure 3: Responsibility for online marketing

IOSCO members should require, subject to a jurisdiction's laws and regulations, that management assumes responsibility for the accuracy of the information provided to potential investors on behalf of the firm, including those provided via various social media channels, including influencers, and the timely disclosure of necessary information regarding potential risks and conflicts of interest to avoid potential financial consumer harm.

Measure 4: Capacity for surveillance and supervision of online marketing and distribution

IOSCO members should consider whether they have the necessary powers and have adequate supervisory capacity to oversee an increasing volume of online marketing and distribution activity. IOSCO members should also consider ways to develop appropriate monitoring programs for the surveillance of online marketing and distribution activities, including on social media.

Within the context of domestic legal frameworks, considerations for enhancing surveillance and supervisory capacity could include:

- the power to request access to content to detect illegal or misleading promotions;**
- having regulatory channels in place to report consumer complaints for misleading and illegal promotions; and**
- suitable evidence tracking processes in place to cope with the fast pace and changing nature of online information.**

IOSCO members are encouraged to share experiences and good practices with each other regarding supervision and surveillance of online marketing and distribution.

Measure 5: Staff qualification and/or licensing requirements for online marketing

Consultation Report refer to participation by licensed entities (see Annex 4 for the classification of the participating firms).

⁵ The Committee 4 survey addressed the following main points: (i) Practical enforcement challenges in the context of online marketing and distribution; (ii) Common patterns or fraudulent schemes; (iii) Investigatory or enforcement powers in the area of online marketing and distribution; (iv) Sanctions and relevant challenges; (v) Effectiveness of current IOSCO framework for international cooperation; (vi) Possible improvements and further practical tools for international cooperation; and (vii) Most significant enforcement challenges. Twenty-five responses were received from the regulators listed in Annex 3.

IOSCO members should consider requiring that firms assess the necessary qualifications for digital marketing staff. IOSCO members may also consider requiring firms to have specific staff qualification and/or licensing requirements for online marketing staff, similar to licensing requirements for sales staff, if such regulatory requirements do not already exist or apply to online marketing staff.

Measure 6: Ensuring compliance with third country regulations

Where firms may have clients from jurisdictions other than where they hold a license, the firm's home regulator should consider requiring their domestic firms to have adequate policies and procedures for onboarding these clients. For example, IOSCO members could require firms to undertake due diligence to determine whether they are required to hold a license in a prospective client's home country and/or whether other regulatory obligations apply, and to retain records of such due diligence.

Measure 7: Clarity about legal entities using internet domains

IOSCO members should consider requiring firms, when they offer products through multiple internet domains, to adopt policies and procedures requiring clear, fair and not misleading disclosure about who the underlying legal entity is offering the product and under what license (and from which jurisdiction). This disclosure should also cover the scope and limitation of services. IOSCO members should also consider prohibiting firms from redirecting clients to a third country website to avoid the regulatory requirements in a jurisdiction.

Additionally, IOSCO members may wish to consider keeping an open register which could enable the public to check and confirm whether a website belongs to a firm authorised to provide services in the jurisdiction and under the law.

THE PROPOSED ENFORCEMENT TOOLKIT

Measure 1 - Proactive technology-based detection and investigatory techniques

IOSCO members could consider whether to use proactive technology-based monitoring tools and approaches, where appropriate, to support the detection and investigation of potentially illegal digital conduct.

Measure 2 – Power to promptly take action where websites are used to conduct illegal securities and derivatives activity, and other powers effective in curbing online misconduct

IOSCO members could consider seeking additional powers to be more effective in promptly curbing illegal online conduct, including the power to shut down or block access to illegal websites, or seeking a legal order to do so, where appropriate.

Measure 3 - Increasing efficient international cooperation and liaising with criminal authorities and other local and foreign partners

IOSCO members could consider ways to increase efficient cross-border cooperation and collaboration in investigations and enforcement actions and enhancing liaison with criminal authorities and other relevant local or foreign partners.

Measure 4 – Promoting enhanced understanding by and collaboration with providers of electronic intermediary services with regards to digital illegal activities

IOSCO members could consider initiatives, individually and collectively through IOSCO, to foster more meaningful understanding by and collaboration with providers of electronic intermediary services in curbing digital illegal activities and anonymous website registration.

Measure 5 - Additional efforts to address regulatory and supervisory arbitrage

IOSCO members could consider additional efforts to address regulatory and supervisory arbitrage in the interest of facilitating international enforcement cooperation and enhancing investor protection on a global scale.

13. IOSCO acknowledges that not every measure described in this Report would be appropriate in all member jurisdictions. Use of any measure, including consideration of proportionate uses, depends on the risks faced in each particular jurisdiction, as well as regulatory powers conferred under the member's jurisdictional framework and its supervisory approach or mandate. In addition, implementation of the measures may vary across IOSCO members, in the discretion of member authorities and consistent with jurisdictions' laws and regulations.

The COVID-19 perspective – Impact on retail distribution and digitalisation

14. IOSCO's recent work on the impact of the COVID-19 pandemic on retail market conduct⁶ demonstrates how exogenous systemic events like COVID-19 increase opportunities for retail misconduct and potential investor harm, especially on a cross-border and digital basis. A stress situation like COVID-19 may cause firms to aggressively or even fraudulently seek new revenue streams and may increase potential risk to retail investors. At the same time, investors might be attracted to the market by the opportunities offered, due to increased price volatility, hoping to turn a quick profit during stress situations.
15. While misconduct relating to complex volatile products continues to be prevalent (e.g., retail OTC leveraged products), the COVID-19 pandemic has increased retail demand for such products, as well as online share trading and often riskier products. Some IOSCO members have observed increased misconduct, including aggressive online advertising, mislabelling of products and misleading disclosure through the use of social media. This in turn might be fueling the rise of some share prices and potentially supporting "pump and dump" type behavior by providing channels to promote harmful activity and certain risks. Some IOSCO members also observed an increase in unlicensed financial services and scam activities.⁷
16. Lessons from the recent COVID-19 turmoil demonstrate the need for increased regulatory attention on digital marketing and offerings on a domestic and cross-border level.⁸ In this context, this Consultation Report aims to highlight and guide IOSCO members on some of the critical regulatory issues, both from a policy and enforcement perspective.

⁶ [FR13/2020 Initial Findings and Observations About the Impact of COVID-19 on Retail Market Conduct \(iosco.org\)](#), December 2020.

⁷ Ibid.

⁸ The surveys that were conducted in relation to this report did not cover specific COVID-19 aspects, as they were drafted prior to the outbreak of the pandemic. The Report, however, includes anecdotal evidence from regulators on developing trends during the COVID-19 crisis.

Chapter 2 – Online Marketing and Distribution

2.1 Online marketing

17. Online marketing is an exponentially growing concept, as firms strive to capitalize on digital tools to increase sales. It encompasses tools and methodologies for promoting goods and services via the internet. Through online distribution, consumers can directly access services virtually. The concept of online distribution complements the opportunities of online marketing.
18. The primary difference between traditional and online marketing is the platform that provides information to the financial consumers. Traditional marketing relies on the use of offline channels such as print media, tv and radio whereas online marketing is dependent on a multitude of social media platforms, websites, and mobile applications.
19. Online marketing presents a number of potential benefits and risks. Among others, the potential benefits of online marketing include:

For financial consumers:

- Increased access to financial services and products;
- Reduction in search cost; and
- Flexibility, convenience, price and quality comparison.

For firms:

- Demographic or geographic targeting;
- Increased outreach, resulting in greater sales and economies of scale;
- Time-effective marketing; and
- Multiple low-cost and efficient marketing options (e.g., e-mail advertising, pay-per-click advertising, local search engines, and social media advertising).

The potential risks for financial consumers, firms, and regulators of online marketing include:

- Possibility for firms to track, experiment with and thus exploit investor biases;
- Unsolicited online offerings and/or offers targeting an inappropriate market segment;⁹
- Push towards unsuitable products or strategies through online marketing methods;
- Financial consumers facing privacy issues, for example through unauthorized use of personal data;
- Increased fraud and misconduct risk fostered through the online environment; and
- Surveillance, investigation and enforcement challenges due to online and cross border nature; and cybersecurity risk, regulatory risk, and reputational risk.

Qualitative example 1 - Collection and use of financial consumer data:

“We collect audience data on leads who have partially completed our sales funnel. We also collect data on customer behavior in our app. With this data, we send out targeted e-mails or serve ads to them on platforms like Facebook ads or Google ads. We have also installed pixels on our website from various advertising platforms which allow us to retarget users who have visited our website. E-mails to customers are personalized to include their name in the heading.” – *Brokerage Services Firm from Asia*

2.2 Online Targeting

20. “Online targeting” is a method for publishing digital advertisements to a select consumer audience, based on their prior online activities and interests. When firms target a group of similar consumers (“target audience”), this is called “**segmentation**”. Targeting can also take place on an individual level, which is called “**personalisation**”. Personalisation allows firms to make offers in advertisements on an individual basis.

⁹ In certain cases, misleading and deceptive results may also occur when a financial consumer is conducting online research and is rerouted to a product or service.

21. **“Programmatic advertising”** is the method of automatically publishing an advertisement based on predefined algorithms in a banner ad¹⁰ on a website or social media platform that is relevant to the firm’s target audience.¹¹ It includes the process of buying digital ads through automated platforms. It is gradually replacing the traditional model of advertising. One regulatory concern with this type of advertising is that firms may not fully be able to control where the advertisements are projected, due to their automated nature. Therefore, there is concern that potential investor harm may propagate more quickly and that advertising on certain websites (e.g., content including violence, use of arms, adult content, gambling, environmental pollution, etc.) may result in reputational damages for firms.¹² Some firms argued that it is difficult to control and address these risks, as search engines are very permissive on which sites advertisements can be listed. That being said, the main responsibility lies with the firm and its management to carry out the necessary due diligence and prevent potential risks of their products being advertised on inappropriate websites. For example, a few survey respondents stated that they mostly have the discretion/choice to control such advertisements.
22. **“Retargeting”** also allows firms to repeatedly target potential customers, who have earlier visited the website, with specifically designed ads to convince them to buy the product.

2.2.1. Financial consumer data types that are used in online targeting

23. To target a specific audience, firms use online data that consumers leave behind when they are online, including:
- First party data: Data that the firm collects from its own customers;
 - Second party data: Data that is essentially someone else’s first party data, which is obtained through corporate cooperation including data from BigTech and social media companies; and
 - Third party data: Data that is obtained from a data collector, such as data aggregator or ad networks, which is available on the market for purchase.
24. Firms usually use a combination of the first and second and/or third-party data types.¹³ One potential risk with the use of third-party data is that when data is not proprietary (e.g., data obtained from third party data providers), the risk of data not being accurate or being improperly obtained (in breach of privacy or confidentiality rules) increases.

2.2.3. Online targeting methods

25. According to the firms’ survey, online targeting methods that firms widely use are “segmentation”, “personalisation” and “retargeting”.
26. Most firms surveyed use **segmentation**.¹⁴ In designing the message to the target audience, firms use a variety of factors, including age, income, gender, geographic location and purchasing history. The most commonly used factors are age and income. Firms also analyze their customers’¹⁵ past experiences and likelihood to buy an investment product.

¹⁰ Banner advertising refers to the use of a graphic that stretches across the website or online media property. Banner advertising promotes a brand and/or gets visitors to visit the advertiser’s website.

¹¹ Respondents to the firm survey mentioned the use of “programmatic advertising”, however this was not the focus of the survey.

¹² It should be noted that inappropriate/unauthorised products can also be advertised on well-known websites.

¹³ According to the survey results, 39% of firms only use first party data. More than half of the firms use second and/or third-party data. 43% of the firms combine their own data with second and/or third-party data. Sometimes firms upload their first party data onto a platform (i.e., a BigTech platform) to combine it with second party data. 10% of the firms only rely on second- or third-party data.

¹⁴ 84% of the surveyed firms target predefined audiences.

¹⁵ The term customers and financial consumers can at times be used interchangeably, if the context requires that a financial consumer is also a firm’s customer.

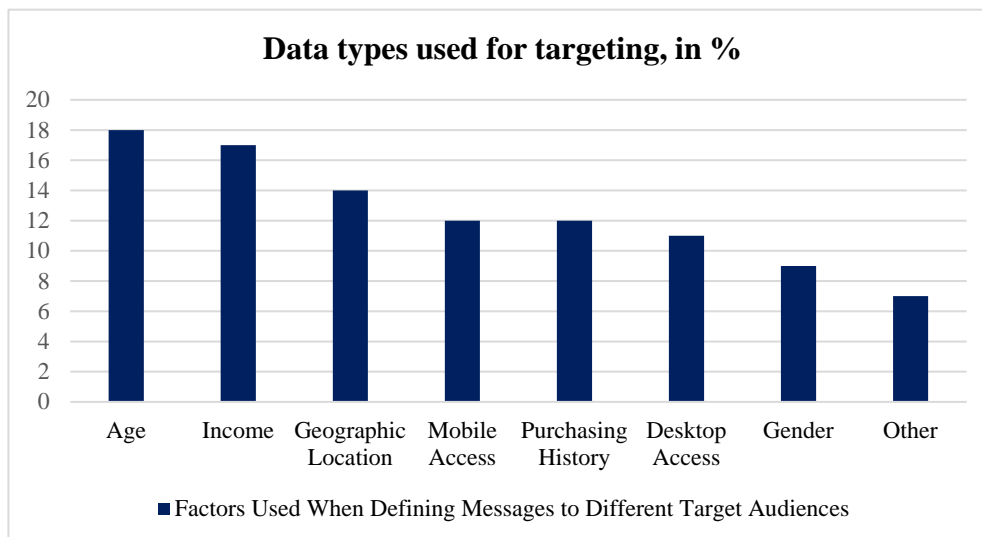


Chart 1

27. According to respondents, an important tool is “**lookalike audience**”, where a firm uses segmentation based on its current customer base and its customers’ demographic data.¹⁶ This allows firms to reach potential new financial consumers, who exhibit similar characteristics to existing customers, and are likely to invest.
28. As explained above, **personalisation** is a form of online marketing, which uses data points to collect personal information about the potential customer to increase the relevance of the advertisement. These data points may include specific geographic locations, niche interests, behavioural patterns, previous fees/charges etc.¹⁷ Marketing agents often incorporate web personalisation in their e-mail campaigns so that the advertisements seem custom made to the potential customers.
29. Firms can use **retargeting** once a customer/financial consumer has shown previous interest in the product, for example by spending a certain amount of time on the website or by starting a registration form. The majority of the surveyed firms also track and measure whether their messages have reached the targeted audience. They do this by using ad tracking metrics and web analytics.

Qualitative example 2 - Use of segmentation, personalisation and retargeting:

“We divide the customers into seven **segments** depending on how familiar they are with our products and how much they use their debit card. E-mails and text messages are **personalised**, always with the customer’s first name and sometimes with other information such as how much fee they paid. Customers are being **retargeted** after having shown any type of interest for the product (through navigation) either by e-mail or through banners on our own website.” – *A French Bank*

2.3. Behavioural Techniques

30. Empirical findings about human behaviour are increasingly incorporated into business models. Behavioural finance examines investor behaviour to understand how people make investment decisions, individually and collectively. Behavioural finance does not assume that investors always act rationally, but instead that people can be affected by behavioural biases. Behavioural techniques are strategies used by firms to analyse consumers’ behaviour when it comes to economic decisions.

¹⁶ Four out of ten responding firms use targeted messages for specific audiences. This practice is especially widespread in Asia, where 78% of firms employ audience targeting. In other regions, between 26% (Americas, also see footnote 5) and 33% (Africa) of firms use unique messages per target audience.

¹⁷ In this case, the line between marketing/distribution and investment advice may become blurry and would depend on the content of the online communication targeted to the potential client, e.g., whether a specific product is presented as suitable to that person based on the consideration of his specific circumstances.

31. Digitalisation makes the use of behavioural techniques more accessible and easily testable by using online experiments. Many financial firms use various behavioural techniques in designing their online marketing messages, as well as deciding on the timing of its delivery and who is delivering it. The use of behavioural techniques brings various benefits for them, including:
- Targeting the digital offering to the audience likely to purchase;
 - Helping to convert visitors to customers;
 - Generating higher click numbers;
 - Increasing return on investment; and
 - Enabling firms to anticipate customer needs.
32. Behavioural finance highlights how human choices are influenced by emotions. Research shows that the use of behavioural techniques may also limit rationality in human decision-making process, as it may steer customer decision making towards certain firm targets. The choice architecture, the background against which decisions are made, can have a significant impact on financial consumer decisions and outcomes.
33. The firms' survey findings confirm firms' use of behavioural techniques in digital offerings. However, there are substantial differences across regions.¹⁸
34. The most widely used behavioural techniques are the following:¹⁹
- **Reciprocity:** Offer something for free so that people might feel obliged to reciprocate and buy a product or service;
 - **Commitment/consistency:** Get people to answer “yes” to a couple of questions or have them start an easy sign-up process and they are more likely to follow through and make a purchase. This also includes the “foot-in-the-door”-technique;²⁰
 - **Social proof:** Other people are doing it too, “we have 100,000 satisfied customers”, “500 people opened an account with us last week”. Reviews and likes can also be regarded as leveraging social proof;
 - **Authority:** “Get advice from professor X, Ph.D.”, “We are authorised by supervisor XYZ”, testimonials by famous people or influencers;
 - **Liking:** Images of persons/environments that can trigger an emotional reaction from potential customers; and
 - **Scarcity:** “Offer ends soon”, “Only two left in stock” “Final week to sign up for this IPO”.

2.3.1. Testing the efficacy of behavioural techniques

35. Firms use various tests to determine whether their use of behavioural techniques works in practice and to improve digital marketing outcomes. One way of testing whether a technique works or which technique works best, is the use of “A/B testing”.²¹ For example, one group of randomly assigned potential customers receives a banner with a green “buy

Qualitative example 3 - Testing behavioural techniques:

“When creating an ad, we try not to use any texts with negative meaning (no/not), use visuals to support texts, make call-to-action buttons well observed” – *A bank from Russia*

¹⁸ More than half of the firms surveyed make use of A/B testing, which is discussed in Section 2.3.1. It is most prevalent in Asia and Europe. While persuasion techniques (nudging, social proof, scarcity) are used twice as much in Europe in comparison to other regions.

¹⁹ Robert Cialdini – *Influence: The Psychology of Persuasion* (2006, first published in 1984).

²⁰ The “foot-in-the-door” technique is based on the idea of getting people to agree to a larger request later by agreeing to a small request first, while they might not accept that large request if asked outright. In the days of door-to-door sales, if a salesperson got their foot between the doorframe and the door, then the potential customer could not slam the door in their face.

²¹ While the digital environment makes it easier to use the A/B testing, this technique has already been used for decades in direct marketing. Digital marketing makes it easier to measure its effects.

this product” button, whereas another group sees the same banner with a red button. The firm measures the conversion rates for each group and the winning version (i.e., with the highest conversion rate, most sales) will be used for all customers. Thus, the firm can optimize how to market their products and services most effectively through iterative testing (of which version sells better). A potential risk of the use of A/B testing is that firms may mainly focus on acquiring new customers and thus increasing conversion rates at the expense of transparent disclosure to consumers. In multivariate tests, more than two versions of a proposition are tested.

2.3.2. Use of financial consumer biases in online marketing

Qualitative example 4 – Use of investor biases:

“Pay day, salary week, bonus periods and 13th month payments are all key moments for our target audience and there is a certain impulse buying/spending that takes place, so our messages cue them to remember to put some money away with us before they splurge.” – *Asset Management and Fund Distribution Firm from Nigeria*

36. Firms increasingly consider financial consumer biases (or more generally consumer psychology) when designing digital campaigns. A quarter of firms surveyed have reporting systems in place to detect signs of emotional and cognitive biases during investment decision making.²² The survey results show that firms’ use of investor biases and their awareness on the potential role of this in online marketing varies substantially across regions.^{23 24}

37. It is

Qualitative example 5 – Use of investor biases:

“Culture traits and societal status are things that we consider when approaching to our customers and we factor this when providing information to them for marketing purposes.” – *Brokerage Services Firm from Nigeria*

important for firms, in line with existing regulation, to use objective, and not misleading data and facts about the products they market, when designing marketing campaigns so that potential financial consumers can make informed investment decisions.²⁵ This avoids exploitation of the biases of financial consumers in a misleading manner. IOSCO members should consider requiring that the firm management carries the ultimate responsibility on not exploiting consumers and that there are firm-level rules in place, such as internal firm policies and procedures, consistent with the jurisdictions’ laws and regulations.

2.4. Digitalisation

38. With the advent and growth of digital platforms for investing, such as online brokers and robo-advisers, and more recently, mobile investment apps and portals, broker-dealers and investment advisers have multiplied the opportunities for retail investors to invest and trade in securities. Firms employ a variety of practices including behavioural prompts, differential marketing, game-like features (commonly referred to as gamification), and other design elements or features designed to engage with retail investors on digital platforms (e.g., websites, portals, and applications).
39. IOSCO members worldwide have been observing gamification trends carefully. For example, on August 27, 2021, the U.S. SEC requested information and public comments on matters related to broker-dealers’ and investment advisers’ use of Digital Engagement Practices (“DEPs”).²⁶ The

²² 25% of respondent firms reported having such systems.

²³ 60% of European firms state that they are aware that investors have certain emotional and cognitive biases and they take these into account when designing their online marketing campaigns. Awareness is slightly lower in the Americas (37%) and Middle East (40%), and higher in Africa (73%) and Asia (78%).

²⁴ Also see footnote 4.

²⁵ 82% of firms use objective data and facts when designing marketing campaigns.

²⁶ Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology To Develop and Provide Investment Advice, Release Nos. 34-92766; IA-5833 (Aug. 27, 2021), 86 FR 49067 (Sept. 1, 2021),

request also focuses on the analytical and technological tools and methods used in connection with these practices. The request was issued as part of an effort to develop a better understanding of the market practices associated with firms' use of DEPs and the related tools and methods, and to facilitate an assessment of existing regulations and consideration of whether regulatory action may be needed in connection with such practices.²⁷

40. Additionally, a call for evidence on certain aspects relating to retail investor protection was issued by ESMA on October 1, 2021.²⁸ ESMA received the mandate and a request to draft a technical advice on this topic from the European Commission, as part of the European Commission's strategy for retail investments in the European Union. In the call for evidence, ESMA asks for contribution related to the appropriateness of the current regulatory framework with regards to digital tools and channels and welcomes input on the impact of information shared on social media on retail investors' behavior. ESMA states that while the use of gamification techniques can help to convey complex information in a simple and rewarding way, the wrong use of these techniques can push investors to take actions based on emotions rather than through rational decisions.²⁹
41. Similarly, other IOSCO members have been watching gamification trends closely. For example, ASIC has provided warnings on the topic of gamification through recent media coverage³⁰ while CONSOB published a statement on stock trading volatility and the use of social forums and web trading platforms.³¹ BaFin is preparing a "surf day" to assess investor protection and behavioural aspects on trading apps.
42. IOSCO is also analysing gamification and self-directed trading related issues in detail through the work of its Retail Market Conduct Task Force, findings of which are expected to be published in early 2022.

2.5. The Online Onboarding Process

43. "Customer onboarding" is the process of seeking financial consumers and bringing them on to the firm's business. Successful marketing results in the online onboarding of the financial consumer.

<https://www.govinfo.gov/content/pkg/FR-2021-09-01/pdf/2021-18901.pdf>. Comments are available at <https://www.sec.gov/comments/s7-10-21/s71021.htm>.

²⁷ In October 2021, the U.S. SEC also published a staff report focusing on the January 2021 trading activity of GameStop Corp (GME) - <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf>.

²⁸ <https://www.esma.europa.eu/press-news/consultations/call-evidence-retail-investor-protection-aspects>

²⁹ On February 17, 2021 ESMA issued a statement urging retail investors to be careful when taking investment decisions based exclusively on information from social media and other unregulated online platforms, if they cannot verify the reliability and quality of that information: https://www.esma.europa.eu/sites/default/files/library/esma70-155-11809_episodes_of_very_high_volatility_in_trading_of_certain_stocks_0.pdf

³⁰ <https://www.abc.net.au/radio/melbourne/investing-in-shares/13516764>

³¹ https://www.consob.it/documents/46180/46181/statement_20210413.pdf/8ca09912-9ce3-4964-b296-1d246f6e1b30

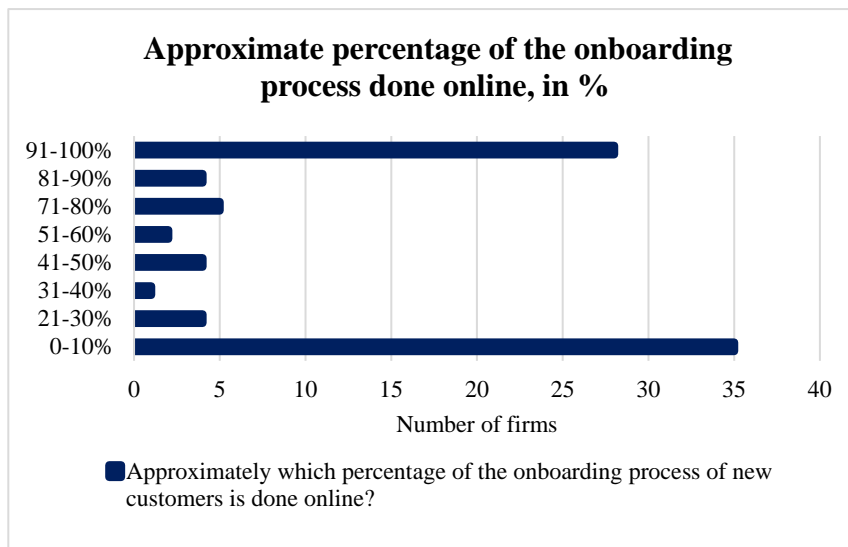


Chart 1

44. From a regulatory perspective, the onboarding phase is a critical component of the overall online marketing and distribution process, which necessitates proper due diligence by the offering firm. There may be various risks related to suitability, disclosure, “know-your-customer” (KYC), “anti-money-laundering” (AML), and fraud both for the customer and the firm if appropriate filtering mechanisms and due diligence are not followed.

45. The above chart illustrates the survey responses on the percentage of the onboarding process done online: the onboarding process took place mostly either fully online (28%) or offline (35%), with most firms using a hybrid approach.³²
46. Firms that do not make use of a full online onboarding process reported that certain aspects such as customers’ verification and execution of the physical agreement take place through hard copies (paper) or in person meeting (at the branch). This is often the case for higher risk corporate customers where online due diligence is not possible, or where customers cannot provide an online signature/authorization. In some cases, customers prefer to complete the transaction physically at the firms’ office.³³

2.5.1. Filtering mechanisms used in the online onboarding process

47. Firms use the online onboarding process to vet applicants’ eligibility to open accounts. While there are significant jurisdictional differences across the regions, firms use a wide range of filtering mechanisms or requirements during customer onboarding to reach the right audience, including:
- Obtaining comprehensive legal advice to ensure that the firm complies with legal obligations of other relevant jurisdictions (e.g., legal obligations of the jurisdiction in which the financial consumer resides or the jurisdiction in which products are offered), and not just the local jurisdiction obligations;
 - For some firms, requiring the customer to have a bank account in the firm’s jurisdiction or being a resident in the same jurisdiction as the firm;
 - Checking the customer risk levels via an internal committee;
 - For several firms, requiring the customer to be resident in a low-risk country;
 - Requiring the financial consumer to pass all screening against AML, KYC, and suitability requirements; and
 - At times, verifying various additional information, including customer ID, e-mail address, social media accounts, source of income, education level, and place of residence, before approving the application.
48. It is important to note that, irrespective of whether the firm assesses the information collected about the potential financial consumer through a human review or an automated filtering process, the assessment considerations are the same. Respondent firms stated that their systems route potential

³² 28 of the 93 of the respondent firms have a fully online onboarding process.

³³ One firm reported that about 1% of their retail customers choose to visit the company’s premises in person despite the ability to complete the process online.

customer applicants through processes based on their country of residence and their respective local requirements for onboarding/marketing.

2.6. Use of outsourcing

49. The term “outsourcing” refers to a business practice in which a regulated entity uses a service provider to perform tasks, functions, processes, services or activities that would, or could in principle, otherwise be undertaken by the regulated entity itself. In many jurisdictions, the complexity of markets and the wider trading landscape has grown as markets become faster and more competitive. These developments, coupled with increasing automation, are incentivising firms to reduce costs and improve efficiency, in some cases, by outsourcing certain tasks to service providers.³⁴

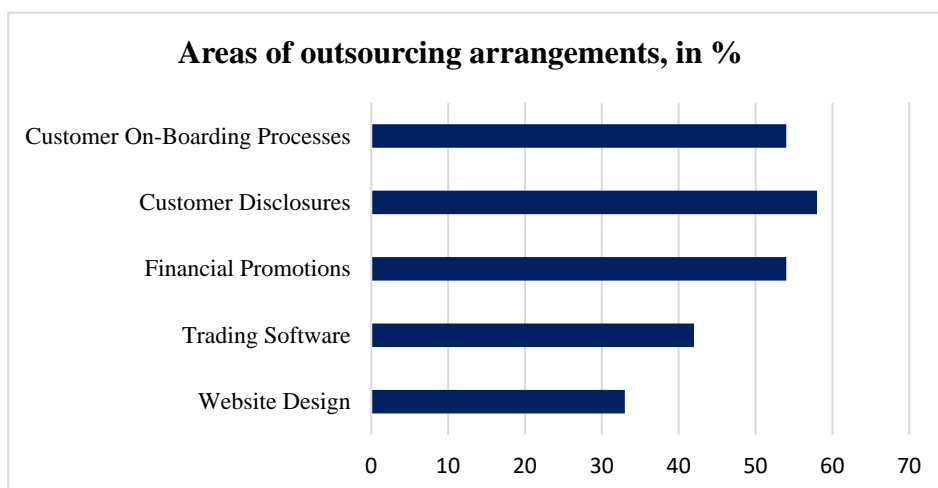


Chart 3

50. According to the firms’ survey findings, one third of the firms outsource one or more activities related to online marketing or online distribution activity.

51. Of these firms, the most common activities they outsource are:

- Digital advertising planning and buying;
- Creation of online marketing campaigns;
- Lead generation (including use of third-party sites and apps to refer business); and
- Social media engagement.

2.6.1. Regulatory supervision of outsourcing arrangements and compliance with local regulations

52. According to survey responses, there are no specific regulatory requirements/approvals related to the outsourcing of online marketing and distribution activities. Rather, IOSCO members apply the general requirements applicable to outsourcing, including online activities. Regulated firms that outsource tasks related to online marketing and distribution should apply the IOSCO Principles on Outsourcing,³⁵ along with the related guidance for implementation, to their outsourcing arrangements.

2.7. Regulatory and firm level rules on online marketing and distribution

2.7.1. Regulatory approach

53. IOSCO members often use principle-based rules, rather than specific technology-based rules. With the transition to more online marketing and distribution, members should consider assessing if gaps in oversight emerge due to the quickly changing technological environment.

³⁴ FR07/2021 Principles on Outsourcing (iosco.org), October 2021.

³⁵ Ibid.

2.7.2. Firm level rules and policies

54. The survey results show that the existence of firm level rules and policies on online marketing varies across firms, and particularly, across different regions. Where firms do not have internal online marketing rules, they rely on their general marketing rules and policies.³⁶

Measure 1: Firm level rules for online marketing and distribution

IOSCO members should consider requiring that firms have proper internal rules, policies, processes and tools for their online marketing and distribution, and review them on a regular basis. This should include that any use by firms of targeting, behavioural techniques and gamification elements should be done in a way that ensures fair treatment of financial consumers and aims to avoid potential financial consumer harm.

Measure 2: Firm level rules for online onboarding

IOSCO members should consider requiring that firms apply appropriate filtering mechanisms, policies and procedures for financial consumer onboarding in line with the laws and regulations of the firms' jurisdiction, the financial consumers' jurisdiction, and the jurisdiction where the products or services are being marketed or distributed. During the onboarding process, the information provided should be clear, fair and non-misleading.

³⁶ The survey findings highlight that:

- 67% of surveyed firms have developed internal rules or guidance to marketing through digital channels.
- Of these firms, 80% have specific rules applicable to investment products and services that the firms offer online.
- A fifth of firms surveyed do not have internal rules or guidance for online marketing and have stated that existing legislation is applied to customer communications through digital channels.
- Over 70% of firms in Europe and Asia have developed specific internal rules for online marketing, with over 80% of these firms developing policies specific to products and services.

Chapter 3 – General Trends and Observations in Digital Offerings

3.1. Tools and channels for online marketing and distribution

55. Online marketing and distribution has seen strong growth over the past years. Firms reported using a wide range of tools and channels for online marketing with social media and banners/display marketing ranking the highest, as two-thirds of the firms make use of these channels. Furthermore, more than half of the firms use email campaigns, search engine optimisation and online video marketing. According to the survey findings, app store marketing and voice marketing are the least commonly used. Although 63% of the surveyed firms have an app, they tend to advertise their apps through other means, such as banner/display marketing.

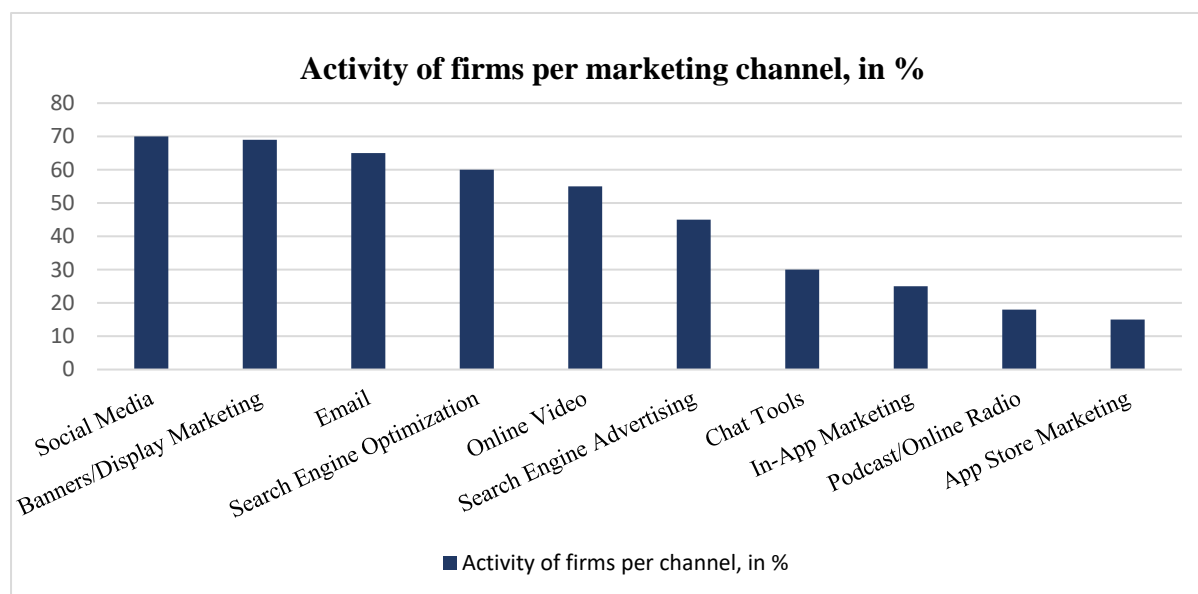


Chart 4

3.2. Budget and firm spending for online marketing

56. The firms' survey results show that firms spend half of their total marketing budget on online marketing, most of which is on desktop marketing. Firms are increasingly moving to online targeting via mobile devices and tablets; however, this is not evident across all jurisdictions.³⁷

57. The majority of the firms' survey respondents indicated that in the last two years they increased the budget allocation for online marketing, half of which had increased their marketing budget by at least 25%. Going forward 68% of firms intend to increase their online marketing budget over the next two years.³⁸

3.3. Regulatory spending for online marketing supervision

58. 17% of IOSCO members surveyed intend to increase their resources in this area in the next two years.³⁹ It should be noted that not all IOSCO members surveyed can share details on budget/headcount allocation.

3.4. Market trends observations in the use of online marketing and distribution tools

³⁷ Asian firms already allocated over 55% to mobile device marketing.

³⁸ 44% of these firms intend to increase their online marketing budget by at least 25%, a quarter of which (11%) indicated that they intend to increase by more than 50% of past budget, while almost half of the other respondents intend to increase it by up to 25% (as of January 2020).

³⁹ In contrast, in 2020, 25% of IOSCO members surveyed indicated an increase in their budget/headcount allocation for online marketing supervision in the past two years.

59. Both the firm and the regulatory surveys asked in which online marketing and distribution tools firms as well as IOSCO members respectively currently observe an increase in their market in general and in which they expect more future growth.
60. **“Influencer marketing”** is (mostly) online video ads by a person with a substantial number of online followers on social media, mostly gained through his/her strong presence. So far, 10% of the firms from the survey already use influencer marketing,⁴⁰ but of this 10%, only some of these firms stated that they oversee the activities of the influencers they engage with while others do not. However, both firms’ survey-respondents as well as regulators shared the observation that in the markets in which they are active or supervise respectively influencer marketing is the most common trend to advertise financial products and services. Some IOSCO members reported challenges with influencer marketing, as they only have jurisdiction over firms and their associates, but not over influencers. In December 2021 the NL-AFM published the results of an exploratory review on financial influencers and more specific about their communication and services regarding investing. While the AFM acknowledges that these influencers fulfill the need of accessible information regarding personal finance and investing, the AFM also sees the risk that several of the influencers investigated are unfamiliar with applicable legislation such as the market abuse regulation MAR, MiFID II, unfair commercial practices directive as well as the respective national Dutch law or do not fully comply with these rules.⁴¹
61. Also, “online video marketing” and “advertisements within dating, news and chat apps” rank high in the market observations, followed by social media stories. IOSCO member-respondents in general make comparable observations to firm respondents, albeit at a lower level. IOSCO member respondents cited that the most common forms of marketing they supervise are advertisements within apps and voice marketing.
62. **“Cross-selling”** allows firms to advertise related products that the customer may be interested in after purchasing the original product. This is an attempt to enhance sales and entice the consumer into purchasing more products than he/she had originally intended. SuperApps⁴² are increasingly used for cross-selling purposes. Both firms and IOSCO members in Asia Pacific reported a slight trend in cross-selling via SuperApps mainly through payment platforms such as Alipay and WeChat, while firms in Africa quoted online marketplaces such as Jumia. The relatively higher trend in Asia can be explained with the dominant use of certain payment platforms. Two IOSCO members mentioned to observe cross-selling using SuperApps, such as WeChat and Alipay.
63. **“Interactive content”** allows firms to engage with their customers based on their interest, for instance, via interactive tools like shoppable posts, quizzes and polls on social media. The use of this tool is increasingly popular in Asia.
64. **“Voice search engine optimization”** is a fairly new marketing tool, which was expected to grow rapidly based on the feedback some IOSCO members have received from marketing agencies during the last few years. The survey findings show, however, that this growth has not happened in practice yet.

⁴⁰ Nine of the 93 firms indicated that they benefit from the services of social influencers. Five oversee the activities of the social influencers they engage and four do not. Given the small sample size it is hard to determine regional differences; however, it appears that the use of social influencers is most common in Asia and Africa.

⁴¹ The Pitfalls of Fininfluencers, Dutch AFM, December 2021
<https://www.afm.nl/en/nieuws/2021/december/verkenning-fininfluencers>.

⁴² A “SuperApp” is a cross selling tool as an application which has numerous in-built functions for a wide range of services, which may include both financial and non-financial services. The SuperApp is a one-stop market where different apps are encompassed in one platform.

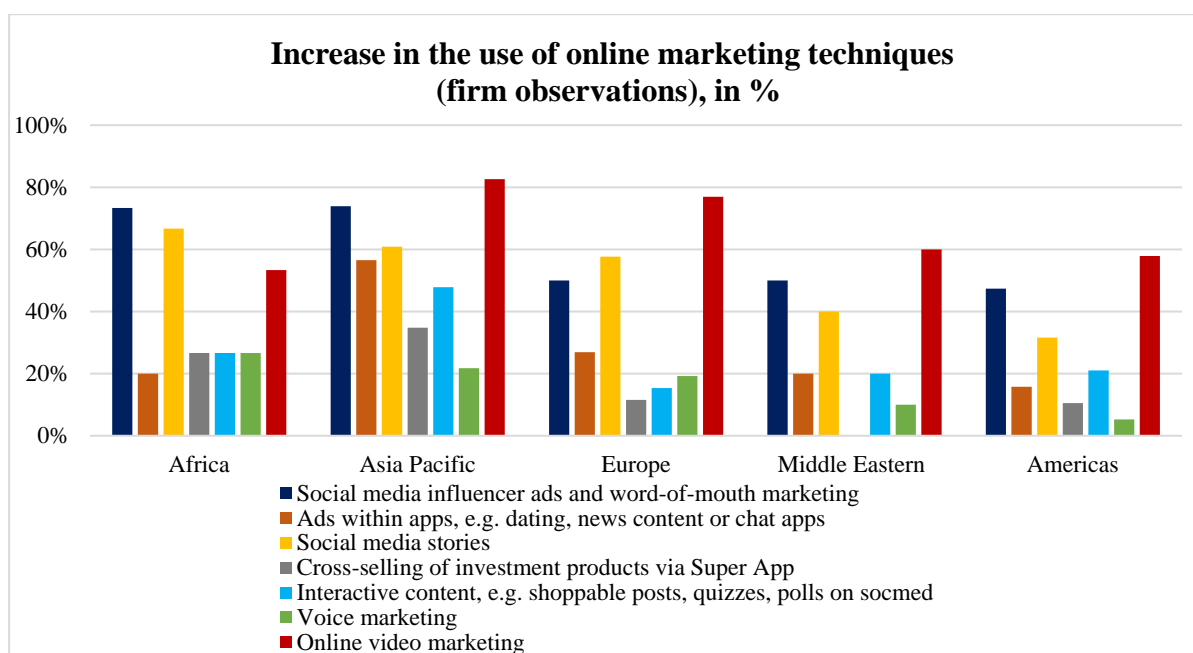


Chart 5

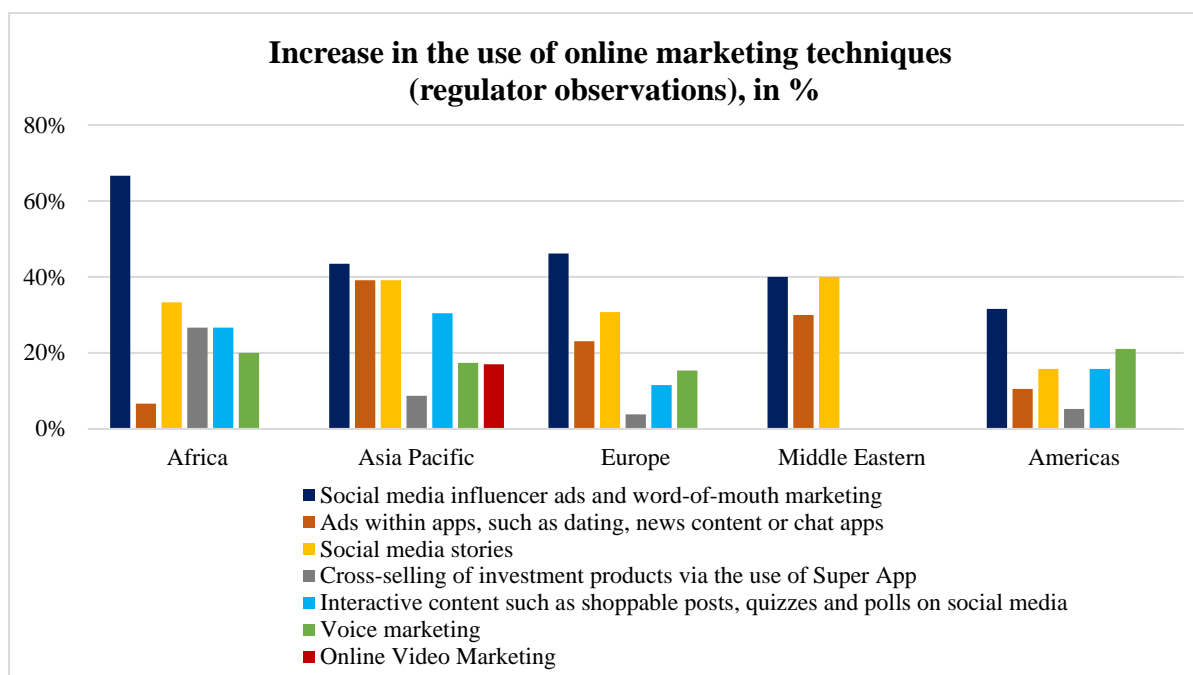


Chart 6

3.5. Future prospects in the use of marketing and online distribution tools

65. As future trends, the majority of firms surveyed are considering using or increasing the use of online video marketing, influencer and word-of-mouth marketing, as well as social media stories. Some firms, particularly those in Asia Pacific, Middle East and Europe are also considering using or increasing the use of advertisements within apps. Some firms utilizing social media platforms such as Facebook, Instagram, WeChat and Weibo are exploring increasing their use of these platforms. A few firms mentioned that they are building their own apps, while others use them already.
66. Influencer marketing is the marketing tool in which firms surveyed expect the highest growth going forward (see chart 6). For example, 63% of the African firms and 43% of the European firms plan to increase use of this tool.
67. Some IOSCO members cited that they also plan to increasingly supervise social media influencers.

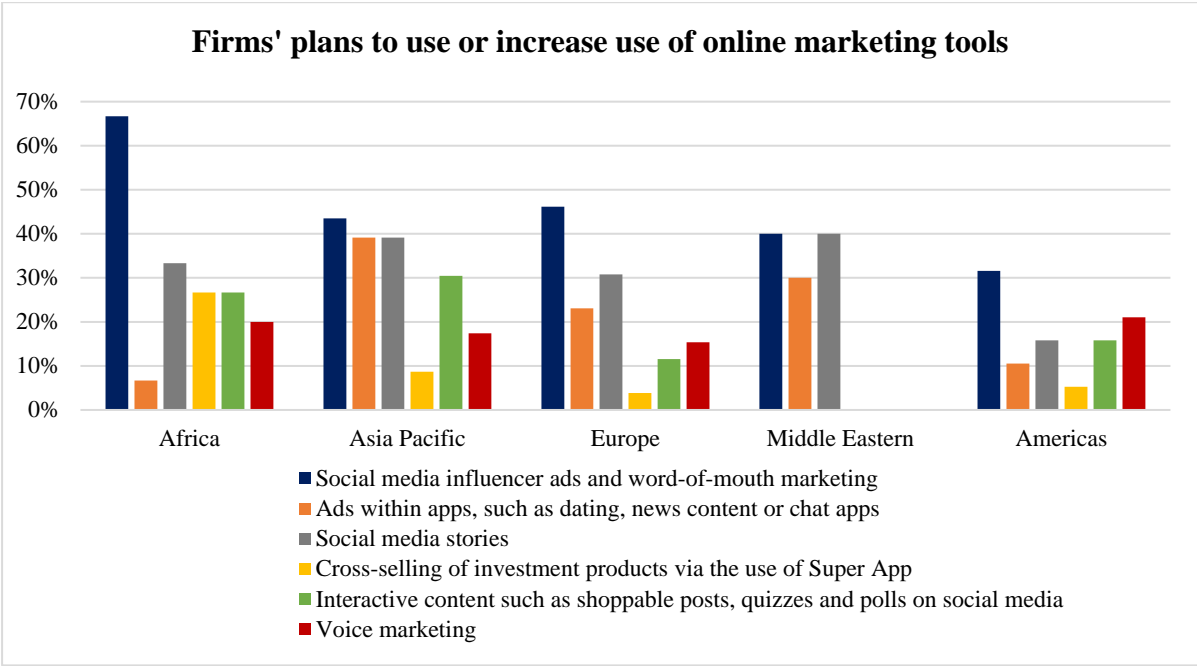


Chart 7

Chapter 4 – Use of Social Media in Digital Offerings

4.1. Increasing use and influence of social media

68. **Social media** is a form of electronic communication that allows users to create and share content via social networking websites, such as Facebook, Twitter, Instagram and TikTok, among others. Social media touches virtually all areas of society and, as such, is reshaping the way individuals, companies, governments, and other organizations interact. It is a frequently used marketing channel due to its enormous reach, ability to support customized marketing approaches, flexibility, convenience and speed. Social media provides a means to multiply the number of interactions between financial consumers and firms.
69. Social media allows for more dynamic interaction among retail investors, provides communication opportunities and, in turn, creates new content. The stock trading events in late January 2021, which saw soaring trading volume from retail investors (organized via popular message boards) driving up the price of certain stocks that had been shorted by institutional investors, demonstrate the power of social media.

4.2. Challenges brought by the use of social media

70. Social media usage will likely continue to evolve rapidly as technology advances and new concepts and methods for social media-based interaction further develop. These developments also affect the financial services industry, as market intermediaries and their representatives increasingly use social media to communicate with existing customers and to attract new ones.⁴³ Social media is widely used in online offering, marketing and promotion of products. That being said, the forms in which social media is used for online marketing differs between firms and is still evolving as discussed in the previous chapter.
71. Significantly, social media communication often occurs outside traditional channels used by firms in the past, with enormous public outreach. This raises potential concerns about the nature of social media usage and its impact on customers, for example, the ability to communicate information to a large group of individuals by simply posting it on social networking sites; the potential for information to become outdated more quickly; the quantum of information available and the ease of accessibility. These bring various challenges for firms' internal compliance units. They may also bring challenges to IOSCO members.⁴⁴

4.3. Most commonly used social media platforms

72. With rapidly evolving landscape and new social media networks coming to markets continuously, 62 firms from the survey use social media for their marketing and online distribution purposes,⁴⁵ The below chart shows that those firms cited Facebook, Twitter, and Instagram as the most commonly used social media platforms for marketing of their products. A few firms also cited YouTube, Snapchat, WeChat and Weibo as the most popular platforms in the Asia Pacific region. One firm also cited TikTok.

⁴³ See IOSCO Report on the IOSCO Social Media and Automation of Advice Tools Surveys, July 2014.

⁴⁴ Ibid.

⁴⁵ Of the 93 firms in the survey, 62 answered the question on social media platforms in the survey. The other firms either stated not to use social media platforms or chose not to answer the question.

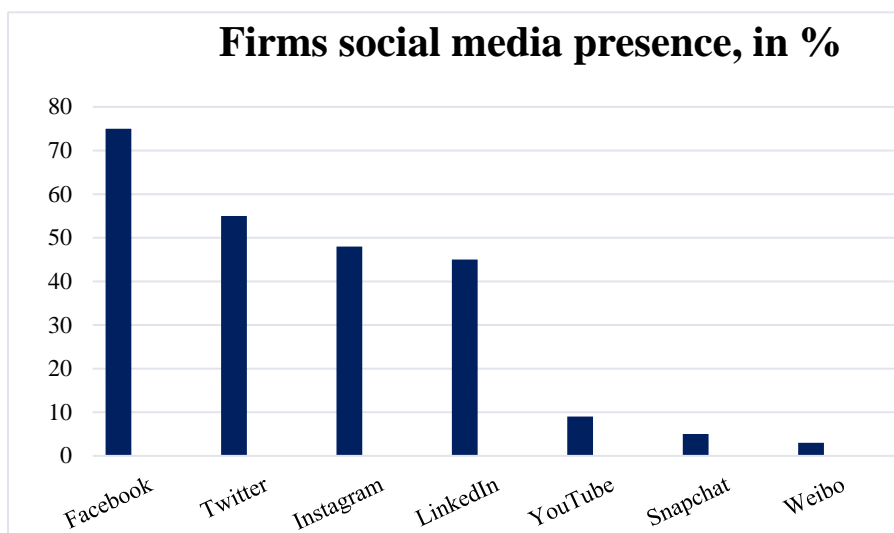


Chart 8

content, audits, on-site-visits, market surveys, and complaints.

73. Internet and social media monitoring by regulators is a challenging task and IOSCO members use different in house or third party tools to address this, depending on the supervisory approach and the legal framework in their jurisdiction. Among others, these tools include advanced analytics tools related to social media

Qualitative example 6 – Firm level surveillance of staff communication with customers

“In accordance with domestic laws and regulations, staff are forbidden to communicate with customers through invisible channels on social networks. We must record and maintain communication between staff and customers during online marketing and distribution”. – *Asset Management and Fund Distribution Firm from*

4.4 Policies and procedures for tracking and recording of staff communication

- Over half of the survey respondents indicated that they have policies and procedures in place to track and record the interaction between staff / agents / referrers / introducers and customers in online marketing and distribution;⁴⁶
- One third of the respondent firms indicated they tracked these interactions by recording the chat or phone conversation; and
- One third of the firms indicated they retained accessible records of this tracking within electronic data storage.

Measure 3: Responsibility for online marketing

IOSCO members should require, subject to a jurisdiction’s laws and regulations, that management assumes responsibility for the accuracy of the information provided to potential investors on behalf of the firm, including those provided via various social media channels, including influencers, and the timely disclosure of necessary information regarding potential risks and conflicts of interest to avoid potential financial consumer harm.

⁴⁶ The existence of policies and procedures was the highest in the Asia region (61%).

Chapter 5 – The Regulatory Perspective

5.1. Oversight of online marketing and distribution

74. The majority of the IOSCO members surveyed have principles-based rules that require online marketing communications (and communications in general) to be made fair, clear and not misleading.⁴⁷ Many members surveyed review online marketing techniques that are brought to their attention on a case-by-case basis, as part of their supervisory activities.
75. Some IOSCO members stated in the regulators’ survey that it is particularly difficult to catch misleading or at times illegal recommendations or promotions published through digital means, especially via closed channels in social media.
76. According to the regulators’ survey, the use of social media increasingly affects how IOSCO members oversee and approach firms that use these evolving digital mediums. To date, some IOSCO members state that they have approached the oversight of social media by using regulatory approaches such as the general rules and guidelines already established for advertising, product disclosure, risk warnings, record keeping, and general supervisory control requirements. Additionally, some members have conducted on/off-site inspections and thematic reviews of how firms employ these evolving mediums. IOSCO suggests that members assess whether applying rules and processes designed to regulate traditional telephone and e-mail correspondence works effectively against an entirely new medium of communication.
77. Some IOSCO members surveyed suggested that regulatory actions regarding social media marketing are often reactive. It can be challenging to supervise against misleading or illegal promotions, due to the sheer amount of social media posts and as not all social media posts are accessible by regulators. Members surveyed mostly rely on consumer complaints for investigation and enforcement purposes for misleading and illegal promotions.⁴⁸ In addition, when an individual has signed up to a particular firm or platform, the ability for direct communication can include unsolicited messaging beyond what the individual has signed up to receive. This may be difficult for IOSCO members to monitor as the platforms often have embedded social media aspects such as chat functions.
78. The four main factors highlighted by IOSCO members that increase challenges in supervision of online marketing and distribution are the following:

1. ***Lack of visibility***

Many members noted that detecting the existence of the activity in an online environment is the greatest regulatory challenge. Many online marketing initiatives are targeted towards specific audiences, and therefore, not visible to every user and regulator, making it possible for misleading information to spread out of regulatory sight.

2. ***Overload of information***

The volume of information posted online poses monitoring challenges. Even if the visibility issue above were to be solved, the vast amount of information that is published daily can make it difficult for IOSCO members to continuously monitor all online marketing. Effective and high-tech regulatory monitoring tools would be helpful to minimize this challenge.

Qualitative example 7 – Lack of regulatory visibility in oversight of online marketing:

“If social media posts are not open to general public e.g., protected tweets, it is difficult to catch misleading or non-legal recommendations or promotions. Even if we search through keywords, they cannot be screened. Even if we can get in closed circuit channels e.g., WhatsApp groups, if the owner of the account uses nickname or/and foreign telephone or IP numbers, it is difficult to locate and identify him/her.” – ***Capital Markets Board, Turkey***

⁴⁷ Only one IOSCO member reported using specific provisions with respect to online marketing as a requirement.

⁴⁸ Some Committee 3 members reported that consumer complaints on misleading and illegal promotions are relatively low.

3. *Continuously changing information*

A firm can create and adapt online advertisements more rapidly than advertisements through traditional channels, such as radio, tv and print. Online information can be forwarded and copied, increasing the potential target market compared to the traditional advertisement channels. Information can also be easily deleted from websites and is therefore more difficult to track. This means IOSCO members need to act quickly to keep track of evidence or other material that could be indicative of an infringement. Members need to respond swiftly when it comes to misleading online information, due to the speed in that online information is distributed.

4. *Cross-border challenges*

Some IOSCO members have observed that online marketing enables unlicensed firms to enter the market relatively easily with minimal or no physical presence. These firms can market themselves and their products with minimal capital expenditure and very low, fixed overheads. Sometimes, the high-risk/high-profit nature of the product makes it particularly attractive for unlicensed firms to use it as a tool to defraud retail investors on a cross-border basis. There may be instances of persons or firms wrongly holding themselves out on social media as being licensed. This can make it difficult for IOSCO members to locate and take action against an unlicensed firm, as described in Chapter 8 below.

79. Some jurisdictions have set their regulatory perimeter to only require firms that market, offer or sell the products to residents of that jurisdiction to be licensed. Firms that offer the relevant products to non-residents are often exempt from the requirement to be registered, and therefore, are not subject to any regulatory oversight in that “home” jurisdiction. A number of unlicensed firms have tried to exploit this regulatory gap to target foreign investors. As a result, as highlighted in Chapter 8, it can be difficult for IOSCO members to effectively take enforcement actions against these firms. Furthermore, customers in the host jurisdiction may not be aware they do not have any regulatory protection.⁴⁹

Measure 4: Capacity for surveillance and supervision of online marketing and distribution

IOSCO members should consider whether they have the necessary powers and have adequate supervisory capacity to oversee an increasing volume of online marketing and distribution activity. IOSCO members should also consider ways to develop appropriate monitoring programs for the surveillance of online marketing and distribution activities, including on social media.

Within the context of domestic legal frameworks, considerations for enhancing surveillance and supervisory capacity could include:

- **the power to request access to content to detect illegal or misleading promotions;**
- **having regulatory channels in place to report consumer complaints for misleading and illegal promotions; and**
- **suitable evidence tracking processes in place to cope with the fast pace and changing nature of online information.**

IOSCO members are encouraged to share experiences and good practices with each other regarding supervision and surveillance of online marketing and distribution.

⁴⁹ [FR17/2018 Report on Retail OTC Leveraged Products \(iosco.org\)](#)

5.2. Product oversight and governance

80. Product governance rules may provide IOSCO members with a tool to address financial consumer harm and protect against the emergence of potential risks from the manufacture and distribution of investment products.⁵⁰

Qualitative example 8 – Exam requirement for online marketing and distribution staff:

When staff of a regulated firm conducts online marketing or distribution activities, he/she is required to acquire a sales representative qualification by taking an exam and registering with Japan Securities Dealers Association, the self-regulatory organization for Japanese securities industry, as a sales representative. (Article 64 of the FIEA) – **Japan FSA**

82. Some jurisdictions have rules and requirements surrounding the oversight and governance of the product lifecycle. We refer to these rules as product oversight and governance, which refers to the systems and controls firms have in place to design, approve, market and manage products throughout the products' lifecycle to ensure they meet legal and regulatory requirements. Product governance regulations aim to ensure that the products:

- meet the needs of one or more identifiable target markets;
- are sold to clients in the target markets by appropriate distribution channels; and
- deliver appropriate client outcomes.

81. Just under two-thirds of firms surveyed were familiar with product governance and oversight principles given the concept is not applied in all regions. Due to the product governance requirements within the European Markets in Financial Instruments Directive II (MiFID II), the survey responses indicated that European firms demonstrated the highest levels of familiarity with product governance requirements.⁵¹ Several firms in Asia-Pacific also displayed a good understanding of product governance.⁵² This may extend further as other jurisdiction impose similar rules to the MiFID II product governance rules.⁵³ Most firms in these jurisdictions had developed internal policies and procedures to make sure that their product development and review process promotes appropriate product features for the target market and appropriate marketing strategies. These firms then typically test their product development and review process by compliance.
82. For other jurisdictions, less than half of the firms that responded to the survey were familiar with product governance principles. However, one global firm outlined that despite product governance requirements not being applicable in all jurisdictions in which they operate, they have developed policies and procedures to achieve the same spirit of the regulation. A number of other firms also outlined that they achieve the same outcome of the product governance requirements, by having a thorough client onboarding process and by ensuring that they only onboard clients for whom their products are suitable (See Annex 5 for respondent members' approach to product governance).

5.3. Licensing requirements and qualifications required from staff

83. Online marketing and distribution is a developing field, and therefore, licensing requirements for online marketers typically do not yet exist in the existing regulatory frameworks. Most IOSCO

⁵⁰ Product intervention powers can also be a powerful and complementary tool for regulators to prohibit the marketing, distribution or sales of certain financial products with certain specified features or to ban certain practices in light of significant investor protection concerns.

⁵¹ In January 2018, the MiFID II introduced product governance requirements requiring firms that manufacture or distribute financial instruments consider the best interests of customers at all stages of the product development and distribution life cycle.

⁵² On December 2020, ASIC published regulatory guidance related to an underlying regulatory requirement to design financial products to meet the needs of consumers, and to distribute their products in a more targeted manner.

⁵³ For instance, Australia imposed Design and Distribution Rules that came into effect in October 2021.

members do not yet require that firms have specific certifications or licensing for staff responsible for online marketing and distribution.⁵⁴ Only one IOSCO member that responded to the member survey requires a degree or skill-set specific to the digital aspect of online marketing and distribution.

84. Most IOSCO members have highlighted that they commonly carry out pre-assessment of firms' staff's qualifications, knowledge and experience during the firm authorization process. This pre-assessment is mainly based on staff's academic background and industry experience. Thus, members are able to assess if the structure and business model of the firm and experience of its staff are appropriate for the nature, scale and complexity of the business.
85. Certain jurisdictions do not specifically assess if the staff responsible for digital offerings are appropriately qualified. Rather, these jurisdictions put this responsibility on the senior management of the firm, who often are required to ensure that all the necessary resources (including adequately skilled staff) are in place as regards to online business activities. As firm/ client interaction moves more and more online, or at times takes place exclusively online, the role of digital marketers transforms and gains more responsibility.

Measure 5: Staff qualification and/or licensing requirements for online marketing

IOSCO members should consider requiring that firms assess the necessary qualifications for digital marketing staff. IOSCO members may also consider requiring firms to have specific staff qualification and/or licensing requirements for online marketing staff, similar to licensing requirements for sales staff, if such regulatory requirements do not already exist or apply to online marketing staff.

5.4. Firm level responsibility in online marketing and distribution

86. Some member jurisdictions commented that it is challenging to identify which firm and individuals are responsible for anonymous advertisements (advertisements where the owners can't be tracked down), and therefore, suggested that IOSCO members should consider whether to require responsibilities be clearly defined under the respective regulatory regimes.
87. The responsibility to prevent consumer harm falls to different firm functions across jurisdictions, including compliance; senior management (CEO, board of directors); sales department, fund manager and trustee; and internal audit.⁵⁵

Challenges in identifying key decision-makers and ultimate beneficial owners

88. Nearly all IOSCO members surveyed responded that the common practice of obtaining information of the key decision-makers and ultimate beneficial owners⁵⁶ is based on their geographical location. IOSCO members expect firms to maintain a record of the geographical location of the senior management and key function holders. In the case of a foreign entity entering a regulator's domestic market, the domestic regulator will often liaise

Qualitative example 9 - Difficulty in identification of geographical location

“The geographic location of a person behind an activity can be difficult to ascertain when dealing with online material. This is made especially hard as more people are aware of geo-tagging and turn these options off on devices – *The UK-FCA*”

⁵⁴ EU jurisdictions, the UK, Switzerland and Turkey have their national certification regimes, which establish minimum criteria for the assessment of knowledge and competence for staff providing investment advice. The Japanese FSA specifically addresses digital offerings and requires digital marketers to have the same licensing requirements as sales professionals.

⁵⁵ In Europe and North America, senior management/board members bear this responsibility, while in Nigeria and China, the fund manager and trustee, as well as the board of directors are responsible. In the UK, regulatory approval is required for certain responsibilities.

⁵⁶ Ultimate beneficial owners are the real owners of the firm who may not appear as the official owners.

with the foreign entity’s regulator to identify key decision makers and ultimate beneficial owners.

89. It is sometimes challenging to geographically locate a person or firm behind an online activity, which makes it difficult to determine which home authority is responsible. The utilisation of mobile applications also makes it difficult to determine the parties behind the online marketing activity. It is often difficult to obtain the relevant digital footprints and validate the identity of an individual based on information posted on online channels. Multilateral requests for assistance to foreign regulators also may take time as part of the process of identifying natural persons, as discussed in the IOSCO Committee 4 findings in Chapter 8.

5.5. Most common tools that IOSCO members use to supervise online marketing activity

Qualitative example 10 – Monitoring of online marketing and distribution channels:

“We monitor online marketing and distribution channels which are open to the general public. In addition, we make use of whistle blowing from former employees or tips from customers to reach closed-circuit channels like WhatsApp groups.” – *Capital Markets Board of Turkey*

90. The vast majority of IOSCO members have a wide range of monitoring tools and policies in place to ensure that online marketing and distribution is not carried out in an aggressive, misleading or biased way or does not involve misrepresentations or fraud.

91. While most IOSCO members do not currently have special powers for online marketing and distribution, some members have relevant general powers and use various tools, including:

Mystery shopping: Mystery shopping is a tool used by some IOSCO members to understand and analyse firm practices. It is also used for inspecting and auditing firm level execution of specific customer services based on regulatory standards. In the regulator survey, the IOSCO members Spain, Australia, AMF Quebec, Canada, UK, France⁵⁷ and Israel indicated that they conduct online mystery shopping.⁵⁸

Use of Web Scraping Platform: The UK FCA has built a “Web Scraping” platform to support a number of use cases, using the FCA powers under Investigative Powers Act 2016.⁵⁹

On and Off-Site Supervisions: For example, in Hong Kong, the SFC employs on and off-site supervision of financial intermediaries’ online distribution platform to investigate instances of consumer harm.

Thematic reviews: Thematic reviews are used for supervision of online marketing activity to assess the level of compliance with the conduct of business rules. The Spanish CNMV adopts this approach.

Qualitative example 11 – Review of online marketing and distribution material

“Regulated firms are obliged to perform ex-ante compliance reviews for online marketing and distribution materials and submit relevant materials to us to review. If there are any aggressive, misleading or biased presentation in materials, the regulated firm will be warned or fined as per the regulation.” - *China Securities Regulatory Commission*

5.7. The Firm Perspective – Regulatory compliance challenges

92. Firms have highlighted the following regulatory compliance challenges:

Strict disclaimer and wording requirements: Firms stated that the regulatory obligation to use specific wording and disclaimers within each advertisement is challenging, especially due to display

⁵⁷ For example, the French AMF uses mystery shopping to monitor how financial products accessible to the general market are marketed, however, does not consider mystery shopping as a supervisory exercise, rather a tool to study and understand the existing market practices.

⁵⁸ Please see Chapter 8 for a discussion on mystery shopping in the enforcement context.

⁵⁹ Please refer to Chapter 8 for a detailed description and further examples of IOSCO members that use scraping tools in the enforcement context.

possibilities with regards to text length option on mobile devices or using paid advertisements on search engines.

Changing regulatory requirements: Some firms found it challenging to ensure that the external communications comply with evolving regulations as the field of online marketing and distribution is still developing. Complying with such regulations likely requires firms to review their digital activities and controls on a continuous basis and to seek (re)approval from the compliance department.

Defining customer risk awareness: Related to customer onboarding, one firm stated that the largest compliance challenge is defining the risk profile of customers in line with the regulatory requirements.

Getting to know the customer through social media: Another challenge is getting to know the customer thoroughly through social media as the knowledge and experience of investment and risk tolerance level may differ widely.

Limited space on mobile application terminals as well as in online advertisements: Limited screen space on mobile devices and in online advertisements makes it difficult for a firm to provide complete and necessary information for a customer to make an investment decision and include potential risk disclosures. This limitation may result in a situation whereby the customer may neglect potential risks or act based on inadequate and incomplete information. To address this, one firm surveyed mentioned that the firm complements the required information link with an additional click-through to all the relevant information.

Risk of circumvention of the controls in place: The use of mobile devices and new technology, increases the potential for customers to (unwittingly) buy products and services outside their home jurisdiction,⁶⁰ leading to the risk of firms circumventing/ breaching the electronic restrictions, such as geographical restrictions, in place to limit a distribution to within their jurisdiction.

⁶⁰ According to survey answers, mobile devices make it possible to switch off the geographical location, see also Qualitative example 9, but also not all firms possess adequate tools to control the geographic location of the client.

Chapter 6 – Cross-Border Activity and Challenges

93. This section analyzes various aspects of online cross-border marketing and product distribution and the challenges related thereto. For the challenges encountered by IOSCO members in the enforcement activities against unauthorized online marketing and distribution of financial products and services, please refer to Chapter 8.

6.1. Cross-border online activity – quantitative findings

94. According to the results from the firms' survey, a quarter of the firms surveyed actively market/distribute their products on a cross-border basis. European firms estimate that 10% of their services and products are provided on a cross-border basis under the European MiFID II passport. The responding African jurisdictions as well as the Middle East show a higher level of cross-border activity with 32% and 27% respectively:

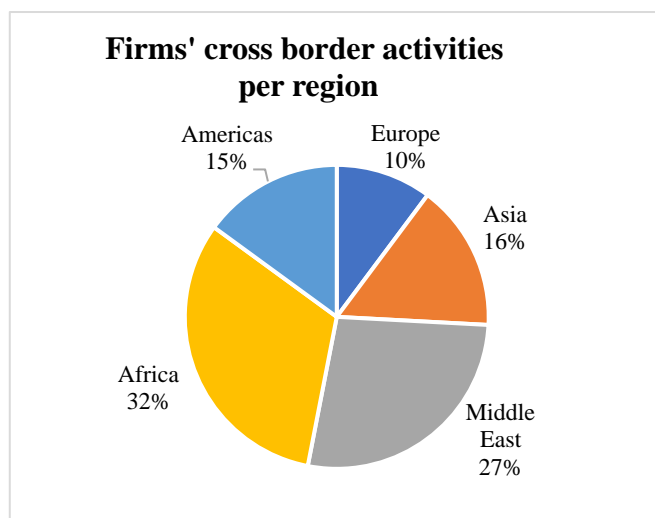


Chart 9

6.2. Multi-language marketing material

95. Half of the respondent firms engaging in cross-border activity provide marketing material in more than one language. Provision of marketing material in more than one language is prominent in jurisdictions where multiple languages are spoken. This trend is partly observed in Europe and Asia. In the Middle East and Africa, all of the respondent firms stated that they use multi language material.

6.3. Tools used to target customers on a cross-border basis

96. While there are jurisdictional differences in how firms target financial consumers on a cross-border basis, social networks, online chat tools, mobile applications and third-party platforms are still the main tools that firms use to this purpose.⁶¹ Generally, financial consumers are targeted via popular social networking websites like Facebook and Instagram, as they provide unrestricted reach that is not confined to a jurisdiction. Location analytics within Google is also gaining popularity as it allows firms to track the whereabouts of their clients along with what kind of products they prefer. Moreover, social networking websites allow firms to benefit from multi-language tools that further target specific financial consumers and expand the firm's reach across borders.

6.4. Role of licensing in cross-border activity

97. Licensing is a key concept, which bifurcates how firms engage in online marketing on a cross-border basis. For example, firms are responsible for complying with relevant laws of a jurisdiction when marketing their products or services. Therefore, firms should only target cross-border financial consumers in jurisdictions where they have a pre-existing license. However, firms could accept foreign financial consumers from other non-licensed jurisdictions on a reverse solicitation

⁶¹ A firm from the Middle East Region stated that third party platforms are used to target and map customers. Third-party platforms often target audiences by collecting their information via a data management platform which ultimately increases the number of clients targeted. Platform analytics (such as Google analytics) and social media (Facebook, Hotjar) are used in cross-border offerings in Africa. In the Americas, two firms stated that they do not map the reach of their online activity. For North America see footnote 4.

basis,⁶² provided they are legally entitled to do so, if the consumer found the website and if it is considered that the website is not specifically targeting these financial consumers.⁶³

6.5. Firm-level policies, procedures and controls to prevent the breach of local laws

98. The firms' survey results indicate that most regulated firms are not active in cross-border online marketing/distribution. Those firms that are active in online marketing stated that their online marketing does not target financial consumers outside of their home jurisdiction. To achieve this, 30% of the firms stated they have control mechanisms in place. Such control mechanisms include firm-level compliance scans and information technology ("IT") filters to ensure that no targeting outside of the home jurisdiction takes place.
99. While many firms find it challenging and costly to maintain a proper level of understanding of applicable foreign regulations, most firms active in cross-border distribution⁶⁴ apply policies and procedures to prevent the breach of different local laws where potential financial consumers are based, including:
- Having firm-level rules included in handbooks, policies and procedures, as well as in the customer due diligence policy;
 - Tailoring the onboarding process to the applicant's country of residence and the respective jurisdictional requirements;
 - Requiring customers to have bank accounts in the relevant jurisdiction where the firm is licensed or allowed to provide service;
 - Prohibiting direct marketing in any country in which the firm is not licensed or allowed to provide service for example by maintaining appropriate group policies;
 - Seeking comprehensive legal advice in multiple jurisdictions to ensure that the firm operates within legal obligations; and
 - Accepting customers who find their website from foreign jurisdictions on a reverse-solicitation basis, provided that the firm is legally entitled to do so.
100. Where reverse-solicitation (see footnote 48) is allowed (although the firm is not licensed in the country of residence of the investor requesting the service/product at his own initiative), ensuring proper disclosure to customers that:
- the firm is not licensed in their jurisdiction;
 - products are not intended for them;
 - they need to consent that they have not been directly solicited (to able to continue the onboarding process); and

⁶² Reverse solicitation is the situation where a client or prospect initiates at its own initiative the provision of a financial service by a third-country firm (from EU perspective). Reverse solicitation would be considered as met when the third country firm responds to the exclusive initiative of the client.

⁶³ For an example of the concept of reverse solicitation in the US, see 1998 Commission Internet release at <https://www.sec.gov/rules/interp/33-7516.htm>. Excerpt: When offerors implement adequate measures to prevent U.S. persons from participating in an offshore Internet offer, we would not view the offer as targeted at the United States and thus would not treat it as occurring in the United States for registration purposes. What constitutes adequate measures will depend on all the facts and circumstances of any particular situation. We generally would not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the United States, however, if the Website includes a prominent disclaimer making it clear that the offer is directed only to countries other than the United States. For example, the Website could state that the securities or services are not being offered in the United States or to U.S. persons, or it could specify those jurisdictions (other than the United States) in which the offer is being made; and The Website offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering.

⁶⁴ According to survey results, 27% of the firms are active in cross border online marketing/distribution. Amongst the active ones, 70% have control mechanisms in place.

- any contact following a form filled in on the internet via a banner in a direct or indirect way cannot be considered as reverse solicitation.

101. To avoid breach of local laws, measures should be in place to prevent firms from actively marketing to financial consumers in jurisdictions where the firm is not licensed or allowed to engage in such activities.

102. In addition, the following good practices can be considered by firms so as to prevent detrimental situations for investors:

- having a bank account(s) in the jurisdiction in which the firms is located;
- ensuring disclosure of information to financial consumers on all relevant information required under host jurisdiction’s disclosure requirements;
- seeking legal advice, including on local financial consumer law; and
- having a “complaints service” in place which offers services in the language of the targeted jurisdiction and access to an ombudsman in the host country.

Measure 6: Ensuring compliance with third country regulations

Where firms may have clients from jurisdictions other than where they hold a license, the firm’s home regulator should consider requiring their domestic firms to have adequate policies and procedures for onboarding these clients. For example, IOSCO members could require firms to undertake due diligence to determine whether they are required to hold a license in a prospective client’s home country and/or whether other regulatory obligations apply, and to retain records of such due diligence.

6.6. Factors that IOSCO members take into consideration while determining whether the firm falls under their regulatory remit

103. Determining where online marketing is occurring is particularly important to determine the responsible regulator and the applicable law. IOSCO members face various challenges in determining whether the online activity occurs in their jurisdiction. Furthermore, various legal consequences might be tied to the online activity depending on where it occurs. IOSCO members typically take into account several factors to determine whether online marketing and distribution activities are carried out in their own jurisdiction by a regulated firm that is headquartered outside the home jurisdiction. IOSCO members could also assess whether national residents are being targeted by firms located in another jurisdiction and whether the communication, website or the app directly targets local customers. IOSCO members could use a number of criteria for this purpose. These could include checking:

- whether the firm uses the specific residents’ language, offerings of dedicated phone services to national residents, use of national electronic domain, etc.;
- whether the firm has a postal address or telephone number in the specific jurisdiction targeted;
- whether the firm has business premises or office for marketing purposes in the specific jurisdiction targeted;
- whether the firm has a “.X” (targeted specific jurisdiction) internet domain name;
- whether the firm organizes the distribution of its products and services through one or more distribution networks located in the specific jurisdiction targeted;
- whether the firm sends promotional communications, regardless of the medium, to potential customers residing or established in the specific jurisdiction targeted;
- whether the firm approaches potential clients domiciled in in the specific jurisdiction targeted directly (email, fax, phone, letter) for the purpose of offering financial services and/or products (other than within existing relationships in relation to these particular products); and
- whether there is evidence of an internet offer targeted specifically at residents, such as the domain name, language, product description, financial or other country-specific client

information, legal framework, prices and methods of payment, as well as the provision of home jurisdiction contact details.

6.7. Main compliance and regulatory challenges for firms in cross-border online marketing and distribution activity

104. Firms have responded that they keep abreast of and follow foreign regulatory restrictions. However, as marketing campaigns become increasingly borderless, it becomes challenging to both deliver robust advertising and stay within regulatory limits at a global scale.
105. One of the biggest challenge firms reportedly face is keeping up to date with regulatory developments across multiple jurisdictions. Understanding global regulation, which can be jurisdiction-specific and remaining on top of constantly changing regulation is difficult and costly. This is particularly difficult for new entrants due to the cost of accessing sophisticated legal and compliance advice.
106. Additionally, firms drew attention to the competitive disadvantage and regulatory arbitrage created by unlicensed firms. Some surveyed firms stated that when regulatory restrictions become too burdensome and complex, the burden of cost falls on licensed firms that are mindful of legal and reputational considerations, and the entities that benefit most are often those that are improperly operating unlicensed and unregulated as they do not comply with the necessary requirements and/or circumvent the law. Furthermore, their ads can be easily accessed by financial consumers due to the aggressive targeting methods that they utilise while not necessarily limiting ads to the group of clients to whom their products are suitable. Regarding the joint efforts by IOSCO members to address regulatory arbitrage, please see Chapter 8.

6.8. Regulatory challenges in supervising cross-border online marketing and communication

107. IOSCO members typically use a full set of administrative sanctions ranging from warnings and suspensions to withdrawal of license against firms that engage in unlawful online marketing and distribution on a cross-border basis without authorization. In general, most members have sanctioning powers on the individual firms that they regulate, but some can request websites to be shut down as described in Chapter 8. The majority of the regulatory regimes require firms providing digital financial services in their jurisdiction to be licensed. These requirements typically allow firms to perform marketing and distribution abroad, however, as long as the service is provided within the home jurisdiction (when local customers are also being served or services are located in the home jurisdiction), the firm should be authorised given the general licensing requirements of the respective regulator are met.
108. The majority of IOSCO members allow regulated firms to operate through different internet domains or use of different trading platforms. The name of these domains or platforms may differ from the regulated firm's corporate name. Therefore, several members require firms to disclose to their customers the internet domains which may have a different name than the legal entity. The rule of clear, fair and not misleading information to investors prevails in most cases.
109. The vast majority of IOSCO members do not differentiate between supervision of online marketing and distribution activities targeted at domestic customers versus those targeted at foreign customers. Most members oblige firms to comply with the local rules. Few members stipulate that foreign customers' local law will have to be taken into consideration by the firm.

6.9. Firms' activity through different internet domains

110. Use of different internet domains can increase the reach to a wider population. 25% of the firms operate through different internet domains in order to target a wider audience.⁶⁵ Some firms also

⁶⁵ While European and the Middle East (with one exception) firms do not operate through different domains, this is not the case in Asia. Firms in Asia state that there are cases of different internet domains where the company is a licensed entity in various countries and in other cases because they operate several investment platforms targeting different customer segments. In Africa different domains are also used to broaden the company's reach or for group structure and/or trademarks purposes. In the Americas, all the firms providing cross-border activities use more than one domain, with the aim of obtaining a maximum reach. For North American survey participation, see footnote 4.

use separate domains for the different services they offer. Firms also operate through different internet domains per jurisdiction in order to align information to the respective compliance requirements. They use the geographical IPs to re-route individuals to the right domain to ensure that they comply with the appropriate regional legislation. Several firms did not explain how they ensure customers are informed in line with the respective regulatory requirements if they rely on a single domain.

111. Firms use different internet domains for a number of reasons. Firstly, the use of different internet domains allows them to protect their business against user error. For example, firms prefer purchasing domains with similar spellings to avoid customer confusion. This in turn helps prevent brand poaching because competitors with similar names may often create unnecessary confusion for customers. Secondly, and more importantly, the use of different internet domains allows firms to segment their customers and reach out to new markets. The rising trend towards geographic domains allows firms to add a location specific extension to reach out to more customers. Thirdly, and in addition to reaching out to more customers, the use of different internet domains with specific geographic location allows firms to increase their visibility under different search engines (e.g., Google's SEO).
112. Given the anonymity and the ease of changing domains on the internet, the use of different internet domains may create risks related to investor protection and challenges in compliance with the relevant regulatory and disclosure requirements, as well as identifying whether the website belongs to a firm that is authorised under national law. It becomes difficult for IOSCO members to attribute liability to the firm. Importantly, when firms increase the number of internet domains for daily business, this adds to the pre-existing cross-border challenges because of the jurisdictional overlap.

Measure 7: Clarity about legal entities using internet domains

IOSCO members should consider requiring firms, when they offer products through multiple internet domains, to adopt policies and procedures requiring clear, fair, and not misleading disclosure about who the underlying legal entity is offering the product and under what license (and from which jurisdiction). This disclosure should also cover the scope and limitation of services. IOSCO members should also consider prohibiting firms from redirecting clients to a third country website to avoid the regulatory requirements in a jurisdiction.

Additionally, IOSCO members may wish to consider keeping an open register which could enable the public to check and confirm whether a website belongs to a firm authorised to provide services in the jurisdiction and under the law.

6.10. Regulatory cross-border cooperation

113. There is consensus across the IOSCO membership that effective regulatory and cooperation techniques are enhanced and enforced through discussions of issues of common interests. Most members provide assistance to their foreign counterparts under information sharing arrangements and the European members abide by the EU laws on cross-border aspects within the EU. Chapter 8 talks about the enforcement aspect and the measures that may contribute to address the enforcement challenges that may emanate from cross-border offerings.

Chapter 7 - Inappropriate Behaviour and Risks

114. Online marketing and distribution can enable inappropriate behaviour and thus increase the risks that investors are exposed to. This is mainly due to the following reasons:

- **Asymmetric information between firms and customers:** One of the main drivers of inappropriate and risky behaviour in online marketing and distribution is the asymmetry of information between the customer and the firm. The survey findings showcase incidents of deceptive advertisements in online marketing that misrepresent facts to the customer.
- **Anonymity in online offerings:** Some firms mentioned that customers are unable to identify the legitimacy of firms when they are targeted by fraudulent and fake firms disguised as well-known firms. These fake firms can pretend to be associated with other companies, steal and use their marketing materials and spoof their e-mail addresses. Such activity not only damages the reputation and brand value of the imitated company, but also may result in retail investor harm.
- **Use of online platforms:** Online platforms can facilitate channelling of huge amount of advertisements with no or poor oversight. The pure amount can be a regulatory challenge.
- **Target audience without investment knowledge and experience:** Marketing financial services on social media platforms like TikTok and Instagram target a relatively young audience, who might not be familiar with investing. Such advertisements often do not properly display essential information on the potential risks.
- **IT illiteracy on the retail investor side:** Firms may take advantage of consumers who may lack adequate IT skills by releasing their personal information online without their consent.

Qualitative example 13 –

“Common risky practices of online marketing and distribution that we observe in the marketplace are the following:

1. Eligibility of investors: Customers' risk tolerance may not match with the products recommended by firms through online channels.
2. There exist omissions and errors in online product parameters.
3. Misleading and non-compliant online recommendations in relation to products, including inaccurate past or expected return (sometimes with promise of guaranteed future returns).
4. Spreading online information combined with fake news which may induce irrational investor behaviour.”

- Investment Advice Firm from China

Commonly Observed Inappropriate Behaviour

115. Some of the commonly observed inappropriate behaviour are the following:

- Pretending to be a credible source to extract information – impersonation;
- Junk e-mails that overpromise returns;
- Bulk targeting;⁶⁶
- Hacking and other cyber security violations; and
- Fake success stories by using influencers.

116. Furthermore, as the dependency on technology increases, so do operational risks and hacker threats. The following chapter analyses the regulatory perspective from an enforcement point of view and shares good practices from IOSCO members.

⁶⁶ Bulk targeting is sending the same e-mail campaign to people in the same geographic location in a bulk without customizing.

Chapter 8 - Enforcement

117. In line with Principle 11 of the IOSCO Objectives and Principles for Securities Regulators,⁶⁷ IOSCO members are encouraged to evaluate whether their powers are sufficiently robust and flexible to be effective and dissuasive against misconduct.
118. This part of the Consultation Report developed by Committee 4 highlights the relevance of international cooperation and identifies and promotes for IOSCO members an Enforcement Toolkit with potential enforcement approaches that may contribute to more effectively curb cross-border online misconduct globally, as a complement and further specification of those explored in the Retail OTC Leveraged Report published in 2018.⁶⁸ Given their ongoing importance, IOSCO will continue to focus on these issues.
119. The identified proposed measures are complementary and should be seen as part of a holistic approach to coordinate efforts to deliver more consistent global enforcement outcomes in this area.
120. Educational materials, warnings and updates on enforcement actions are another critical complement to mitigate and address risks posed by online marketing and distribution to retail customers. Digital fraudsters are always on the move and often hide behind a “digital veil” that makes it difficult for IOSCO members to locate, identify and take action against them. Well informed investors are the first line of defence against fraud and unlicensed operators. Raising public awareness of illegal schemes and of regulators’ enforcement actions is an additional and critical tool that authorities can use to limit cross-border online misconduct and to deter future illegal activity.⁶⁹
121. The present work on the enforcement section complements the proposed policy measures developed by IOSCO Committee 3 to address and mitigate the risks posed by online (cross-border) marketing and distribution by licensed firms.

8.1. IOSCO survey findings

122. This section describes the findings of the survey conducted among Committee 4 members about their experience of enforcement of digital offerings.

A. Investigatory and enforcement challenges

123. The survey responses showed commonalities when it comes to the identification of the practical challenges faced by IOSCO members, notwithstanding diversity in legal frameworks and

⁶⁷ Under IOSCO Principle 11, “*the Regulator should have comprehensive enforcement powers.*” (see IOSCO *Objectives and Principles of Securities Regulation*, May 2017, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>). According to the *IOSCO Methodology for Assessing the Implementation of the IOSCO Objectives and Principles of May 2017* (available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>), the regulator should have comprehensive powers, including detection, investigation and sanctioning powers. Furthermore, in the IOSCO Report on *Credible Deterrence In The Enforcement Of Securities Regulation*, June 2015, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf>, IOSCO noted that “*to keep pace with financial innovation and illicit practices, regulators should consider regularly evaluating, and, as appropriate, revising regulatory and enforcement strategies, priorities and tools*”.

⁶⁸ The toolkit described in the 2018 Report explores issues raised by unlicensed entities offering OTC leveraged products to retail investors, with a particular focus on unlicensed binary options firms and activities carried out by them. The measures included in the 2018 Report cover five areas: (i) Formal enforcement actions; (ii) Cooperation with international and local partners; (iii) Laws that facilitate or strengthen enforcement actions; (iv) Information gathering; and (v) Raising awareness with relevant stakeholders such as advertising facilitators, mobile application providers, banks and payment platforms.

⁶⁹ The *IOSCO Report on Retail OTC Leveraged Products*, cited above, includes also a specific “Toolkit of investor education materials with guidance about retail OTC leveraged products and firms offering them”. The toolkit contains guidance to regulators in the following four areas: (i) Developing educational content about retail OTC leveraged products; (ii) Informing the public about unlicensed or fraudulent firms; (iii) Using different communication channels to reach targeted audiences; and (iv) Forging partnerships to increase the effectiveness of educational measures. The *IOSCO Report on Investor Education on Crypto-Assets of December 2020* (available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD668.pdf>) contains additional guidance to regulators in the aforesaid areas in relation to crypto-assets.

enforcement approaches. Social media, and the Internet generally, display some unique features⁷⁰ (e.g., consistently with Committee 3 findings, nearly instantaneous communication with many users in multiple jurisdictions at a relatively low cost; ease to create a site, account, email, direct message, or webpage that appears legitimate; potential for anonymity; speed of change) that make credible deterrence particularly difficult to achieve.

124. Many IOSCO members reported that investigations in the context of online marketing and distributions of financial services and products are costly and time consuming. Although most IOSCO members enjoy wide information gathering and enforcement powers, they still face challenges in timely detecting, investigating and enforcing illegal activities in the essentially borderless online environment, especially in tracing the flows of funds⁷¹ and in determining the geographic location of the operations and of persons responsible, the true identity of such persons and the actual scale of harm to investors. This is due to a combination of different factors as outlined below and it is perceived as complicating the ability to undertake swift and effective enforcement actions.
125. Some IOSCO members noted that investigations and enforcement of illegal online activities may be particularly challenging where new complex products such as crypto-assets are used. Further, IOSCO members reported that where the activities of market participants are novel, determining the scope of regulation can be difficult. Where crypto-assets are used, it may be more challenging to trace the flow of funds and it may take a longer time to obtain information from another jurisdiction due to regulatory differences.

Fast moving targets

126. Many IOSCO members reported that online illegal activities are essentially cross-border moving targets. Perpetrators of online illegal activities tend not to “stay in one place.” They regularly change domain names and locations as well as the target location of their fraudulent schemes after the publication of alerts or warnings by the regulator or after a website is taken down. At a relatively low cost, they migrate to new products, brands or jurisdictions to continue to defraud investors. This migratory conduct creates significant challenges to many IOSCO regulators’ activities, even when specific investigatory techniques and enforcement powers, as described below, are successfully used.

Multi-jurisdictional/complex structure, regulatory arbitrage and gaps

127. Many IOSCO members reported that online offers tend to be structured by setting up different parts of the online marketing process in different jurisdictions and using multiple layers of letter-box entities or cloned names to elude investigations. Perpetrators often use different brand names confusing investors. Introducing broker related activities by third parties may actually be hiding unauthorised provision of investment services. OTC platforms and their data servers are often

⁷⁰ In the IOSCO Report on *Securities Activities on the Internet*, October 1998, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD83.pdf>, IOSCO explored the main characteristics of the Internet and how they may increase opportunities for misconduct by bad actors. The said report also describes factors that should be taken into account by regulators to identify whether there are sufficient ties to the local jurisdiction leading to their exercise of their regulatory authority. In this regard, please also see the IOSCO Report on *Securities Activities on the Internet II* of June 2001, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD120.pdf>. The IOSCO *Report on Retail OTC Leveraged Products*, cited above, identifies particular challenges encountered by IOSCO members in combating illegal activity (including sales of the products by unlicensed firms and fraud) arising from the sale and offer of OTC leveraged products through online trading platforms.

⁷¹ Many regulators reported that mapping the flow of funds may be particularly challenging, particularly if investors do not send their money directly to the entity operating the website and instead send funds via credit-card or payment processors to foreign intermediaries, including those opened by various nominee entities. Obtaining information related to the scheme and tracing funds to off-shore entities or financial institutions is time-consuming. A few regulators noted that, even when information is obtained, the information format can be challenging to navigate and may require currency conversions and significant data entry to analyse the output.

deliberately incorporated in countries with regulatory gaps⁷² or in uncooperative jurisdictions. IOSCO members may face difficulties in obtaining information and documents from multiple foreign regulators or from foreign website and social media providers. This makes the investigation and collection of evidence a difficult and lengthy process and creates challenges to pursue legal actions.

Private communication channels and “anonymizing” tools

128. Several IOSCO members reported that the use of encryption and private messaging (such as through e-mail and smartphone apps) makes it difficult for regulators to gather valuable evidence. In order to obtain the content of such messages, some IOSCO members may need to make a petition to a court and to identify the individuals first. Sophisticated search engine optimisation tools or cloaking techniques may be used by scam perpetrators to hide illegal activities so that a monitoring algorithm and/or persons see a landing page with content completely different from the one that potential investors are presented with. The ability to identify the offender is further complicated by the fact that the products often are offered on a website that is registered through a privacy registrar company which may be located in a jurisdiction with limited ability to access the underlying subscriber information and/or is registered through a shell company operating in a jurisdiction that is slow, unable or unwilling to provide, information identifying the entities and individuals associated with the shell company.

Inaccurate and transient nature of information

129. Many IOSCO members reported that information made available on a website or social media may be deliberately inaccurate, partial, ephemeral or misleading by design, in order to conceal the true nature or scope of the product or service and to circumvent the regulatory perimeter. Fake names and virtual offices are often used to hide the identity and location of the persons behind the illegal activity. Moreover, information made available, including false or misleading marketing/promotional material and communications used to solicit investors, can be easily and inexpensively erased or altered, posing regulatory and evidentiary issues for IOSCO members attempting to build an investigation. Many apps do not preserve the content of communications.

Enforcement challenges

130. Many IOSCO members reported that it can be difficult at times to pursue legal action against perpetrators of illegal online activity. This is the case for example where the persons behind the activity cannot be located in order to be served due to the use of multiple layers of nominee entities hiding the identity of the true operator. The collection of monetary sanctions from other jurisdictions may also be challenging, especially if the person is not regulated. Similarly, it may be difficult to have an asset freeze recognized and implemented abroad, and/or have the funds repatriated at the conclusion of the case. Some survey respondents outlined that enhanced ability to take sufficient and prompt actions to deal with illegal products or activities, faster cooperation with foreign regulators and greater liaison with law enforcement authorities would enable them to better tackle online harm.

B. Specific investigatory techniques

131. In order to keep pace with the challenges identified in the previous section, some IOSCO members reported that they are increasingly adopting or are interested in exploring technology-based investigatory techniques and approaches specific to online marketing and distribution activities. These “specific investigatory techniques” complement the toolkit used for all methods of solicitation or suspicious activities such as the power to require the production of information, obtain statements, request assistance from other authorities, including foreign counterparts, and – in some cases - obtain subscriber and data traffic records from telephone service providers (TSPs) and internet service providers (ISPs). Other IOSCO members are able to use their current detection and investigation powers to address current and emerging threats.

⁷² For example, they may be incorporated in jurisdictions in which the product is not regulated or where entities are not required to retain robust records and regulators may lack the ability to obtain certain types of information, such as trading and payment processor/bank account records.

Customer and Whistleblower Complaints

132. Many IOSCO members reported that given the multiplicity of websites, local customer complaints,⁷³ whistleblower submissions (see examples in the box)⁷⁴ and other unsolicited assistance are an important and crucial source of information for detecting illegal online activities. Receiving prompt and detailed complaints is of particular relevance considering the speed of change in the online environment. As reported by some respondents, obtaining evidence about online illegal activities in a timely manner may otherwise be very difficult. Committee 3 findings also show that, while IOSCO members usually do not have specifically dedicated units responsible for online marketing and distribution related complaints, nearly all of them review customer complaints related to online marketing and distribution.⁷⁵ⁱ

Examples of IOSCO members that have established whistleblowing programs

- The U.S. CFTC developed a whistleblowing program (see <https://www.whistleblower.gov/>) based on monetary incentives, which has proven to be a valuable source of information.
- The OSC Ontario, Canada established a Whistleblower Program which offers monetary awards and whistleblower protections and is a fruitful source of information for hard to detect forms of misconduct (see www.officeofthewhistleblower.ca).
- The U.S. SEC established an Office of the Whistleblower to administer the SEC's program (see <https://www.sec.gov/whistleblower>).

Forensic evidence, undercover investigations and mystery shopping

133. Some IOSCO members have established specialized units and/or asked already existing surveillance departments to gather forensic evidence through proactive Internet detection activities.

134. In a few jurisdictions, IOSCO members are empowered to conduct undercover investigations and mystery shopping in the context of online marketing and distribution of products and services, using pseudonyms/non-real email addresses and in certain cases fake passports and/or bank accounts. As reported by these IOSCO members, this may be a tool to verify ties to a local jurisdiction and to gather information and evidence, including information useful to determine the

⁷³ The public can be a useful source of information and intelligence to identify misconduct. Deterrence can be enhanced when regulators have transparent, well known and easily accessible mechanisms for the public to provide tips and make complaints about suspected or actual misconduct. See IOSCO Report on *Credible Deterrence In The Enforcement Of Securities Regulation*, supra.

⁷⁴ The relevance of developing programmes to encourage whistleblowing to regulators was highlighted in the IOSCO Report on *Credible Deterrence In The Enforcement Of Securities Regulation*, supra.

⁷⁵ According to Committee 3 findings, Abu Dhabi, Japan, UK, the Netherlands, and Chinese Taipei have established dedicated internal structures to oversee customer complaints related to digital advertising and distribution. In Italy, customer complaints are analyzed and logged in a database, where categorization is made based on the provision of the service or activity involved. Enforcement teams then follow-up on such complaints. In Israel, the handling of public inquiries under ISA's internal procedure is the responsibility of the Public Inquiries Officer. In another interesting example, the U.S. SEC and FINRA further require firms to report customer complaints with statistical information on a quarterly basis. Such statistical information includes customer complaints related to misinterpretation, suitability requirements, and marketing/ sales communications and problem codes (Problem codes is a FINRA issued document which is used to categorize complaints)
https://www.finra.org/sites/default/files/Web%20-%20Complaints%20%20Problem%20and%20Product%20Codes_0.pdf

scale of potential harm and to identify and locate the persons behind the illegal activity. Examples resulting from the survey responses are provided in the box below.⁷⁶

Examples of IOSCO members conducting undercover investigations and mystery shopping

- AFM Netherlands has been recently empowered to perform pseudo purchases with a complete fake identity (including a fake passport and/or bank account under a false name); however certain additional practical competences in order to make an effective use of such new power have not yet been arranged for.
- AMF Quebec conducts undercover operations to gather evidence on the web. The investigator posing as an investor contacts the target under a false identity (asking questions, including to identify and locate the perpetrator and to determine the scale of harm, and requesting documentation) and becomes an investor. Accusations can be laid against the target for the solicitation of the investigator posing as a potential investor. Significant efforts from certain social media to eliminate fake accounts can make it challenging for the regulator to create a false identity. BCSC British Columbia uses special anonymous IP addresses to search social media and responds to advertisements (feign interest in offers) and attends webinars covertly.
- CONSOB Italy has a dedicated unit in charge of collecting forensic evidence through non-traceable IP addresses and, to the extent possible (e.g., it is not possible to create fake documents such as IDs), carrying out undercover operations under fake names/emails, for example verifying whether the website enables registration from Italian residents and give access to investment services/products. Once the searches/checks are completed, the unit provides investigators with relevant outcomes, including for instance non-mutable screenshots, information on persons behind non-anonymous domains, outcomes of the undercover attempt to register and open trading accounts, etc. These documents and information are further analyzed to build the case and are often essential to move on with investigations around online activities.

Tools to monitor websites and social networks

135. A few IOSCO members (see examples in the box below) are employing so-called scraping tools and artificial intelligence to systematically monitor websites and/or social networks proactively, e.g., where specific products are offered. Moreover, Committee 3 findings show that some IOSCO members use third-party providers that utilize professional monitoring tools to scan social network. These technology-based tools enable investigators to explore and analyse data collected from the web or social networks through keyword searches and to identify risky promotions or potential harm.

⁷⁶ On the use of mystery shopping techniques, see also the Committee 3 findings in Chapter 5.

Examples of IOSCO members using tools to monitor websites and social networks

- AMF France monitors websites that are identified as being suspect with the help of professional tools. An alert appears if something changes on those websites. Three specific tools based on Artificial Intelligence have been developed: 1) FISH (Financial Scam Hunter): web scraping of financial websites and automatic scam qualification; 2) SPADE (SPAM Detection): classification by an algorithm to determine the relevance of spam signals received by a public-private partnership (Signal Spam); 3) WETREND: detection of weak signals by topic modelling in order to discover upcoming and trending financial scams, using spams from Signal Spam and complaints of investors. When a new financial investment is detected on the internet, a legal analysis of its activities is carried out before deciding on the further course of action.
- AFM Netherlands uses scraping tools to monitor websites where specific products are offered, such as CFDs.
- CNMV Spain has been applying an ongoing systematic search for unauthorised entities throughout the Internet environment.
- ISA Israel conducts proactive technological monitoring of ventures by professional monitoring tools that scan social networks by keywords.
- UK FCA has been working on building a “Web Scraping” platform to support a number of cases, which includes the detection of risky financial promotions advertised to consumers through search engines and via websites. A custom built front-end will allow supervisors to build a scraping request either through the use of search engine/search terms, or through entering URLs directly. The tool then scrapes data from the web and will allow supervisors to explore and analyse the data, once it has been collected, for example through keyword searches, for the purpose of efficiently identifying risky promotions and potential harm within the scraped results. The data is used to identify the priority results and to take action. The regulator intends to look to further build out such products and add additional capabilities to the tool to support other use cases.
- U.S. CFTC’s LabCFTC has launched the Project Streetlamp competition (see <https://www.challenge.gov/challenge/project-streetlamp/>) to challenge innovators to utilize technology, including artificial intelligence and innovative approaches to detect foreign entities that should be – but are not – registered with the CFTC. The competition is intended to generate information that ultimately helps customers make more informed decisions about whether to trade with, or through, these unregistered foreign entities.

Communication with third-parties such as ISPs, criminal authorities or the financial police

136. Some IOSCO members have had discussions with ISPs, social media entities and other websites asking them to actively vet/ban posts connected to investor scams⁷⁷ or have entered into protocols with criminal authorities or the financial police to strengthen cooperation against potential scams.

⁷⁷ Working with ISPs, social media entities and other websites to have them remove content on a voluntary basis may not be appropriate in every circumstance. Foreign domains cannot be blocked as the service providers usually require formal local court orders or may not cooperate with regulators.

Examples of communications between IOSCO members and third-parties against online illegal activities

- The Dutch AFM reported to have had discussions with social media parties in order to ask them to actively monitor/ try to ban investor scams. A difficulty which is encountered is that these scam parties use a technique named ‘cloaking’, in which the monitoring algorithm and/or persons see another landing page different from that seen by potential investors.
- The French AMF entered into a protocol with the financial police defining the framework for cooperation which enables the parties to share their knowledge in order to ensure more effective identification of trends in new financial scams and carry out joint prevention and awareness-raising initiatives among the general public. The cooperation framework will be extended to include training for police officers in charge of receiving complaints to familiarise them with the financial market sectors. A special task force has been created on digital intelligence, which allows French institutions and government departments to exchange information on digital intelligence tools and best practices.
- CONSOB Italy transmits a specific report to the criminal authority for each suspected case of illegal activity, including activity perpetrated online. CONSOB is also a signatory to protocols on cooperation with financial police bodies to facilitate its supervisory activity.
- The OSC Ontario, Canada reported having had some degree of success in working with ISPs, social media entities and other websites in the jurisdiction to have them remove content (i.e., posts and advertisements) on a voluntary basis. The regulator uses “knock-and-talks” disruption tools where staff from the regulator (usually with the assistance of a police officer from a law enforcement partner agency) knock on the door of a subject and tell them to cease and desist. This can be effective in furthering the investor protection mandate and more rapid than a drawn out investigation and hearing process, although it may not be appropriate in every circumstance.
- The UK FCA reported that, if the website is based in the UK, the web host will generally cooperate with the regulator’s request for a website to be taken down. If the web host is based abroad, the response is far more variable.

C. Enforcement approaches

137. The survey showed that most respondents are able to exercise existing powers to take action for violations in the area of digital marketing and distribution. They generally reported a broad range of measures to use and sanctions they can impose, which may include for instance placing limitations on the activities of firms and monetary sanctions.

138. Some IOSCO members are empowered to shut down or block access to illegal websites directly (see the examples in the box) or apply for court orders restricting the activities (including website shutdown), freezing assets or obtaining search warrants. Other authorities reported some positive experience in persuading local web hosts to cooperate with their request for a website to be taken down voluntarily, whilst noting this may not be appropriate in every circumstance, in particular as regards foreign websites. As the ability to take quick actions to stop violations is critical to minimize investor harm, the power to shut down or block access to illegal websites directly or the existence of appropriate mechanisms for obtaining a court order for this purpose on an urgent or prompt basis are reported as being particularly important to support the effectiveness of the enforcement action. For example, a positive experience was reported by a regulator in relation to the fact that it may directly require ISPs to block access to an illegal website from its country regardless of whether the domain and hosting are within the member jurisdiction and without the need to identify the persons behind it first. However, even when powers to shut down or block

access to illegal websites are successfully used, operators of the websites often set up new websites under a new name.

Examples of IOSCO members empowered to shut down or block access to illegal websites (or order removal of unlawful content) directly

- The Italian Consob can, with regard to anyone who offers or carries out investment services via web without being qualified, order that the unauthorized investment services provider cease the infringement. Furthermore, Consob can suspend and/or prohibit the public offering of financial instruments and other financial products (and the related advertising) carried out without a prospectus. Moreover, Consob can directly order the providers of Internet connectivity, operators of other telecommunication networks and providers of telecommunication services to ban the access to the website (including foreign website) from Italy. The power can be exercised in cases of unauthorised provision of investment services/activities as well as in cases of public offers of financial instruments/products without prospectus. The power proved to be the most effective way to promptly stop online illegal activities of foreign entities and supported the credibility of Consob in the fight against online illegal misconduct. From July 2019 until [June 4, 2021], Consob blocked access from Italy to 462 illegal websites. On the homepage of Consob's website (www.consob.it), the section "Watch out for scams!" provides useful information for the purpose of warning investors in relation to unauthorized financial initiatives.
- The Dutch AFM may, in certain circumstances, order the explicit display of a warning to consumers when they access an online interface, order a hosting service provider to remove, disable or restrict access to an online interface or order domain registries or registrars to delete a domain name.
- In British Columbia recent amendments to the legislation seems to allow the regulator to order a website to not disseminate certain information but this has not been tested yet.

Examples of IOSCO members effectively using court processes to shut down or block access to illegal websites

- The CNV Argentina may present a proper pleading to the court asking for the shutdown, but this kind of measure has not been taken yet and there is no related leading case in the national courts.
- The French AMF Chairman can judicially require the blocking of websites. The procedure makes it possible for the regulator to act before the judicial tribunal (which has agreed to organize an audience approximately every 2 months) in order to systematically compel the ISPs in the French national territory, after formal notices are sent to the operator and to the website host. Interestingly, if after the blocking order the offer remains accessible from other websites, it is possible to go back to the judge for the blocking of “bypassing sites” with a simple request by the Chairman of the regulator and without the change of host requiring formal notice to be sent to the new host.
- The DFSA (Dubai) can make an application to the DIFC courts for cease orders and injunctions, which it would do if the subject of the orders/injunctions was outside of the DFSA’s jurisdiction.
- The Japan FSA may seek a court order to cease or prohibit concerned illegal activities including shutdown of the websites.
- The AMF Quebec can be empowered by judgements obtained from administrative tribunals or quasi criminal (penal) courts to require a company owning a website to close down a website or withdraw it from public access.
- The CMB Turkey may request the Court to ban Internet access if the domain and hosting are within the country.
- The UK FCA may seek a court order to cease or prohibit concerned illegal activities including shutdown of the websites.
- The U.S. SEC and the U.S. CFTC have the power to seek emergency relief in federal district court to halt ongoing fraud, such as a temporary restraining order against a person or entity from violating the federal securities and derivatives laws.

D. Relevance of international cooperation and cooperation with other partners

139. Determining the geographical location of operations and of the persons behind the illegal activities, ascertaining the identity of such persons and of the victims and tracking down the flow of funds are complex and often unsuccessful efforts without substantial resources and effective international cooperation.
140. Many of the survey responses show that the existing IOSCO sharing and cooperation frameworks – i.e., formal requests for assistance under the IOSCO Multilateral Memorandum of Understanding (“MMoU”) and Enhanced MMoU (EMMoU) - are generally useful in gathering material information and concluding investigations successfully.
141. In some cases, cooperation may not be timely or fully satisfactory. Another challenge reported by many respondents pertains to difficulties in obtaining assistance from local regulators where regulatory differences and gaps are exploited or arbitrated.
142. Several respondents suggested potential improvements in international cooperation (both under the existing frameworks and through additional forms of collaboration). For example, the survey responses underline that there might be opportunities to improve the quality of requests for assistance and their execution under the existing frameworks and the efficiency in response times, compatibly with the complexity of the investigations at stake. The survey responses also indicate value in improving prompt sharing of intelligence. Some respondents also suggested that IOSCO

could consider encouraging further members to become signatories to the EMMoU (since ISP and TSP subscriber records are critical in investigating cross-border online marketing and distribution of financial services and products) and enhancing dialogue with less cooperative jurisdictions. Some respondents indicated that it would be desirable to enhance the powers of authorities to take appropriate actions in curbing the unauthorised or fraudulent marketing and distribution of financial products and services through online channels. It was further noted that, to the extent assistance can be provided in relation to new products (such as crypto-assets) or in cross-border recovery of sanctions or when requiring undertaking of remedial/corrective actions, it would support credible deterrence and facilitate a faster worldwide response to illegal online misconduct.

143. Furthermore, some respondents suggested enhancing current liaisons with criminal law enforcement agencies, which often play a crucial role in enforcement actions against illegal online activities in many IOSCO member jurisdictions, and to undertake initiatives to make ISPs and web hosting providers more accountable in the efforts towards preventing online scams and prohibiting anonymous website registrations.

144. Those suggestions were considered in the preparation of the Enforcement Toolkit described in section 8.2 below.

8.2. Proposed Enforcement Toolkit

Measure 1: Proactive technology-based detection and investigatory techniques

IOSCO members could consider whether to use proactive technology-based monitoring tools and approaches, where appropriate, to support the detection and investigation of potentially illegal digital conduct.

145. IOSCO members are encouraged to regularly review their investigatory techniques and resources and to retool their kits as appropriate, to facilitate detection and prosecution of illegal activity.⁷⁸ This includes illegal activity conducted using digital means.

146. As a complement to other detection and investigation techniques, IOSCO members could consider the use of technology-based investigatory tools and approaches, such as automated algorithmic searches over the Internet and social media based on scraping software or artificial intelligence, undercover investigations and mystery shopping. These specific tools may help minimize manual work and foster more efficient and proactive approaches, contributing to improvement of the overall effectiveness of members in timely detection, investigation and prosecution of illegal digital activity.

Guidance on the application of the measure

147. Becoming promptly aware of online illegal activities and obtaining sufficient evidence on which to ground an enforcement case can be a challenge because of the vastness and ephemeral nature of the Internet and the constant surveillance that is necessary. Detection may be made harder by several factors explored in section 8.1.

148. Complaints, whistleblower submissions and unsolicited assistance are and remain an indispensable source of information to be encouraged or incentivized (including through relevant investor education and raising awareness initiatives) as they could provide valuable information to members in order to identify potential misconduct and to minimize the harm that could have occurred.⁷⁹ They can be supplemented by online monitoring tools, which can contribute to more timely and effective investigations. Programs for the systematic surveillance of Internet and social media, such as scraping tools, has proven to be a very useful practical tool.⁸⁰ Moreover, certain IOSCO members have the legal authority to conduct undercover investigations and mystery shopping to

⁷⁸ See the IOSCO Report on *Credible Deterrence In The Enforcement Of Securities Regulation*, supra.

⁷⁹ Ibid.

⁸⁰ See the IOSCO Report on *Securities Activities on the Internet*, supra, which states that “Regulators and SROs should strengthen surveillance of Internet activities by routinely monitoring for unauthorized or fraudulent activities”. The Report also states that “Regulators and SROs need to learn new methods for conducting surveillance and must become familiar with Internet-specific methods for locating and sharing information”.

assess the accuracy of information and gather forensic evidence in a timely fashion.⁸¹ Where appropriate, IOSCO members could consider taking steps to be able to conduct such undercover activities as part of their toolkit to be effective and dissuasive against misconduct.

149. It is also important that IOSCO members have qualified technical personnel and adequate resources to keep pace with technological developments. Targeted capacity building initiatives by IOSCO and IOSCO members – such as specialized technology training, e.g., on tracing and tracking crypto-asset transactional information - may serve to enhance the abilities of IOSCO members to investigate and prosecute online illegal activities. Through IOSCO and a greater engagement at the level of the Technology Applied to Securities Markets Enforcement Conference (“TASMEC”),⁸² IOSCO members could continue to share expertise and existing experience and learn from each other about common patterns or fraudulent schemes as well as about specific techniques and advanced technologies explored in surveillance/investigatory activities.⁸³

Measure 2: Power to promptly take action where websites are used to conduct illegal securities and derivatives activity, and other powers effective in curbing online misconduct

IOSCO members could consider seeking additional powers to be more effective in promptly curbing illegal online conduct, including the power to shut down or block access to illegal websites, or seeking a legal order to do so, where appropriate.

150. The regulator or other competent authority could consider additional enforcement powers to be effective against illegal activity. In particular, in order to minimize investor harm, it is important for IOSCO members to have the legal authority, or seek a legal order, to promptly take action to terminate access to online products/services by the public once those online products and services are identified to be illegal, fraudulent, or unauthorised. Still, websites are moving targets, closing and opening quickly under different names/domains to elude investigations. Therefore, it remains key that subscriber data and certain traffic data are maintained by TSPs. ISPs and electronic communication providers and that regulators are able to obtain and share such data in order to work out who is actually behind the setting up of the website(s) and contribute to enhance investor protection on a global scale.

Guidance on the application of the measure

151. Timely detection and prosecution of fraudulent online content is crucial for protecting investors from investment scams, but as survey results indicated in section 8.1 this is extremely challenging for IOSCO members due, among other things, to the sheer volume of content, the anonymity that fraudsters can hide behind online and the cross-border nature of online misconduct.
152. The speed at which the online environment changes makes it important that effective actions be taken to promptly stop online illegal activities as a means by which to ensure investor protection.
153. Public warnings and cease and desist orders may be effective against a licensed entity or persons located in the regulator’s jurisdiction, given the reputational effects and/or the ability to meaningfully enforce the measures in its territory. For abusive activities from abroad/by foreign entities, these measures may not be sufficient.

⁸¹ On the importance of the role that mystery shopping can exercise to identify mis-selling practices and improve the effectiveness of investor protection, see for example the European Parliament Report on “*Further development of the Capital Market Union (CMU): improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation*”, September 2020.

⁸² In recognition of the potential of technology to improve enforcement by increasing efficiency, enhancing decision-making and deterring securities violations, IOSCO Committee 4, in collaboration with the Québec Autorité des marchés financiers, agreed in 2017 to organize semi-annual conferences that allow regulators to share existing data analytic practices and techniques for addressing enforcement issues.

⁸³ In its report on *Securities Activities on the Internet*, supra, IOSCO recommended that “*Regulators and SROs should have staff sufficiently trained in current techniques for conducting surveillance on the Internet*” and they “*should assist one another by exchanging details about techniques for monitoring Internet advertising, offers of securities or financial services that may contain false or misleading information, and by sharing expertise with regulators who have limited experience in this area*”.

154. The power to shut down or otherwise block illegal websites promptly, either directly or via petition to a court, may prove to be an effective means of halting ongoing misconduct. For example, the regulator may be empowered to require local providers of Internet connectivity, operators of other telecommunication networks and providers of telecommunication services to promptly block access from its jurisdiction to illegal websites, including where the website is hosted abroad, without the need to identify the persons behind the online illegal activities first. Where shutting down, or halting access to, an illegal website requires a petition to a court, the power of the regulator to seek emergency relief in court or the establishment of procedures or protocols ensuring quick engagement with the court may be critical in order to stop online misconduct effectively. IOSCO members are encouraged to be able to take actions against illegal activity being conducted on websites at a national level. The ability of IOSCO members to exercise this power consistently and in a coordinated manner (as discussed under Measure 3) would be an important dissuasive element in curbing illegal online activities.
155. Even if websites are shut down, offenders may soon after open another website under a different domain to continue to target investors in the same or in another jurisdiction. It is important that IOSCO members have the appropriate powers to effectively identify the different entities involved in online misconduct and the interconnections between them. Investigations may be costly and time-consuming in light of the challenges described in Chapter 8.1. In this regard, IOSCO observes again the relevance and effectiveness of the power to obtain and share subscriber and data traffic records from TSPs, ISPs and electronic communication providers. An important complement could include initiatives that require TSPs, ISPs and electronic communication providers to maintain this type of information for a suitable period of time.⁸⁴
156. Powers to freeze assets on behalf of other IOSCO members would also be valuable to help prevent dissipation of investor funds and bolster credible deterrence.⁸⁵

Measure 3: Increasing efficient international cooperation and liaising with criminal authorities and other local and foreign partners

IOSCO members could consider ways to increase efficient cross-border cooperation and collaboration in investigations and enforcement actions and enhancing liaison with criminal authorities and other relevant local or foreign partners.

157. Enhanced cooperation among IOSCO members - which, among other things, includes timely provision of information to each other - is a necessary prerequisite to obtain information needed to deliver credible deterrence and preserve investor confidence as it allows IOSCO members to overcome the tension between the territorial limits of their enforcement powers and the ubiquity of illegal online activities.⁸⁶ Increasing efficiency in cooperation among IOSCO members using the existing mechanisms at their fullest capacities as well as through more expedited ways of intelligence sharing and additional forms of collaboration in investigations and enforcement actions will help to hold wrongdoers accountable for their online illegal activities. Enhanced liaison

⁸⁴ In the *Report on Retail OTC Leveraged Products*, supra, IOSCO noted that “*The availability of information from ISPs is important to enforcement actions. In order to investigate and prosecute domestic and cross-border securities violations, we recommend that regulators encourage or endeavor to ensure that ISPs maintain subscriber data and certain traffic data*”.

⁸⁵ Regulators are encouraged by the *Resolution on Cross-Border Cooperation to Freeze Assets Derived from Securities and Derivatives Violations*, Resolution of the IOSCO Presidents’ Committee, June 2006, available at <https://www.iosco.org/library/resolutions/pdf/IOSCORES25.pdf>, to examine the legal framework under which they operate and strive to develop, through law reform or otherwise, mechanisms by which they or another authority within their jurisdiction could, on behalf of a foreign regulator, freeze assets derived from suspected and established cross-border securities violations and thereby deny wrongdoers the benefit of their ill-gotten gains.

⁸⁶ In the *IOSCO Report on Credible Deterrence In The Enforcement Of Securities Regulation*, supra, IOSCO noted that “*Although there is presently strong co-operation between many securities regulators, especially as facilitated by the IOSCO MMoU, all jurisdictions can look for additional ways to improve cooperation, and consequently deterrence*”.

with criminal authorities and other relevant local or foreign partners (including for instance the financial police) would also support credible deterrence.

Guidance on the application of the measure

158. The importance of efficient and extensive international cooperation is apparent from some of the unique features of online illegal activities being conducted across borders, such as the multi-jurisdictional nature of the misconduct (especially in that they are often carried out from disparate locations or virtual offices located in less-regulated jurisdictions targeting victims around the world), shifting the proceeds of violations abroad and wrongdoers fleeing easily to a foreign country. In circumstances such as these, effective enforcement can be difficult to achieve when cooperation is not available or accessible in a timely manner.
159. Although there is presently strong co-operation between many IOSCO members as facilitated by the IOSCO MMoU and EMMoU,⁸⁷ which often prove useful in gathering material information (especially in obtaining critical account records and mapping the flows of funds) and concluding investigations successfully, there is opportunity to improve the ways in which IOSCO members cooperate.
160. IOSCO members should consider adopting policies and procedures to provide for efficient cross-border cooperation. In addition, IOSCO should reiterate to its members the importance of becoming Appendix A.1 signatories to the EMMoU, as well as the importance of an optimal application of the principle of the fullest assistance permissible under the IOSCO MMoU, taking into account that it is increasingly critical for IOSCO members to be able to obtain subscriber records from TSPs, ISPs and electronic communication providers in relation to suspicious online activity conducted from other jurisdictions.
161. More comprehensive consultations and proactive referrals under existing mechanisms to quickly share information about multi-national digital violations are also important. Technical assistance programs or MMoU/EMMoU guidance may serve to promote more proactive/unsolicited assistance efforts.
162. Quality and timeliness of the information shared among IOSCO MMoU/EMMoU signatories and the ability of the requesting authority to properly analyse the data received can be critical for the success of investigations. In this respect proper staffing and resourcing of IOSCO members is essential, but workshops and educational initiatives may also play a role (e.g., delivering guidance, for example through a more detailed MMoU request template, or organizing workshops on how to write an effective request for assistance or to foster timely responses). Exchange of information with more efficient secured communication channels that make use of new technologies could be explored.
163. More practical and expedited ways of getting intelligence from other jurisdictions may be developed or further strengthened, especially when information is public. For instance, the following practical approaches could be considered, whilst preserving full confidentiality of information exchanged:
 - Increased direct contacts between investigators in requesting and requested authorities' jurisdictions, once a formal request for assistance under the IOSCO MMoU or EMMoU has been accepted, in the interest of saving time and effort;
 - Joint or parallel investigations into online illegal activities where permissible and appropriate; and

⁸⁷ The IOSCO MMoU, which is based on the concept of the fullest assistance permissible, was put in place with the goal of ensuring that a cooperative mechanism exists among IOSCO members at the international level to facilitate the detection and deterrence of cross-border misconduct. The IOSCO EMMoU provides the framework for additional assistance to be provided to regulators in the following areas: (a) Audit work papers, communications and other information relating to the audit or review of financial statements; (b) Subscriber and data traffic records held or maintained by TSPs; (c) Subscriber records held or maintained by ISPs and other electronic communication providers; (d) Recordings of telephone conversations or other electronic communications held or maintained by regulated persons; (e) Compelling physical attendance for testimony; and (f) Where permissible, requiring or requesting the freeze or sequestration of funds or assets located in the requested authority's jurisdiction or, if not, advising and providing information on how to freeze assets, at the request of another signatory.

- Facilitating submission of follow-up enquiries to progress investigations once a member has agreed to assist in the case.
164. IOSCO could consider developing ways to: (i) maximize use of public information, including the sharing of information from public databases by less formal means, consistent with jurisdictions' applicable law and regulations, and within short periods of time; and (ii) leverage the use of existing methods of sharing information and intelligence to enable sharing of enforcement-related information on emerging digital threats, including those arising from crypto-assets.
165. Additional forms of collaboration among IOSCO members in enforcement actions could contribute to reduce investor harm and deliver credible deterrence. In particular, new collaboration mechanisms may be developed to help ensure that the home regulator of wrongdoers undertake actions to stop online illegal activities (including crypto-asset related misconduct) upon request of the foreign regulator that has ascertained a violation. This may include protocols or similar mechanisms among IOSCO members allowing the exercise of available powers to shut down or block access to illegal website/social media pages or issuing cease trade orders consistently and in a coordinated manner and exploring ways to facilitate cross-border recovery of monetary sanctions.
166. Furthermore, closer international cooperation and coordination could be important with respect to nascent products such as crypto-assets that can raise significant risks.⁸⁸ In some cases, crypto-assets are offered as cross-border products to investors by unlicensed and/or fraudulent firms and platforms that try to avoid being registered in any jurisdiction by exploiting cross-border gaps and engaging in regulatory arbitrage or that register in jurisdictions that do not have robust regulations. In these cases, IOSCO members may not have jurisdiction over the individuals/entities engaged in the misconduct, or the products being marketed online, and/or are unable to obtain critical information needed, such as account records, in response to a request for assistance from a foreign regulator. Additionally, the underlying products often change and mutate faster than the supervisory regimes can amend their regulatory remit to regulate them. Without cross-border assistance to obtain critical account records and the ability to identify and track down potential victims, it can be difficult to develop and bring these types of cases.
167. According to Principle 15 of the IOSCO Objectives and Principles, "*the regulatory system should allow for assistance to be provided to IOSCO members who need to make inquiries in the discharge of their functions and exercise of their powers*". IOSCO will continue to promote closer international coordination and cooperation to address regulatory gaps in the area of crypto-assets.⁸⁹ To the extent that enhanced assistance could be provided on such matters, it may facilitate a faster worldwide response to crypto-assets-related risks, including the risk of online mis-selling and fraud, and support credible deterrence.
168. Furthermore, IOSCO members could consider creating/enhancing existing efforts to liaise with criminal authorities and other law enforcement agencies.⁹⁰ This may include for example:

⁸⁸ On risks raised by some crypto-assets, see for example the warning published by the European Supervisory Authorities (EBA, EIOPA and ESMA) on March 17, 2021: *Crypto-assets: ESAs remind consumers about risks*, available at <https://www.eiopa.europa.eu/sites/default/files/publications/crypto-asset-risks-esa-update.pdf>. On the need for closer international cooperation and coordination in relation to crypto-assets, see also International Monetary Fund, *Regulation of Crypto-assets*, Fintech Note 3/2019.

⁸⁹ In the Report on *Investor Education on Crypto-Assets*, supra, IOSCO underlined that "*Due to the global spread of interest in crypto-assets, internationally coordinated responses in certain areas, such as enforcement and investor protection, may help provide clarity to businesses and investors. International coordination may limit jurisdictional arbitrage and facilitate innovation in blockchain and crypto-asset technologies, while allowing regulators to monitor developments to ensure fair and efficient markets, financial stability, and the protection of investors*".

⁹⁰ In the IOSCO Report on *Credible Deterrence In The Enforcement Of Securities Regulation*, supra, IOSCO noted that "*Potential wrongdoers may be deterred from engaging in misconduct when they know that securities regulators are working with criminal authorities and other domestic, national and international agencies to strengthen their detection, investigation, prosecution and sanctioning capabilities*". See also the *Report on Retail OTC Leveraged Products*, supra.

- Streamlined procedures to seek court approval with the necessary urgency when the regulator has to rely on the criminal authority to exercise some of its powers, such as the power to shut down or block access to illegal websites; and
- Cooperation arrangements facilitating the process for referring information on potential digital violations.

Measure 4: Promoting enhanced understanding by and collaboration with providers of electronic intermediary services with regard to digital illegal activities

IOSCO members could consider initiatives, individually and collectively through IOSCO, to foster more meaningful understanding by and collaboration with providers of electronic intermediary services in curbing digital illegal activities and anonymous website registration.

169. IOSCO members, individually and collectively, could consider efforts to enhance the understanding of providers of electronic intermediary services, such as hosting services and ISPs, web hosting providers, domain registrars, social media platforms, online advertising facilitators and other electronic communication providers, on the importance of identifying the actors and preventing, detecting and tackling online illegal activities.

Guidance on the application of the measure

170. IOSCO could work with ISPs, hosting service providers, domain registrars, social media platforms, online advertising facilitators and other electronic intermediary service providers to encourage them to play a part in fostering an online environment that is a safe and trusted place for cross-border distribution of financial services and products to retail investors.⁹¹

171. IOSCO members are encouraged to renew efforts to achieve this measure.⁹² In particular, IOSCO members, individually and collectively, could undertake further initiatives in relation to providers of electronic intermediary services with a view to:

- a. Educating providers of electronic intermediary services on how they can help to more effectively tackle online illegal activities worldwide and emphasizing that regulatory frameworks could set out incentives to this purpose (which may include, where appropriate, proportionate due diligence requirements on providers of electronic intermediary services and clear rules, subject to conditional exemptions, for their liability with regard to the third-party information they transmit or store) to better protect investors worldwide;
- b. Encouraging providers of electronic intermediary services to no longer accept anonymous users of Internet services carrying out financial activities, as a way to deter online illegal activities and help IOSCO members to deliver credible deterrence. Electronic service providers could obtain, and store for a reasonable period of time, certain essential information from subscribers that use them to distribute financial services or products, making such information accessible to IOSCO members to facilitate investigations of suspected illegal activities. Similarly, it is important for

⁹¹ The issue of electronic intermediary service providers' accountability and transparency is increasingly deserving attention at an international level. Several jurisdictions are introducing or considering introducing diligence requirements for providers of electronic intermediary services, adapted to the type and nature of the intermediary service concerned. For example, in the EU, the Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act), published by the European Commission on December 15, 2020, defines clear responsibilities and accountability for providers of intermediary services, and in particular online platforms, such as social media and marketplaces, by setting out clear due-diligence obligations, including notice-and-action procedures for illegal content and an obligation for certain online platforms to receive, store and partially verify and publish information on traders using their services.

⁹² In the *Report on Retail OTC Leveraged Products*, supra, IOSCO encouraged IOSCO members to reach out to mobile application providers, advertising facilitators and other relevant stakeholders to raise awareness of illegal activities related to OTC leveraged products. The said Report presented examples of IOSCO members that have raised awareness about binary options fraud and unlicensed firms offering binary options to retail investors among mobile application stores and noted that this engagement has resulted in certain app stores preventing unauthorized firms from offering binary options apps through their sites.

TSPs, ISPs and other electronic communication providers to hold subscriber and data traffic records for a reasonable period of time consistently with applicable data protection legislation;

- c. Streamlining exchanges of necessary information with other IOSCO members, including through: (i) timely responses to regulators' information requests (such as for instance those intended to obtain subscriber and data traffic records from TSPs, ISPs and other electronic communication providers, or information about persons behind illegal distributions of financial services or products from hosting service providers); (ii) prompt notification to the regulator of suspicions of illegal distributions of financial services and products, providing all relevant available information;
- d. Encouraging providers of hosting services to act expeditiously to identify the actors and remove or disable access to information relating to illegal distributions of financial services and products upon obtaining actual knowledge or awareness of such illegal content (for instance through investigations on their own initiative or following receipt of a notice) and in any case whenever a court, regulator or law enforcement authority requires such removal or disablement. Providers could set-up appropriate mechanisms to receive notice of illegal activities. Online platforms could publish aggregated information of such removal/disablement actions and suspend, for a reasonable period of time, provision of services to firms that frequently provide manifestly illegal content relating to the distribution of financial services or products online. This would show credible engagement by online platforms to support members' effort to deliver deterrence and investor protection; and
- e. Encouraging search engines and social media websites to put warnings and measures issued by IOSCO members against illegal distributions of investment services and products (including orders to shut down or block access to illegal websites) in a prominent location on the user's screen.

172. IOSCO members could share with each other experiences and good practices regarding interactions with providers of electronic intermediary services and facilitate knowledge of developments in this area.

173. These initiatives could contribute to reduce the extent to which electronic intermediary services are used to conduct illegal activities, thus increasing trust in the distribution of financial services and products in the online world.

Measure 5: Additional efforts to address regulatory and supervisory arbitrage

IOSCO members could consider additional efforts to address regulatory and supervisory arbitrage in the interest of facilitating international enforcement cooperation and enhancing investor protection on a global scale.

174. Regulatory and supervisory arbitrage remains a significant source of harm to society as a whole and diminishes the effectiveness of members' enforcement actions. This is an issue of particular relevance in the context of online marketing and digitalisation, as perpetrators of online illegal activities tend to take advantage of regulatory gaps and differences through scams or shell companies deliberately located in less-regulated jurisdictions. In such cases, IOSCO members may not have jurisdiction over the individuals/entities engaged in the misconduct, or the products being marketed online, and/or are unable to obtain critical information needed in response to a request for assistance from a foreign regulator. Continuous efforts by IOSCO to promote regulatory and supervisory efforts through initiatives targeted to jurisdictions more systematically involved in illegal online activities is important to effectively deter and tackle online illegal activities and to protect investors around the world.

Guidance on the application of the measure

175. IOSCO members may experience significant investigatory and enforcement challenges associated with regulatory arbitrage in cases of illegal online misconduct. In some cases, requested IOSCO members may not have the authority, or may not exercise their authority, to require entities situated in their jurisdiction to be registered and supervised or to comply with appropriate record-keeping requirements. In other cases, requested IOSCO members may lack the ability to obtain certain

types of information relating to emerging types of misconduct or products (including crypto-assets) as they do not fall within their regulatory remit. Offenders may be able to make use of these regulatory differences to escape enforcement action.

176. IOSCO members could consider the nature of emerging types of products, such as crypto-assets, and determine whether they come within their regulatory framework. Regulation of these products may be tailored to jurisdiction-specific features. Nevertheless, it is important for a regulator to provide cooperation to a counterpart who has jurisdiction over such products and is seeking assistance in investigating misconduct related to such products. International cooperation can help reduce excessive risks of investor losses and potential damage to trust in the financial sector at a global scale.
177. Outreach to non-cooperative jurisdictions (including through technical assistance programs) in order to raise standards and to encourage authorities to more vigorously enforce their securities laws, to seek IOSCO membership and to sign the MMoU/EMMoU is of paramount importance. Dialogue has proven to be effective in the past when IOSCO addressed issues with jurisdictions that were identified as having issues with cooperation. A similar exercise could be continued towards jurisdictions most systemically burdened with online illegal activities to try to remedy issues bilaterally with them through IOSCO.
178. IOSCO members can play a role in helping to ensure that differences in regulatory approaches and enforcement policies of jurisdictions in respect of new products, including crypto-assets, does not create a leeway for fraudulent/unauthorised online schemes to thrive, while supporting healthy innovation and contributing to build trust in such products.

Consultation Question:

Do market participants agree that the proposed measures included in the policy and enforcement toolkits are appropriate for addressing the specific risks arising from “retail distribution and digitalisation”? Are there any areas that are missing and/or merit IOSCO consideration?

Chapter 9 – Conclusion

179. Various technological advancements are enhancing retail investors’ access to financial products and services. These developments bring an increasing number of retail investors to capital markets through online offerings and, in some cases, on a cross-border basis. Recent developments related to online marketing and distribution, new online targeting techniques and the application of behavioural knowledge, accompanied by increased retail participation, have resulted in an escalation of innovative, but at times also harmful or even fraudulent online activity.
180. This Consultation Report largely draws on IOSCO members’ experiences and practices and aims to help IOSCO members in providing protection for retail investors against harmful and fraudulent online activity, to reduce supervisory and regulatory arbitrage and foster credible deterrence.
181. Some IOSCO members have expressed concern about the suitability of certain riskier products and crypto-assets for retail investors, as well as the risk of fraudulent offerings via online platforms and mobile tools. Furthermore, the exponential growth in the use of social media in online marketing and distribution increasingly influences retail decisions, whereby retail investors are closely monitoring social media activity and sharing investment tips and seeking information from a wide variety of sources. This can also include the activities of influencers, who at times give financial advice without the required license. Social media in certain cases may promote scams. Similarly, various digital apps and online trading platforms are using “gamification” techniques and may exploit behavioural biases to influence retail trading behaviour. Hence, the responsible use of social media in financial offerings increasingly becomes a regulatory concern.
182. This Consultation Report is an outcome of IOSCO efforts to address regulatory concerns and provide proposed policy and enforcement measures relating to digital trends to promote a high level of investor protection. The overarching objective of this report is to identify and promote possible regulatory and enforcement approaches that enhance the protection of retail investors who are increasingly the recipients of online offerings and marketing techniques. It provides a variety of proposed measures that IOSCO members are encouraged to consider when determining their approach to online offerings and marketing. It also proposes useful guidance on enforcement measures IOSCO members are encouraged to use. Such measures could help IOSCO members in addressing fraudulent online activity, leveraging innovative powers and technology-based detection and investigatory techniques, as well as enhancing collaboration with other IOSCO members, criminal authorities, other foreign and domestic authorities, and providers of electronic intermediary services.
183. Developments in online marketing and distribution, including via social media, will continue to evolve rapidly. As products and services and potential harm to investors can propagate quickly in the online environment, IOSCO members need to keep pace with such propagation and position themselves to be able to monitor such developments. Therefore, IOSCO members should continue to observe and consider changes in their respective markets and on a cross-border basis. IOSCO will also continue to monitor the issues associated with online marketing and distribution of services and products, with a view to ensuring that the considerations highlighted in the Consultation Report remain relevant and appropriate.

ANNEX 1 - Glossary

1st party data

Data collected and owned by the company itself. For example, website data, mobile application data, and CRM data.

2nd party data

Data collected as a result of corporate cooperation. This includes online campaign data and customer journey data.

3rd party data

Data delivered by data providers, which is available on the market for purchase.

A/B testing

A/B testing is a way to test out changes in online marketing design or content. The test is between two subjects, A and B. One is the original design (the control) and the other is the altered design (the treatment).

Marketing affiliate

An affiliate marketing agency is an organization that facilitates some forms of online marketing by matching merchants with marketers who promote products to consumers on social media, on websites, and through email.

App store or app marketplace

An app store (or app marketplace) is a type of digital distribution platform for computer software called applications, often in a mobile context. Applications or apps provide a specific set of functions which, by definition, do not include the running of the computer itself.

Banner

Banner advertising refers to the use of a graphic that stretches across the website or online media property. Banner advertising promotes a brand and/or gets visitors to visit the advertiser's website.

BigTech

The largest and the most dominant companies in the IT industry of the US, namely the big 5 (Amazon, Apple, Facebook, Google and Microsoft).

Bulk targeting

Bulk targeting is sending the same e-mail campaign to people in the same geographic location in a bulk without customizing.

Chat tool

A chat tool is an online interactive tool for communication between two or more people on the web. One can talk in real time with other people in a chat room, typically by typing, though voice chat is available.

Choice architecture

Choice architecture is the different ways in which choice can be presented to consumers. The way the choice is presented, thus changes consumer choice.

Complex/non-complex instruments e.g., such as used in MiFID II – Source: Markets in Financial Instruments Directive II (MiFID II)

Complex financial instruments require that you have both the knowledge and experience to understand the risks. Examples of complex financial instruments include warrants and derivatives. To understand the risks of these financial instruments, you must have both knowledge and experience of the characteristics of the instrument, such as its complexity, technical structure and financial risks.

Cross-selling

The practice of selling additional products/services to existing customers.

Customer

Customers are individuals acting for personal, domestic or household purposes, not business or professional purposes.

Customer journey

The customer journey is the complete sum of experiences that customers go through when interacting with a company and/or brand through different channels and media.

Data aggregator

Compiling of information from databases with intent to prepare combined datasets for data processing.

Desktop marketing

Desktop marketing is a type of marketing that utilizes internet and online based digital techniques such as desktop computers and other digital media platforms to promote goods and services.

Digital channel

A digital channel is any online, mobile or other technological means through which a customer can obtain and manage a financial product or service.

Display marketing

Digital display marketing allows businesses to place advertisements (banners) on websites, in apps, and on other online platforms either directly or via ad networks.

Email advertising

A type of digital marketing tool wherein the customer receives promotional ads via email.

Feedback loops

A feedback loop is the part of a system in which some portion (or all) of the system's output is used as input for future operations. Feedback loops can be either negative or positive.

Foot-in-the-door

The “foot-in-the-door” technique is based on the idea of getting people to agree to a larger request later by agreeing to a small request first, while they might not accept that large request if being asked outright. In the days of door-to-door sales, if a salesperson got his foot between the doorframe and the door, then the potential customer could not slam the door in his face.

Influencer marketing

Influencer marketing is (mostly) online video ads by a famous person with a substantial number of online followers on social media.

Information technology filter

An information technology filter, also known as an IT-filter, program or section of information technology code that is designed to examine each input or output request for certain qualifying criteria and then process or forward it accordingly.

Interactive Content

Interactive content is a technique to engage the audience with the content, rather than just passively reading, or watching content.

Lookalike Audience

Lookalike audience is a Facebook segmentation tool where a firm uses segmentation based on its current customer base and its customers' demographic data. It creates a way to reach new people who

are likely to be interested in a particular business because they have similar tastes to some pre-existing customers.

Mystery shopping

Mystery shopping refers to test purchases of financial services or products. The assessment of behaviour of participants when conducting test purchases of financial services or products shall be understood as a set of actions designed to achieve the objectives stated in the national regulation aiming at determining how financial services or products are offered or provided by the supervised financial market participants or other persons.

Nudging

Nudging is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives.

Onboarding

Onboarding is the process of going through procedures to effectively familiarize a new customer with one's product or service.

Online marketing

Online marketing is the practice of leveraging web-based channels to spread a message about a company's brand, products, or services to its potential customers. The methods and techniques used for online marketing include email, social media, display advertising, search engine optimization, search engine advertising and more.

Online targeting

Online targeting is a method for targeting digital advertising impressions to appear to a select audience of consumers based on their prior actions, those actions occurring either online or offline; also called behavioural targeting.

Outsourcing

A business practice in which a regulated entity uses a service provider to perform tasks, functions, processes, services or activities (collectively, "tasks") that would otherwise be undertaken by the regulated entity itself. The concepts and terms with relation to outsourcing are defined in the IOSCO Principles on Outsourcing.⁹³

Pay-per-click advertising

An example of an internet advertising model wherein the advertiser pays the publisher when someone clicks on the ad.

Personalisation

In the context of this survey, personalization is online targeting on an individual level.

Pool selling

The selling or distribution of chances in a betting pool.

Product Governance and Oversight e.g., such as used in MiFID II – Source: Markets in Financial Instruments Directive II (MiFID II)

Product oversight and governance: the responsibilities of manufacturers in organising processes, functions and strategies aimed at designing, operating and bringing products to market, and reviewing them over the life of the product.

Programmatic Advertising

The use of buying digital advertising software where machines and algorithms purchase display space.

⁹³ See footnote 33.

Ranking possibilities

Possibilities to position marketing material of other information on a product or service in a hierarchy or scale.

Retargeting - Source: IAB

The use of a pixel tag or other code to enable a third-party to recognize particular users outside of the domain from which the activity was collected. It enables advertisers to show an ad specifically to visitors that previously were exposed to or interacted with the advertisers' creative (outings).

Search Engine Advertising (SEA)

Advertisements made within the sponsored listings of a search engine.

Segmentation

Segmentation is the process of dividing a market of potential customers into groups, or segments, based on different characteristics. The segments created are composed of consumers who will respond similarly to marketing strategies and who share traits such as similar interests, needs, or locations.

Search Engine Optimization (SEO)

The process of improving the volume and quality of traffic to a website from search engines via search results.

Shoppable

A transaction that occurs directly within the social media post.

Shoppable quizzes

Shoppable quizzes are a type of personalized marketing technique which creates a series of questions for the consumers to answer about their preferences (such as BuzzFeed quizzes).

Social media

Social media are forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).

Social media influencer ads

Social media influencer ads are user-generated ads or endorsements from social media users that have a large social media following and hence can "influence" customer trends.

Social Proof

It describes a psychological and social phenomenon wherein people copy the actions of others in an attempt to undertake behaviour in a given situation.

Super Apps

A "SuperApp" is a cross-selling tool as an application which has numerous in-built functions for a wide range of services, which may include both financial and non-financial services. The app is a one-stop market where different apps are encompassed in one platform.

Target audience

A target audience is the intended audience for an ad, usually defined in terms of specific demographics (age, sex, income, etc.), product purchase behaviour, product usage or media usage.

Voice marketing

Voice marketing is a process through which firms reach their customers via live or recorded audio content.

Voice search engine optimisation

The process of optimizing your pages to appear in voice searches.

Web scraping

Extracting and copying data from a web page to a structured format using computer programs.

Whistleblower

Individuals who provide, information relating to a potential violation of securities laws to the regulator in a manner established, by rule or regulation.

ANNEX 2 - List of regulators that contributed to the IOSCO Committee 3 survey

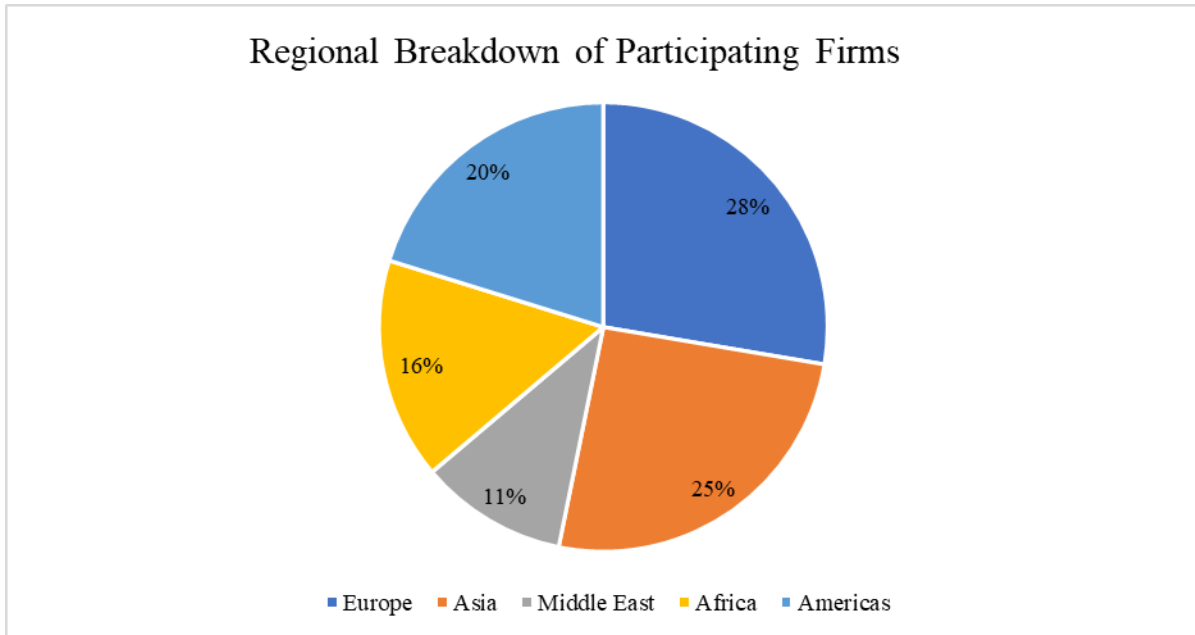
Regulator	Jurisdiction
Financial Services Regulatory Authority	Abu Dhabi
Australian Securities and Investments Commission	Australia
Investment Industry Regulatory Organization (IIROC)	Canada
Autorité Des Marchés Financiers (AMF Québec)	Canada
China Securities Regulatory Commission	China
Financial Supervisory Commission	Taiwan
Federal Financial Supervisory Authority (BaFin)	Germany
Securities and Futures Commission	Hong Kong
Israel Securities Authority	Israel
Commissione Nazionale per le Società e la Borsa	Italy
Financial Services Agency	Japan
Securities and Exchange Commission	Nigeria
The Dutch Authority for the Financial Markets (AFM)	Netherlands
Polish Financial Supervision Authority	Poland
The Bank of Russia	Russia
Capital Market Authority	Saudi Arabia
Monetary Authority of Singapore (MAS)	Singapore
National Securities Market Commission (CNMV)	Spain
Swiss Financial Market Supervisory Authority	Switzerland
Capital Markets Board	Turkey
Financial Conduct Authority (FCA)	United Kingdom
Securities and Exchange Commission (SEC)	United States of America
Financial Industry Regulatory Authority (FINRA)	United States of America
Commodity Futures Trading Commission (CFTC)	United States of America
National Futures Association (NFA)	United States of America

ANNEX 3 - List of regulators that contributed to the IOSCO Committee 4 survey

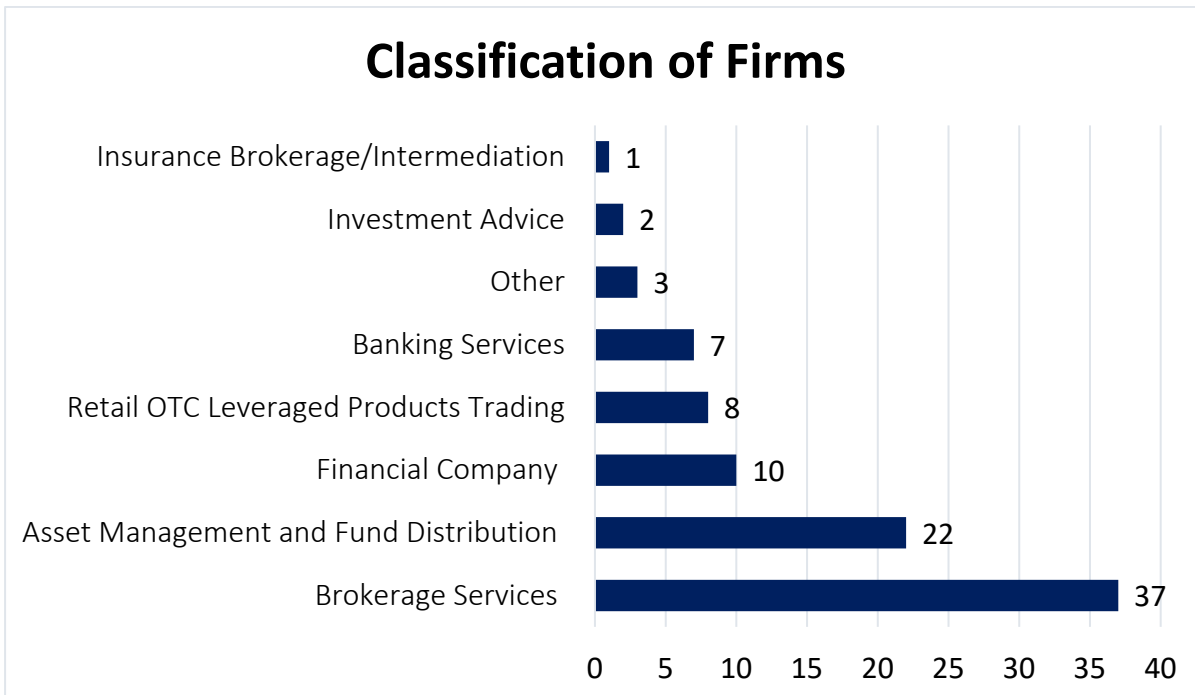
Regulator	Jurisdiction
Comisión Nacional de Valores (CNV)	Argentina
Comissão de Valores Mobiliários (CVM)	Brazil
British Columbia Securities Commission (BCSC)	British Columbia, Canada
Ontario Securities Commission (OSC)	Ontario, Canada
Dubai Financial Services Authority (DFSA)	Dubai
The Autorité des marchés financiers (AMF)	France
Federal Financial Supervisory Authority (BaFin)	Germany
Hellenic Capital Market Commission (HCMC)	Greece
Securities and Futures Commission (SFC)	Hong Kong
Israel Securities Authority (ISA)	Israel
Commissione Nazionale per le Società e la Borsa (CONSOB)	Italy
Financial Services Agency (FSA)	Japan
Comisión Nacional Bancaria y de Valores (CNBV)	Mexico
Authority for the Financial Markets (AFM)	Netherlands
Securities and Exchange Commission (SEC)	Nigeria
Financial Supervision Commission (KNF)	Poland
Portuguese Securities Market Commission (CMVM)	Portugal
Autorité des marchés financiers (AMF)	Quebec
Comisión Nacional del Mercado de Valores (CNMV)	Spain
Financial Sector Conduct Authority (FSCA)	South Africa
Swiss Financial Market Supervisory Authority (FINMA)	Switzerland
Capital Markets Board of Turkey (CMB)	Turkey
Financial Conduct Authority (FCA)	United Kingdom
Commodity Futures Trading Commission (CFTC)	United States of America
Securities and Exchange Commission (SEC)	United States of America

ANNEX 4 - CHARTS

Regional Breakdown of Participating Firms to the Committee 3 survey



Classification of Participating Firms to the Committee 3 survey



ANNEX 5 - Respondent IOSCO members' approach to product governance

The below findings demonstrate the different approaches to product governance across different regions. The table provides an overview on to what extent firms have developed internal rules, policies or guidance applicable to product governance and target groups:

- *Question 2a: Have you developed internal rules, policies or guidance relating specifically to marketing through digital channels?*
- *Question 2b: If yes, are the rules, policies and guidance specific to investment products and services offered online?*
- *Question 3: In your jurisdiction, are you familiar with product governance and oversight principles, as for example used under MiFID II?*

Question	2a			2b		3	
	Yes	No*	No	Yes	No	Yes	No
Total	67%	21%	12%	80%	20%	63%	37%
<i>Europe</i>	73%	23%	4%	83%	17%	92%	8%
<i>Asia</i>	77%	23%	0%	88%	12%	73%	27%
<i>Mid-East</i>	60%	40%	0%	60%	40%	40%	60%
<i>Africa</i>	67%	7%	27%	80%	20%	29%	71%
<i>America</i>	53%	16%	32%	70%	30%	47%	53%