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ANNEX

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to the

COMMUNICATION TO THE COMMISSION

on the intention to adopt with amendments the Commission Delegated Regulation supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be included in an application for authorisation as a crypto-asset service provider

Annex

Ms Verena Ross
Chair
European Securities and Markets
Authority - ESMA
201-203 rue de Bercy
75012 Paris -France

Dear Ms Ross,

On 25 March 2024, the European Securities and Markets Authority (“ESMA”) sent to the Commission the draft Regulatory Technical Standards (“RTS”) on Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulation (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 ⁽¹⁾ (hereinafter “MiCA Regulation”). The draft RTS specifies the information to be included in an application for authorisation as a crypto-asset service provider.

With this letter I would like to inform ESMA that the Commission intends to endorse the proposed RTS once changes are introduced as set out in the annex. The reasons for these changes can be summarised as follows:

Identity and proof of good repute of the members of the management body (Article 7(1)(f) of the draft RTS)

- In compliance with the principle of data minimisation, the types of information to be collected as part of the ‘personal history’ of the members of the management body of the applicant should be listed exhaustively. Therefore, the first sentence of Article 7(1)(f) of the draft RTS should be drafted so as to ensure that the types of information listed thereunder constitute an exhaustive list.
- Similarly, the information requested about criminal records should be limited to what is relevant for the assessment of the authorisation as crypto-asset service provider by bringing the wording of Article 7(1)(f)(i) of the draft RTS fully in line with Article 62(3)(a) and (c) of the MiCA Regulation.

ICT systems and related security arrangements (Article 9(b) of the draft RTS)

⁽¹⁾ OJ L 150, 9.6.2023, p. 40

- The draft RTS introduces the requirement to conduct and submit the results of a cybersecurity audit, realised by a third party cybersecurity auditor, with particular reference to Regulation (EU) 2022/2554 on digital operational resilience (DORA). Article 9(b) of the draft RTS stipulates that the cybersecurity audit must cover a minimum of requirements, such as a vulnerability assessment, configuration reviews and penetration tests using different audit approaches/phases (black box, grey box, white box)).
- The above-mentioned provision creates a new obligation to conduct an external audit which is not foreseen under DORA and which is not covered by the mandate under MiCA. In addition, this obligation links this cybersecurity audit with the threat-led penetration testing tests (TLPT) which are more specific and regulated under separate provisions under DORA.
- Accordingly, Article 9(b) of the draft RTS should be amended to provide that such a cybersecurity audit, realised by a third party cybersecurity auditor should be provided **if available** and that the content of a cybersecurity audit should include **ideally** (but not in a mandatory form) the list included in Article 9(b).

In light of the above, I would like to inform you that the Commission, acting in accordance with the procedure set out in the fifth and sixth sub-paragraphs of Article 10(1) of Regulation (EU) No 1095/2010, as amended, intends to adopt the RTS submitted by ESMA once the above-mentioned concerns are taken into account and the necessary modifications are made by ESMA.

As per Article 10(1), sub-paragraph 5 of Regulation (EU) No 1095/2010, as amended, where the Commission intends to adopt a draft RTS in part or with amendments, it shall send the draft RTS back to the Authority, explaining the reasons for its amendments, and within a period of 6 weeks, the Authority may amend the draft RTS on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission.

It should be recalled that the procedure laid down in in Article 10(1), sub-paragraph 6 of Regulation (EU) No 1095/2010, as amended, sets out that if, on the expiry of that six-week period, the Authority has not submitted an amended draft RTS, or has submitted a draft RTS that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the RTS with the amendments it considers relevant, or reject it.

It is noteworthy that Article 10(1) sub-paragraph 2 of Regulation (EU) 1095/2010 militates that regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.

In this context, it is essential to underline that the regulatory technical standards shall be in conformity with the legal mandate set out in the MiCA Regulation and shall not go over the said mandate by imposing additional obligations.

I would like to express our appreciation for the work undertaken by ESMA to deliver the draft RTS and look forward to continuing our good cooperation on this legal act.

Yours sincerely,

John BERRIGAN
Electronically signed

Enclosure: Amended draft to the draft Commission Delegated Regulation supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be included in an application for authorisation as a crypto-asset service provider

c.c.: Irene Tinagli MEP, Chair of the Committee on Economic and Monetary Affairs, European Parliament; Thérèse Blanchet, Secretary-General of the Council of the European Union