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INSIDE THIS ISSUE

Reg A+ : The Faster, Cheaper Way to Go Public and Remain Public in the U.S.

By Morris DeFeo and Jennifer Rodriguez

For Israeli companies looking to enter the U.S. market and raise capital, regulations and capital raising rules can be burdensome. However, once you have a registered U.S. company and meet a few other qualifications, Regulation A+ enables qualified private issuers to raise capital in the United States through securities offerings having many of the attributes of SEC-registered public offerings, without the same level of SEC review or ongoing reporting obligations. Thus, the company can go public and remain public in the U.S. in a manner that is considerably less expensive or time consuming than otherwise.

Overview

Regulation A+ (officially known as the amended version of Regulation A), was adopted in its current form in 2015 pursuant to the requirements of the Jumpstart Our Business Startups (or JOBS) Act to facilitate capital raising by smaller businesses in the United States and Canada. Accordingly, it is available exclusively to issuers organized under the laws of, and with a principal place of business in, the U.S. or Canada.

Reg A+ offerings fall into two categories:

- Tier 1, for offerings up to $20 million in a 12-month period
- Tier 2, for offerings up to $50 million in a 12-month period

Certain investment and other limitations apply.

All offerings under Reg A+ require the filing with, and review by, the SEC of an offering statement on Form 1-A. Issuers may choose between two formats for the offering statement, and financial statement requirements, including the need for audited financial statements, vary depending upon whether Tier 1 or Tier 2 is used.

Why Reg. A+?

As a general rule, issuers seeking to raise capital by selling securities in the U.S. must either register their offering with the SEC under the U.S. Securities Act of 1933, as

amended (the 1933 Act) or seek an exemption from registration. SEC registration can be attractive because it typically affords the greatest opportunity to raise significant amounts of capital from the largest potential pool of investors. However, SEC registration is rigorous, costly and time-consuming. Moreover, once an issuer files a registration statement, it must assume additional regulatory obligations , including the duty to file annual and other periodic reports with the SEC and satisfy other obligations arising under the U.S. Securities Exchange Act of 1934 (the 1934 Act), including those imposed by the Sarbanes-Oxley Act. Accordingly, issuers, especially startups and small businesses that typically have tight monetary and human resources, must evaluate the relative costs and benefits of such an undertaking.

If a company wishes to raise a limited amount of capital, and is not otherwise seeking to establish itself as a public reporting company in the U.S., it may be well-served by relying on an available exemption from registration. One of the most well-known is the "safe harbor" exemption comprising Regulation D (Reg D) under the 1933 Act. Reg D certainly has its advantages—but it can be limiting if an issuer is not well-connected to a network of institutional and high net worth investors. Reg. D permits only a limited amount of sales to unaccredited investors (i.e., investors who do not meet the income, net worth or other criteria identified by the SEC to qualify as "accredited investors"), and in most cases prohibits an issuer from publicizing its offering through means of a "general solicitation," or advertising. Moreover, securities issued in most Reg D offerings are considered "restricted securities" the transferability of which is limited under SEC rules. However, a significant advantage of Reg D is that, unlike full-blown SEC registration or Reg A+, no SEC review of disclosure materials is required.

Reg A+ provides a mechanism for raising capital that sits somewhere in the middle of the public offering/private placement spectrum, balancing the pros and cons of these methods in a way designed to uniquely promote the growth of small businesses. Issuers in a Reg A+ offering may effectively conduct a public offering for up to $50 million in aggregate proceeds which, with certain limitations, allows the inclusion of both accredited and unaccredited investors. While filing and review of the Reg A+ offering materials by the SEC are required (unlike a Reg D private placement), the level of scrutiny generally does not rise to the level one would expect in a registered public offering, and the SEC review period is generally shorter than a corresponding review of a registration statement under the 1933 Act. Moreover, while Tier 2 offerings require certain ongoing periodic filings with the SEC, it is far less burdensome than the full panoply of 1934 Act reporting resulting from SEC registration. Additionally, there are no Section 13 or Section 16 filing obligations under Reg A+. Finally, unlike securities sold in most Reg D offerings, securities issued pursuant to Reg A+ are not deemed "restricted securities." The potential for immediate liquidity can be highly attractive to potential investors.

In addition to meeting the requirements of the U.S. federal securities laws, companies seeking to issue securities must also ensure that they meet the requirements arising under applicable state securities or "blue sky laws" in each state where the offering is to be made. Requirements vary from state to state. In many states most Reg D-qualified offerings can be effected through coordinating exemptions from state securities registration through a simple notice filing (a copy of the Form D as filed with the SEC, along with a state-determined filing fee generally in the range of $300-$500 per state).

In the context of Reg A+ offerings, things can be a little tricky. Tier 1 offerings under Reg A+ must satisfy the securities registration and qualification requirements of each individual state in which securities are offered. Under Reg A+, Tier 2 offerings are expressly exempt from state securities registration and qualification requirements including state review of the offering statement, but only if the securities are sold to qualified purchasers or the securities are listed on a national securities exchange. States are also free to impose a notice filing requirement and a state-determined filing fee, much like a Reg D notice filing. Therefore, despite the explicit preemption of state securities laws, in practice, state authorities continue to impose their own views of how their securities laws apply even in the context of Tier 2 offerings.

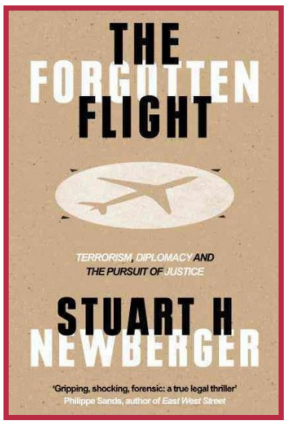
Conclusion

Reg A+ is increasingly popular as a means for smaller qualified issuers to access the U.S. capital markets and one that serves as a great option for many Israel based companies. Before embarking on any capital raising strategy, however, issuers are advised to evaluate their objectives and the relative costs and benefits of each alternative.

Morris DeFeo *heads and serves as Co-Chair of the firm's Securities Practice and Corporate Group.*

Jennifer Rodriguez *is an associate in Crowell & Moring's Securities Practice and Corporate Group.*

Practice Spotlight:
Stuart Newberger and International Terrorism Litigation



Crowell & Moring has developed an active, successful, and unique practice in obtaining monetary relief for victims of international terrorism and their families. Stu Newberger took a minute to discuss the practice and his forthcoming book, *The Forgotten Flight: Terrorism, Diplomacy and the Pursuit of Justice*.

Q: *Please tell us why this practice is so unique.*

A: Our team have tried to judgment more than a dozen cases in the U.S. District Court for the District of Columbia dealing with international terrorism, and have several more cases pending in that court. We were at the forefront in trying these types of cases.

Q: *Who do you primarily represent?*

A: We represent the American victims of terrorist acts abroad, primarily surviving family members. Congress established the U.S. Victims of State Sponsored Terrorism Fund via the "Justice for United States Victims of State Sponsored Terrorism Act" in 2015. It was funded for this fiscal year [FY17] with about $1.1 billion. We are representing about 500 claims to this fund.

Q: *You are releasing a book telling the story of one of the biggest cases the team has worked on. Tell me more about the case and the book.*

A: The case is known as the "French Lockerbie" case, and is one of the most significant matters the [International Terrorism Litigation] team has worked on. We represented seven American families and the owner of a jumbo passenger jet against the government of Libya. We successfully argued that the Libyan state had a role in blowing up UTA Flight 772 [en route from North Africa to Paris in 1989,] killing 170 persons. We obtained a judgment for over $1.6 billion against the Libyan state in 2008.

The book tells the story of the flight itself as well as how we came to be involved with and represent some of the families, and how the case progressed through the U.S. court system. These cases have been brought against terrorist states such as

Recent Events

Michael Granoff of Maniv

Investor Lunch: Maniv Mobility Fund

Tuesday, March 21, 2017

Israel Practice Chair Sam Feigin and Crowell & Moring hosted a program with OurCrowd, a global equity crowdfunding platform, featuring Michael Granoff, President of cutting edge advanced transportation technology fund, Maniv Mobility.

Crowell & Moring, LLP, New York,NY

Upcoming Events

Cyber Tech Israel

June 12-13, 2017

Crowell & Moring will host a panel and reception the evening of June 12 in Washington D.C. and will sponsor and participate in Cyber Tech Fairfax on June 13, details to be confirmed.

Cyber Week

June 25-29, 2017

Crowell & Moring will participate in Cyber Week in Israel.

Tel Aviv University

Iran, Libya and Sudan, for almost 20 years, and we already have collected several hundred million dollars for our clients over that time. We continue to pursue such cases and claims today.

***Q:** What is unique about this book?*

A: The book is the first time the UTA 772 story has been published in English. Most people remember very well the Pan Am 103 flight that Libya blew up over Lockerbie Scotland in late 1988, killing over 250 passengers, crew and people on the ground. Very few know about a similar act of mass murder 10 months later, also carried out by Libya, when a French jumbo jet was blown up over a North Africa, killing 170 people, en route to Paris. That is why the BBC called it "The Forgotten Flight." Our team played the lead role in prosecuting that case, holding Libya responsible and helping to force Qaddafi to settle all claims with the US through a diplomatic deal with President Bush in 2008.

***Stuart Newberger** is a partner in Crowell & Moring's International Dispute Resolution and Israel Practices.*

Trump Administration Issues Trade Policy Agenda Focusing on U.S. Sovereignty and Jobs:

In a Congressionally-mandated report on U.S. trade policy released on March 1, the Trump administration emphasized U.S. sovereignty in determining trade policy, promised to use trade remedy laws assertively to counter unfair trading practices, pledged to aggressively put pressure on countries to eliminate barriers to U.S. exports, and committed to reviewing the U.S. approach to trade agreements. During President Donald Trump's meetings with Prime Minister Benjamin Netanyahu in February, trade was amongst several topics discussed. With the administration's focus shifted from multi-lateral to bi-lateral trade agreements, there may be an opportunity for strengthened ties with Israel via a renewed free trade agreement.

The Trump Administration's 2017 Trade Policy Agenda (the Agenda) makes the case for "freer and fairer trade" as articulated by candidate Trump during his campaign for the presidency, noting that other governments often fail to follow the international rules adequately and fail to administer their trade actions in a transparent manner. Although the Agenda does not provide much detail, it does state that a fuller version of the administration's trade policy priorities will be released once President Trump's new U.S. Trade Representative is confirmed.

The Agenda's overarching message reflects messages heard on the campaign trail and during the confirmation hearing of U.S. Commerce Secretary Wilbur Ross. It states that U.S. trade policy will be designed to "increase our economic growth, promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports."

The reference to agriculture in the Agenda is likely a White House acknowledgement of concerns raised by Members of Congress from agriculture-exporting states that the Trump Administration had overlooked the importance of U.S. agriculture exports when highlighting trade deficits and the "job-killing" aspects of trade.

America First

Defending the United States' national interest in the realm of trade policy is a recurring theme in the Agenda, which begins by declaring the Administration's commitment to prioritize U.S. sovereignty over trade policy and its own trade objectives.

The Agenda sets out the basis in domestic law that adverse WTO decisions do not change U.S. law unless the U.S. Government decides to implement modifications administratively or through legislation. However, under WTO rules, WTO members may be authorized to take retaliatory measures – usually in the form of increased tariffs on American exports – if the United States does not bring a policy into conformity with WTO findings in a timely manner.

Aggressive Trade Remedy Laws will be in Play

The Agenda makes clear that U.S. trade remedy laws will take a front seat in the Administration's efforts to level the playing field for U.S. companies. This is not surprising: this stance was part of candidate Trump's "economic nationalism" on the campaign trail, and the Administration's pick for USTR, Robert Lighthizer, is known for his track record on steel antidumping cases and for recommending trade remedy actions against China if necessary to safeguard U.S. trade interests.

The Agenda highlights potential U.S. actions to be taken under Section 201 of the Trade Act of 1974 (safeguards), which allows the President to provide relief in response to a surge in imports, and Section 301 of the same act, which allows the United States to impose trade sanctions against countries that violate trade agreements or engage in unfair trade practices. In addition to

"leveling the playing field," these provisions also will be used as policy levers to encourage countries to "adopt more market-friendly policies."

Section 201 was last invoked by President George W. Bush in 2002. Tariffs were imposed on foreign steel in a response to an alleged import surge. Section 301 has not been used unilaterally for more than 20 years (since 1995) as the U.S. committed to raising Section 301 issues first through the WTO's dispute settlement process when those issues are covered under WTO agreements.

However, recent press reports on, and op-eds by the Administration have covered or alluded to additional legal mechanisms (such as Section 122 import surcharges, Section 232 national security safeguards (under Trade Expansion Act of 1962), and even action under the Trading with the Enemy Act or International Emergency Economic Powers Act) that permit unilateral U.S. action for national emergency and security purposes. The Agenda appears to lay the legal groundwork for justifying actions independent of the WTO should the U.S. find it necessary to do so.

Rebalancing and Leveling the Playing Field

On opening up foreign markets to U.S. exports, the Agenda declares that the Trump Administration will take an "aggressive" approach to eliminating barriers to U.S. exports, using "all possible leverage," including the principle of reciprocity, applying limits on trade or investment on countries that refuse to open their markets (e.g., limiting U.S. market access to levels provided by U.S. trading partners).

Foreign trade barriers mentioned include foreign subsidies, currency interventions, theft of intellectual property, unfair competitive behavior by state-owned enterprises, violation of labor laws, use of forced labor, and technical barriers to trade – more loosely defined in media reports as burdensome or unnecessary regulations. Examples raised in the Agenda included theft of trade secrets, restricting the flow of digital data and services, and limiting competition in the services sector.

Hint on Next Steps for Bilateral Trade Deals?

The Agenda is critical of current U.S. trading arrangements, including the North American Free Trade Agreement (NAFTA) and the U.S.-Korea Free Trade Agreement. It cites trade deficits and other economic figures and attributes poor U.S. economic performance to trade developments, such as China's accession to the WTO, which was also raised in the President's February 28 address to the joint session of Congress, suggesting that China will be a major focus of scrutiny and action.

In response, the Agenda states that the Administration will review the U.S. approach to trade agreements and will likely seek bilateral, rather than multilateral agreements going forward. It states that by withdrawing from TPP, the Trump Administration has "paved the way for potential bilateral talks with the remaining TPP countries," signaling that it may seek bilateral deals with Japan, Canada, and Mexico (whose leaders President Trump or his cabinet officials have met with recently on a variety of issues, including trade).

While the Agenda goes on to note that "the President has begun his consultations with Congress on the ways in which future trade agreements can work for all Americans more effectively than they have in the past," detailed consultations with Congress on new bilateral agreements will also need to await the confirmation of a USTR (trade lawyer Stephen Vaughn has been named acting USTR and General Counsel, the former until the USTR, presumably Lighthizer, is confirmed). Notably absent was any reference to "key allies" (such as the U.K.) as candidates for future bilateral trade agreements, although both sides are acting as though this is a given.

A more detailed trade policy agenda will be released once a USTR has been confirmed. In the meantime, the trade policy agenda as previewed in the report released March 1 confirms signals and statements made by the President and his key advisors to date. The Trump administration is signaling that it is prepared to take a more aggressive approach to unfair trade practices being pursued by U.S. trading partners.

The Agenda signals that the White House will seek to use the leverage of the U.S. market wherever possible to increase market-opening that benefits U.S. exports, while reworking existing and future U.S. trade agreements to achieve economic outcomes focused solely on U.S. workers, farmers, ranchers and businesses.

***Melissa Morris** is a director in Crowell & Moring's International Trade Group and focuses on analysis of free trade areas.*

***Tracy Huang**is an associate director in Crowell & Moring's International Trade Group and works on anti-corruption, China, and other matters.*

Fastest Five Minutes:

U.S. Government Contracts Legal and Regulatory Developments

February 2017 Highlights

The Fastest Five Minutes is presented by Crowell & Moring co-hosts David Robbins and Peter Eyre who are active in the Firm's Israel Practice. The podcast is a bi-weekly summary of significant government contracts legal and regulatory developments that no government contracts lawyer or executive should be without. Subscribe to our biweekly update on iTunes, Google Play, or listen from our website.

In a flurry of activity, the Trump Administration issued a variety of executive orders. The orders include **a federal hiring freeze** and **a temporary freeze on EPA grants and contract awards**. An **overall regulatory freeze** was also issued, pending review by the new Administration **in an order that two regulations be canceled for every regulation implemented**.

The President prohibited executive agencies from hiring federal civilian employees to fill positions that were vacant as of noon on January 22, 2017 or creating new positions. The freeze was lifter on April 12th, and the Trump administration issued guidance for agencies wishing to hire. Some exemptions exist, namely for military personnel for positions at executive agencies, where department heads deem necessary to meet national security or public safety responsibilities and for positions that the Office of Personnel Management Director determines are otherwise necessary.

As reported in the press, **the Administration also temporarily froze contracts and grants spending at the EPA pending review by the incoming EPA leadership of the EPA's spending efforts.** Reports are that this freeze has been lifted.

The Trump Administration also issued the traditional hold on non-final regulations so they could be further reviewed for alignment with the Administration's priorities. Shortly thereafter, the President went farther ordering that two regulations be canceled for every new one implemented and ordered that the cost impact of non-statutorily mandated regulations generally must be zero dollars.

Speaking of regulations, our Department of Homeland Security is proposing to amend the Homeland Security Acquisition regulation to account for requirements to safeguard role classified information also known as CUI. The proposed rule marks the beginning of DHS' shift for the government CUI program away from DHS's prior focus on protecting sensitive information. It would consolidate pre-existing requirements for handling sensitive DHS information and require all contractors handling CUI to be in full compliance at the time of the contract award. The proposed rule would also impose quick reporting requirements for any known or suspected incidents involving CUI which are largely taken from pre-existing reporting requirements for sensitive security information. Effective immediately, federal contractors must begin using the voluntary self-disclosure of disability form from OFCCP with the January 31, 2020 expiration date.

A joint congressional resolution is working through Congress under the Congressional Review Act to undo the Fair Pay and Safe Workplaces regulation put into place under the Obama Administration. This final rule was enjoined on the eve of its implementation date and may never become effective if this effort succeeds.

The Department of Defense issued updated frequently asked questions about the application and requirements of DFARs 2522047012 Safeguard and Cover Defense Information in Cyber Instant reporting. The FAQs speak to the scope and applicability of the role implementation of security controls reporting requirements in costs associated with compliance. **DOD AT&L also issued a new DOD Instruction 5000.75 Business Systems Requirements and Acquisition.** This establishes new guidelines for business system requirements and acquisition and allows for the use of commercial off-the-shelf dates to the Pentagon's information infrastructure. It notes that all leaders must drive toward commercial off-the-shelf (COTs) and government off-the-shelf (GCOTs) solutions. The instruction, except for certain appendices, does not apply to the acquisition of other Pentagon programs and services including major defense acquisition programs (MDAPs).

The NASA OIG issued an Industrial Control System Security Within NASA's Critical and Supporting Infrastructure report which identified a number of issues with NASA's ability to protect its vital asset. The DOD IG again reported critically on the department's reporting of contractor performance. The

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https://www.crowell.com/Practices/Israel-Practice

IG noted that the DOD did not consistently comply with the requirements for assessing contractor performance through timely submission of performance assessment reports. The IG called out Dibco, DLA Energy, and DLA Troops Support for particular delays.

Defense and civilian agencies guidance was released concerning further implementing the federal hiring freeze, including a note that contracting out the functions impacted by the freeze would not be permitted. However, certain exemptions are allowed. For example, DOD ordered 16 such exemptions.

The Fifth Circuit and U.S. ex. rel. Vavra v. KBR held that under Section 8706(A)(1) of the Anti-kickback Act, corporations are liable "for the knowing violations of those employees whose authority, responsibility or managerial role within the corporation is such that their knowledge is imputable to the corporation." This standard was applied to the two KBR employees who accepted meals and entertainment on 33 occasions from a supplier of KBR. The court found that one employee's knowledge could be imputed to the corporation because the employee was responsible for supervising the subcontracted issue for issuing the supplier met its obligations, including contractor performance and for executing technical evaluations for rebidding the subcontract. Therefore, according to the court, this employee "had somewhat significant managerial or authority over the spear of activity in question." In contrast, the court found that the other employee, who is neither involved in nor had the authority to take any procurement action regarding the subcontractor issue, had only "limited authority" which was not enough to impute his knowledge to KBR. With respect to whether numerous instances of meals, drinks, and other entertainment constituted kickbacks under the Act, the court concluded that anything of value offered in order to subvert the proper process for awarding subcontracts is a potential kickback.

The 4th Circuit in U.S. ex. rel. Michaels v. Agape Senior Community joined the 5th Circuit in deciding that the government possesses an unreviewable right to veto false claims act settlements, even after electing not to intervene. The case also raised whether statistical sampling is an appropriate methodology for establishing liability and damages in false claims act cases. However, the 4th Circuit did not reach the statistical sampling issue in its decision.

Federal News Radio has reported that the GSA has joined the DOD in hiring so-called ethical hackers to find cyber vulnerabilities. Stated differently, and with our tongues firmly planted in our cheeks, there may be a hiring freeze at the federal level but you can still get paid to hack government websites, apparently.

Fastest Five Minutes: U.S. Government Contracts Legal and Regulatory Developments

March 2017 Highlights

The fraud section of the Department of Justice published new guidance on its website entitled, Evaluation of Corporate Compliance Programs. It provides insights into the mindset of prosecutors tasked with corporate investigations. The guidance includes questions about how senior leadership demonstrates model behavior to subordinates, what concrete action stakeholders have taken to demonstrate a commitment to compliance, and what compliance expertise is provided by the board of directors.

The guidance asks how corporate training programs are tailored for high-risk employees and activities and how companies measure the effectiveness of these programs. There is a significant focus on the internal compliance function, including how it compares with other corporate functions in terms of stature, compensation, rank, titled resources and access to key decision makers. It is a great resource for those that would like to better understand the government thinks about compliance and ethics, in the DOJ particularly but also other agencies.

The GSA Office of Inspector General issued a report evaluating information technology security compliance of 18-F, the GSA's Rapid Technology Development Center. The 18-F program within the Technology Transformation Service was designed to help federal agencies build, buy and share digital services. The IG report found that 18-F disregarded GSA IT security policies for operating and obtaining information technology. According to the report, 18-F also created and used its own set of guidelines for assessing and authorizing information systems that circumvented GSA IT. While rapid acquisition and alternative acquisition systems appear to be all the rage, this report highlights some of the risks of moving quickly on acquisition.

The Secretary of Defense, Jim Mattis, also distributed guidance last month directing certain structural reforms within DoD, including eliminating the Undersecretary of Defense for Acquisition, Technology and Logistics, and separating out some of its duties. Other directive changes included some pointed at the Chief Management Officer and others related to information management and cyber operations. Meanwhile, Secretary Mattis also issued guidance calling for cross-functional teams across military departments to avoid duplication. Acquisition and contract management is expressly called out as an item meriting analysis for potential deficiencies. With all the moving parts surrounding defense procurement, the meetings of the Government Industry Advisory Panel take on new and enhanced importance. The GAO was also active publishing its high-risk series during this period, and a report critical of U.S. government cybersecurity overall.

The Fourth Circuit issued an interesting decision in *Beck v. Department of Veterans Affairs*. After multiple thefts and data breaches related to the unencrypted personal information of 7,400 veterans out of a VA hospital, an appeals court dismissed a lawsuit this month in which patients alleged violations of the Privacy Act and the Administrative Procedures Act. As a result of the lack of clear victimization, Judge Diaz called the lawsuit's allegations insufficient and speculative to show real harm or risk was present. The plaintiffs pointed to the money they spent buying credit and identity monitoring, but that was deemed too speculative by the Court.

***David Robbins** is a partner in Crowell & Moring's Government Contracts Group who recently spoke at several programs in Israel.*

***Peter J. Eyre** is a partner and co-chair of Crowell & Moring's Government Contracts Group.*

NYDFS Implements First-In-The-U.S. Cybersecurity Rule for Covered Financial Services Companies

On February 16, 2017, the New York Department of Financial Services (NYDFS) published a final rule (the Rule) imposing new cybersecurity requirements on covered financial institutions. The NYDFS supervises and sets rules for financial institutions and insurance companies doing business in New York, including foreign banks with representative offices. The Rule took effect on March 1, 2017; however, covered institutions will have 180 days to come into compliance with most requirements, with longer transition periods of 1-2 years for certain obligations. The Rule requires covered entities to certify annually that they are in compliance with its requirements, with the first certification due on February 15, 2018. NYDFS revised its prior drafts of the Rule based on two rounds of public comment.

It is unclear how the Rule—and others like it that may appear in the future—will interact with voluntary standards aimed at critical infrastructure more generally, such as the U.S. National Institute of Standards & Technology (NIST) Cybersecurity Framework (CSF). While the Rule addresses many of the same considerations as other pre-existing standards, it delves deeper into the specifics. For example, multi-factor authentication and encryption at rest are tools that industry can use to meet standards such as the Gramm-Leach Bliley Act and NIST CSF, but neither is specifically required.

The Rule's impact is likely to be most prominently felt by financial services companies that are not already subject to U.S. federal cybersecurity standards, to the extent they have not already established cybersecurity programs that are largely compliant.

The Rule is notable for its potentially broad reach. Specifically, the Rule defines a "Covered Entity" as "any Person operating under or required to operate under a license, registration, charter, certificate, permit, accreditation or similar authorization" under New York's Banking Law, Insurance Law, or Financial Services Law. (Sec. 500.01(c)). While the Rule contains exemptions based on, for example, number of employees (fewer than 10); gross annual revenue (less than $5 million in each of the last three fiscal years from New York business operations of the Covered Entity and any affiliates); and year-end total assets (less than $10 million, including assets of all affiliates), it nevertheless potentially draws a broad range of banks, insurance companies, and other financial services providers within its reach. (Sec. 500.19).

The Rule requires Covered Entities to establish and maintain a risk-based cybersecurity program that is "designed to protect the confidentiality, integrity and availability" of its information systems, as well as any "nonpublic information" stored on such systems. (Sec. 500.02). It likewise requires Covered Entities to prepare written policies, and to designate a Chief Information Security Officer (CISO). (Secs. 500.03 and 500.04). Among the other requirements the Rule imposes are:

- Either "effective continuous monitoring" of the Covered Entity's information system or annual penetration testing and bi-annual vulnerability assessments, consistent with the Entity's level of risk. (Sec. 500.05)
- Systems that are designed to reconstruct material financial transactions sufficient to support normal obligations of the Entity and that include audit trails designed to detect and respond to cybersecurity events. (Sec. 500.06)
- Development of third-party service provider security policies that set forth minimum cybersecurity practices required to be met by third parties providing services to the Covered Entity. (Sec. 500.11)
- The use of multi-factor authentication, consistent with the Entity's risk assessment, in order to prevent unauthorized access to nonpublic information or information systems. (Sec. 500.12)
- The use of encryption, consistent with the Entity's risk assessment, in order to protect nonpublic information held or transmitted by the Entity "both in transit over external networks and at rest." (Sec. 500.15)
- A requirement to provide the NYDFS Superintendent with notice within 72 hours from a determination that a qualifying cybersecurity event has occurred. (Sec. 500.17(a))
- An annual reporting requirement to the NYDFS Superintendent certifying compliance with the Rule and setting forth any identified areas, systems, or processes requiring material improvement, updating, or redesign, and documenting any remedial efforts planned or underway to address these. Entities also must retain for inspection all records, schedules, and data supporting the certification, for period of five years. (Sec. 500.17(b))

The Rule is the first known effort by a U.S. state regulatory agency to impose mandatory cybersecurity requirements on a class of businesses, and in that way it represents a break from prior efforts that have focused more on voluntary standards. New York's experience with the implementation of the Rule may inform similar efforts by other state regulators in the future.

Institutions that are already subject to other obligatory cybersecurity standards for the financial industry, such as those imposed under the Gramm-Leach Bliley Act (GLBA), or by the Financial Industry Regulatory Authority (FINRA) or the Securities and Exchange Commission's Office of Compliance, Inspections and Examinations (SEC OCIE), may find that they already have addressed many of the steps required by the new Rule. However, they still will have to assess for any overlaps and gaps with the requirements of the new Rule as they build compliance programs.

Given the increasing interrelationship between U.S. state and federal obligations, as well as both cybersecurity and anti-money laundering (AML) regulations, it is important for affected firms to adopt a coordinated approach with an integrated team of legal professionals.

Evan D. Wolff *is a partner in Crowell & Moring's Privacy and Cybersecurity Groups.*

Carlton Greene *is a partner in Crowell & Moring's International Trade and White Collar and Regulatory Enforcement Groups.*

About Crowell & Moring's Israel Practice

Our Israel Practice provides one-stop strategic and legal advice to Israeli companies doing business in the U.S. and multinationals partnering with Israeli companies. We handle the complete array of issues that Israel-related businesses tend to experience, from intellectual property advice on the first idea, to corporate and employment representation in the establishment and financing of the entity, to securities work on the public offering, through M&A representation in conjunction with the sale of the company.

We understand the fast-paced, cutting-edge needs of Israeli companies, investors, executives and entrepreneurs. We anticipate issues and opportunities and operate proactively, quickly, and creatively. We are deeply ensconced in the most relevant sectors including:

- High Tech
- Technology, Media & Telecommunications
- Internet
- Cybersecurity
- Aerospace & Defense
- Pharmaceuticals & Life Sciences
- Energy/Clean Tech
- Retail & Consumer Products

We handle virtually every type of legal work needed by Israeli companies doing business in the U.S. and around the world. Areas of focus include:

- Mergers & Acquisitions
- Intellectual Property
- Formation of U.S. Entities & Tax Planning
- Financing, including venture capital and debt financings
- Public Offerings
- Government Contracts
- International Litigation & Dispute Resolution
- Labor & Employment
- Advertising & Product Risk Management
- International Trade and Customs
- Joint Ventures and Franchising
- Licensing and Strategic Collaborations

We facilitate business opportunities for our clients by early identification of market openings, private and government RFPs, technology trends, investor desires, compelling technology and the like, and by making introductions to potential business partners. Our extensive relationships with Fortune 500 companies, category killers, private equity leaders, and venture capital funds enable us to introduce Israeli emerging companies to the most sought after investors and strategic partners. And our vast network in the Israeli business community allows us to introduce our industry-leading multinational clients to compelling Israeli technologies and products, and those who create them.

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If you have questions or would like additional information related to the content provided in this newsletter, please contact the authors or Sam Feigin, Chair of Crowell & Moring's Israel Practice.

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