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COMMISSION DELEGATED REGULATION (EU) .../...

of 13.7.2022

supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying the entry knowledge test and the simulation of the ability to bear loss for prospective non-sophisticated investors in crowdfunding projects

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 21(8) of Regulation (EU) 2020/1503 on European Crowdfunding Service Providers for business ('the Regulation') empowers the Commission to adopt, following the submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, delegated acts specifying the necessary arrangements to carry out an entry knowledge test and a simulation of the ability to bear loss.

Article 21 of Regulation (EU) 2020/1503 provides that crowdfunding service providers shall, before giving prospective non-sophisticated investors full access to invest on their crowdfunding platform, assess whether and which crowdfunding services offered are appropriate for the prospective non-sophisticated investors. For the purposes of this assessment, crowdfunding service providers shall request information about the prospective non-sophisticated investor's experience, investment objectives, financial situation and basic understanding of risks involved in investing in general and in investing in the types of investments offered on the crowdfunding platform. Crowdfunding service providers are also expected to require prospective non-sophisticated investors to simulate their ability to bear loss. Article 21(8) requires ESMA to develop draft RTSs to specify the arrangements necessary to (a) carry out the assessment referred to in Article 21(1), (b) carry out the simulation referred to in Article 21(5) and (c) provide the information referred to in Article 21(2) and Article 21(4).

In accordance with Article 10(1) of Regulation (EU) No 1095/2010 establishing the ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 21(8) of the Regulation. A consultation paper was published on the ESMA website on 26 February 2021, and the consultation closed on 28 May 2021. Moreover, the ESMA worked in close cooperation with the EBA, and requested advice from the Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010. Within the final report on the draft technical standards, the ESMA included an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its analysis of the costs and benefits related to the draft technical standards submitted to the Commission. This analysis is included in the Final Report on the draft technical standards available at https://www.esma.europa.eu/sites/default/files/library/esma35-42-1183_final_report_-_ecspr_technical_standards.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The draft regulatory technical standards specify the requirement for the assessment of appropriateness of crowdfunding services. They also introduce requirements to ensure reliability of the information provided by investors and to clarify the information to be requested pursuant to Article 21(2). The standards, moreover, set out the details for the presentation of a risk warning pursuant to Article 21(4).

Furthermore, the draft regulatory technical standards lay down requirements for the simulation of the ability to bear loss of prospective non-sophisticated investors, depending on whether it takes place via an online calculation tool or without one. Moreover, the draft regulatory technical standards specify, in relation to the simulation, the requirements for the calculation of: a) the net worth; b) the net annual income; c) the total liquid assets; d) the annual financial commitments. Finally, the standards set out the requirements relating to the valuation date of the components of the net worth calculation.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937¹, and in particular Article 21(8), fourth subparagraph, thereof,

Whereas:

- (1) In order to ensure that crowdfunding service providers carry out the entry knowledge test for prospective non-sophisticated investors referred to in Article 21 of Regulation (EU) 2020/1503 in a harmonised way, it is necessary to lay down common rules for the assessment of whether and which crowdfunding services offered are appropriate for the prospective non-sophisticated investors.
- (2) In order to ensure that crowdfunding service providers ascertain that prospective non-sophisticated investors understand the level of risk associated with crowdfunding investments, crowdfunding service providers should take reasonable steps to ensure that the information collected from prospective non-sophisticated investors is reliable and reflects accurately their knowledge, skills, experience and financial situation, investment objectives and basic understanding of the risks involved.
- (3) Investors should be informed clearly and in a uniform manner about the risks they would incur if they decide to invest in crowdfunding services. Crowdfunding service providers should therefore issue a harmonised risk warning to prospective non-sophisticated investors failing the entry knowledge test following specific requirements on how the warning should be displayed to such investors.
- (4) In order to promote investor protection and ensure that the simulation of the ability to bear loss is performed adequately by prospective non-sophisticated investors, crowdfunding service providers should make available on their website an online calculation tool aiming at helping prospective non-sophisticated investors to simulate their ability to bear loss. However, because of the sensitive nature of the information to be provided by prospective non-sophisticated investors in such online calculation tool, that tool should be set up in a way that prevents crowdfunding service providers

¹ OJ L 347, 20.10.2020, p. 1.

from being able to access or record the information inputted by prospective non-sophisticated investors.

- (5) In order to ensure that information provided by prospective non-sophisticated investors in the online calculation tool by cannot be collected without their express consent, that tool should be set up in a way that prevents crowdfunding service providers from altering or interfering with the result of the simulation performed by prospective non-sophisticated investors. Furthermore, in order to protect prospective non-sophisticated investors and in particular to enable them to check that the information they inserted is correct and accurate, the result of the simulation of the ability to bear loss should not be collected directly by crowdfunding service providers but rather should only be shared willingly by prospective non-sophisticated investors once they consider that the result of the simulation reflects adequately their ability to bear loss.
- (6) In order to ensure flexibility in the way the simulation of the ability to bear losses is performed, crowdfunding service providers should be able to offer prospective non-sophisticated investors the possibility to simulate their ability to bear losses through a different method without the help of the online calculation tool, provided that such possibility is offered in addition to making the online calculation tool available on the crowdfunding service providers' website.
- (7) In order to ensure a harmonised approach in the simulation of prospective non-sophisticated investors' ability to bear losses, rules should be laid down with regard to how the net worth of prospective non-sophisticated investors should be calculated, based on their annual income, total of liquid assets and annual financial commitments.
- (8) Given the risks of divergent approaches, and the potential negative consequences of such divergences on the meaningfulness of the simulation of prospective non-sophisticated investors' ability to bear losses, it is appropriate to specify with a sufficient degree of detail how each of the components used to calculate the net worth should be computed and to establish a common date for the valuation of the various components.
- (9) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority and developed in close cooperation with the European Banking Authority.
- (10) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council².
- (11) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council³ and delivered an opinion on 1 June 2022,

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

³ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

HAS ADOPTED THIS REGULATION:

Article 1

Assessment of appropriateness of crowdfunding services

1. When assessing, in accordance with Article 21(1) of Regulation (EU) 2020/1503, whether and which crowdfunding services offered are appropriate for prospective non-sophisticated investors, crowdfunding service providers shall consider the following:
 - (a) whether the prospective non-sophisticated investor has the necessary experience and knowledge to understand the risks involved in investing in general;
 - (b) whether the prospective non-sophisticated investor has the necessary experience and knowledge to understand the risks involved in the types of investments offered on the crowdfunding platform.
2. For the purposes of paragraph 1, point (b), crowdfunding service providers shall assess the prospective non-sophisticated investor's understanding of what constitutes a crowdfunding service and the risks involved in it.

Article 2

Information to be requested in accordance with Article 21(2) of Regulation (EU) 2020/1503

1. The information that crowdfunding service providers are to request from prospective non-sophisticated investors regarding their experience and basic understanding of risks involved in investing shall include, to the extent appropriate to the nature, scale and complexity of the crowdfunding service offered and the type of investment envisaged, the following:
 - (a) the types of investment services and financial investments with which the prospective non-sophisticated investor is familiar;
 - (b) the nature, volume and frequency of the prospective non-sophisticated investor's past transactions in transferable securities, admitted instruments for crowdfunding purposes or loans, including in early or expansion stage businesses, and the period over which those transactions have been carried out;
 - (c) the level of education and profession or relevant former profession of the prospective non-sophisticated investor, including any professional experience or skills acquired in relation to crowdfunding investments.
2. The information that crowdfunding service providers are to request from prospective non-sophisticated investors regarding their investment objectives shall include, where relevant in relation to the type of crowdfunding service offered, the following:
 - (a) information on the prospective non-sophisticated investors' expected holding period of investments;
 - (b) the risk profile of the prospective non-sophisticated investors and their preferences regarding the sustainability of investments;
 - (c) the aims of the prospective non-sophisticated investors' investment.

3. When assessing the financial situation of prospective non-sophisticated investors, crowdfunding service providers shall take into consideration the results of the simulation referred to in Article 21(5) of Regulation (EU) 2020/1503.

Article 3

Reliability of the information requested in accordance with Article 21(2) of Regulation (EU) 2020/1503

1. Crowdfunding service providers shall take reasonable steps to ensure that the information collected from prospective non-sophisticated investors in accordance with Article 21(2) of Regulation (EU) 2020/1503 is reliable and reflects accurately prospective non-sophisticated investors' knowledge, skills, experience and financial situation, investment objectives and basic understanding of the risks involved.
2. For the purposes of paragraph 1, crowdfunding service providers shall take the following steps:
 - (a) inform prospective non-sophisticated investors on the importance of providing accurate and up-to-date information;
 - (b) ensure that the means used to collect information are suitable for the aims of those prospective non-sophisticated investors and appropriately designed for use by those prospective non-sophisticated investors;
 - (c) ensure that questions used in are likely to be understood by prospective non-sophisticated investors and precise enough to collect information reflecting adequately and accurately the situation of prospective non-sophisticated investors.

Article 4

Risk warning pursuant to Article 21(4) of Regulation (EU) 2020/1503

1. When issuing the risk warning referred to in Article 21(4) of Regulation (EU) 2020/1503, crowdfunding service providers shall not encourage prospective non-sophisticated investors to proceed with the investment.
2. The risk warning referred to in paragraph 1 shall contain the following text:

'An investment in a crowdfunding project includes the risk of losing the entirety of the money invested.'
3. The risk warning referred to in paragraph 1 shall be displayed to prospective non-sophisticated investors in an easily readable and prominent way on the crowdfunding service providers' website.
4. The window displaying the risk warning referred to in paragraph 1 shall be prominent and remain visible on the crowdfunding service providers' website until the prospective non-sophisticated investors have acknowledged that they have received and understood that warning.

Article 5

Simulation of the ability to bear losses using an online calculation tool

1. Crowdfunding service providers shall make available on their website an online calculation tool enabling prospective non-sophisticated investors to simulate their ability to bear losses.
2. The online tool referred to in paragraph 1 shall compute the ability to bear losses of prospective non-sophisticated investors, based on the information listed in Article 21(5), points (a), (b) and (c), of Regulation (EU) 2020/1503, as provided by the non-sophisticated investor.
3. The online tool referred to in paragraph 1 shall be easy to use and shall not require prospective non-sophisticated investors to perform any tasks other than providing the information set out in Article 21(5), points (a), (b) and (c), of Regulation (EU) 2020/1503.
4. The online tool referred to in paragraph 1 shall display the result of the simulation in a manner which is clear and understandable for prospective non-sophisticated investors.
5. The online tool referred to in paragraph 1 shall be set up in a way that does not enable crowdfunding service providers to access or record the information inputted by prospective investors pursuant to paragraph 3 or to amend or interfere with the result of the simulation referred to in paragraph 4. However, the online tool may embed a feature enabling prospective non-sophisticated investors to transmit the result of the simulation to the crowdfunding service provider.

Article 6

Simulation of the ability to bear losses in addition to the online calculation tool

In addition to the on-line tool referred to in Article 5(1), crowdfunding service providers may offer prospective non-sophisticated investors the possibility to simulate their ability to bear losses through a different method, provided that the crowdfunding service provider provides the prospective non-sophisticated investors with appropriate information about the method used to simulate the ability to bear losses.

Article 7

Calculation of the net worth of a prospective non-sophisticated investor

For the purposes of the simulation referred to in Article 21(5) of Regulation (EU) 2020/1503, the net worth of prospective non-sophisticated investors shall be calculated in accordance with the following formula:

Net worth = (net annual income) + (total of liquid assets) - (annual financial commitments)

Article 8

Net annual income

1. The net annual income referred to in the formula laid down in Article 7 shall be calculated as the total annual income received by the non-sophisticated investor after deduction of associated costs and charges, social contributions and taxes.
2. For the purposes of paragraph 1, the total annual income shall be the sum of any labour income, any interests on bank deposits or other debt instruments, any dividend payments or any real estate income, whereby:
 - (a) ‘labour income’ shall include wages, unemployment benefits and pension payments received by the non-sophisticated investor, with the exclusion of exceptional payments;
 - (b) ‘interests on bank deposits or other debt instruments’ shall include payments on bank deposits or other debt instruments received by the non-sophisticated investor during the preceding calendar year, with the exclusion of exceptional payments;
 - (c) ‘dividend payments’ shall include payments received by the prospective non-sophisticated investor by virtue of holding shares or units of a collective investment scheme or other equity instruments, with the exclusion of any capital gains realised by selling all or part of such holding;
 - (d) ‘real estate income’ shall include any payment received in relation to the renting of real estate properties, with the exclusion of any capital gain realised by selling all or part of such real estate properties.

Article 9

Total of liquid assets

1. The total liquid assets referred to in the formula laid down in Article 7 shall be calculated as the sum of the total cash held by a non-sophisticated investor on saving accounts and current accounts, and the value of assets that can be easily and swiftly converted into cash, including:
 - (a) saving products that can be turned into cash within a maximum of 30 calendar days;
 - (b) financial instruments negotiated on a regulated market within the meaning of Article 4(1), point (21), of Directive 2014/65/EU of the European Parliament and of the Council⁴;
 - (c) shares and units of collective investment schemes offering redemption rights on at least a weekly basis.
2. The following assets shall not be considered to constitute liquid assets:
 - (a) real estate properties;

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, (OJ L 173, 12.6.2014, p. 349).

- (b) amounts paid to a pension scheme for occupational retirement purposes;
- (c) company shares which are not freely redeemable or transferable, including previous crowdfunding investments.

Article 10

Annual financial commitments

The annual financial commitments referred to in the formula laid down in Article 7 shall include all the expenditures for which a non-sophisticated investor has undertaken a commitment in relation to a given calendar year, including:

- (a) alimony and child support payments;
- (b) rent and mortgage payments;
- (c) repayments of loans;
- (d) payments of insurance premiums;
- (e) utilities expenses payments, including those made to cover electricity, heating and water expenses;
- (f) service subscription payments;
- (g) income tax and property taxes.

Article 11

Valuation date of total of liquid assets and annual financial commitments

1. The total of liquid assets referred to in Article 9 and the annual financial commitments referred to in Article 10 shall be valued as of 31 December of the calendar year preceding the one in which the simulation is performed.
2. However, where a valuation at such date would not accurately reflect the current situation of the prospective investor's net worth, the valuation shall be performed at a more recent date enabling a more accurate valuation.
3. For the purpose of paragraph 2, a more recent date may be any date between 31 December of the calendar year preceding the one in which the simulation is performed and the date on which the simulation is performed and shall be the same for the valuation of the total of liquid assets and the annual financial commitments. When determining such date, prospective non-sophisticated investors shall consider whether taking such date as the reference date will enable an accurate valuation in respect of the net annual income, the total of liquid assets and the annual financial commitments referred to in the formula laid down in Article 7.
4. The net annual income referred to in Article 8 shall be the income of the calendar year preceding the year in which the simulation is performed. However, where the valuation of the total of liquid assets and annual financial commitments is performed using a more recent date pursuant to paragraph 2 of this Article, the net annual income shall be the income received during the 12 months preceding such more recent date.

Article 12

Transmission of the result of the simulation of the ability to bear loss

Crowdfunding service providers shall request prospective non-sophisticated investors to provide them with the result of the simulation carried out pursuant to Article 21(5) of Regulation (EU) 2020/1503.

Article 13

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13.7.2022

For the Commission
The President
Ursula VON DER LEYEN