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ISRAEL PRACTICE NEWSLETTER

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What Strategic Investors in Israeli Emerging Technology Companies Should Know: Q&A with Corporate Attorney Karen Kopel

Karen Kopel

As part of our multi-faceted Israel Practice, Crowell & Moring regularly represents financial and strategic investors in Israeli technology companies. Investments by strategic investors raise special business and legal considerations, and when those transactions involve Israeli companies, we draw on our experience handling these types of transactions in the U.S. and Israel to the benefit of our clients.

Recently, Crowell & Moring represented firm client GigOptix, Inc. in its strategic investment in Tel Aviv-based emerging technology company, Anagog Ltd. GigOptix led the Series A round, which also included U.S., Chinese and other Israeli based investors. The core Crowell & Moring team consisted of Jeff Selman, Mark Kass and Karen Kopel, all members of the Corporate Group and the Israel Practice. Jeff and Karen practice out of the firm's San Francisco office, and Mark out of our DC office.

Q: Attorneys in Crowell & Moring's Corporate Department have a lot of experience doing early stage and strategic investments in emerging technology companies, both from the investor-side as well as company-

UPCOMING EVENTS

April 11-14 | Tel Aviv

C&M attorneys will be in Israel meeting with clients, prospective clients, investors and thought leaders with a focus on cybersecurity and privacy. One member of our team, who is both an engineer and an attorney, is among the foremost authorities on both the legal and technical issues. Meetings will focus on what large companies should and should not be doing to protect themselves, what cyber tech providers must do to conform their technological capabilities to the regulatory landscape and where and how to pursue business opportunities outside of Israel.

side; how do strategic investments into an Israeli emerging technology company differ from similar U.S. investments?

A: Practically speaking, the concepts relevant to an investment into an Israeli-based company are the same as an investment into a Delaware corporation. One key objective is to integrate the specific Israeli legal structure and forms of agreements into a set of deal documents that work for a U.S. business and legal audience. That way, the transaction can be better integrated by the strategic investor and all of its constituencies. Israeli law is based on and heavily influenced by the British system, and as a result, Israeli deals use different documents. However, all the concepts should still be there – voting, board of directors, shareholder rights, etc. – they just may be found in different documents and expressed in different ways then they would be in a Delaware company. Investor's counsel needs a thorough understanding of the Israeli and U.S. templates for the relevant deal documents to make sure that each of the key issues which are regularly addressed in the U.S., but may be less common in Israeli deals, are properly handled.

Q: What are the main differences between investment documents in Silicon Valley and Israel?

A: The typical Israeli Stock Purchase Agreement is fairly similar to what we see in the U.S., but the Articles of Association has significant differences from its U.S. counterpart – the Certificate of Incorporation. Israeli law incorporates what we would find in a company's Certificate of Incorporation and Bylaws together into the Articles of Association, along with certain elements taken from the British corporate system. Furthermore, Israeli Articles of Association often include many concepts that, in Silicon Valley, would be found in a separate Voting Agreement, Investors' Rights Agreement and Right of First Refusal and Co-Sale Agreement, such as preemptive rights, right of first refusal, co-sale and drag-along. Placing these rights into a corporate charter, rather than separate agreements, can have legal implications, which we address.

Q: Can you describe GigOptix and Anagog, and what makes this investment "strategic" for GigOptix?

A: GigOptix, Inc. (NYSE: GIG) is a lead designer, developer, and global supplier of a broad range of analog, digital, and mixed signal components to enable high-speed information streaming over the telecom networks, datacom infrastructure, and consumer electronics links. GigOptix's ability to innovate and create differentiated products is based on deployment of various semiconductor technologies that span from III-V compounds to SiGe-BiCMOS and CMOS based device designs. The company is based in San Jose, California, although Dr. Avi Katz, Founder, Chairman and CEO of GigOptix, is originally from Haifa, Israel.

Anagog is the developer of the world's larget crowdsourced parking network. Its mobility status SDK allows detection of a user's real-time mobility status with ultra-low battery consumption. The SDK can tell if a user is currently walking, driving, at home, when and where a user parked his car, if he is riding a bus, enters or exits a predefined zone, and more. Such mobility status detection enables the best context-aware applications and services and drastically improves the user's experience. Anagog's mobility status SDK can even provide certain levels of predictions on the user's activities. This predictive information, when collected simultaneously from multiple users, provides the most powerful crowd sourced parking network.

Anagog is deploying the SDK globally via a B2B model, where other B2C app developers are implementing the mobility status SDK in their apps and are providing services based on the SDK to their users.

GigOptix is not only interested in helping Anagog grow because it believes in Anagog's technology and capabilities. GigOptix also sees an opportunity to integrate Anagog's technology into GigOptix's Internet-of-Things semiconductor chipset and use that integration to extend its present leadership in datacenter links into end-user cloud connectivity. Drawing on our experience with U.S. and Israeli collaboration agreements, the Crowell & Moring team assisted GigOptix in structuring and documenting this collaboration.

Karen Kopel *is an associate in the firm's Corporate Group. Beyond working on M&A and financing transactions, she provides legal and strategic advice to emerging company clients on formation, strategic planning, corporate governance, and commercial and intellectual property transactional matters.*

mHealth: Bipartisan Bill Would Expand Telehealth and Remote Patient Monitoring

By Jodi G. Daniel and Jim G. Flood

The U.S. House and the Senate introduced a bipartisan bill that would lift the restrictions on the provision of telehealth and remote patient monitoring (RPM) services, with the goal of cost savings and improved quality of care. In February, Democrat and Republican lawmakers from both chambers introduced the *Creating Opportunities Now for Necessary and Effective Care Technologies (CONNECT) for Health Act.*

Telehealth advocates have suggested that the bill would save the government $1.8 billion over ten years. Indeed, supporters of telehealth services argue that "virtual visits" may reduce costly hospitalizations, ultimately cutting health care spending through better access and feasibility. Those savings, however, have not been recognized by the Congressional Budget Office's (CBO) analysis of past telehealth bills. CBO reports that greater accessibility may result in more health care services and increased spending.

More than 50 organizations, including patient advocates, insurers, health care providers, and tech companies, are publicly supporting the proposed legislation. The sponsors emphasize that the bill has bipartisan appeal, and may garner enough support to pass this year. We believe this is a bill to watch this year.

Summary of Key Provisions in the Proposed Legislation

The proposed legislation expands the use of telehealth and RPM services in several ways:

- **"Bridge" Demonstration Waivers:** Under the new proposed demonstration program, certain health care professionals, including alternative payment participants, may apply to obtain a "bridge" waiver. Applicants must submit proposals detailing how they would use telehealth and/or RPM services to meet the guidelines under the Medicare Access and CHIP Reauthorization Act (MACRA), including the Merit-based Incentive Payment System (MIPS) requirements, which include quality, resource utilization, and clinical practice improvement. If the application for waiver is granted, the applicant is permitted to use telehealth and/or RPM services without the prohibitions in section 1834(m) of the Social Security Act, including:
    - The originating site restrictions.
    - Geographic limitations (subject to state licensing requirements).
    - Use of store-and-forward technologies (currently available only in Alaska and Hawaii).
    - Appropriate uses of RPMs (as defined).
    - The type of health care provider who may furnish telehealth and RPM services.

To ensure compliance with the Act's prerequisites, the bill includes annual reporting requirements, and cooperation in randomly conducted audits. It also requires applicants to annually attest how they would use telehealth and/or RPM services to meet the MIPS requirements. Unless the Secretary expands the demonstration through rulemaking, the "bridge" waiver program automatically sunsets on December 31, 2019. The proposal requires the Secretary to provide a report to Congress in 2020 on the impact of the new demonstration programs on spending and the goals of MACRA.

- **APM Participation in Telehealth and/or RPMs:** Effective January 1, 2017, the Secretary may also issue waivers to alternative payment models (APM) participants to use telehealth and/or RPM services without section 1834(m) limitations that currently exist. Applicants would be required to submit data annually on utilization and expenditures for telehealth and/or RPM services, and data on the applicable quality measures under MACRA.
- **Other Expansions of Telehealth and RPM Services:** The bill expands coverage for RPM services for certain individuals with chronic health conditions and recent hospitalizations, and allows telehealth to be used to meet monthly clinician in-person visit requirement for certain home dialysis treatments, provided an in-person examination is done at least once every three consecutive months. The proposed legislation waives originating and geographic site restrictions for telestroke evaluation sites, and Native American health care

facilities. It also authorizes FQHCs and rural health clinics to provide distant telehealth services.

- **Telehealth and RPM Services for Medicare Part C:** The bill authorizes Medicare Advantage Organizations (MAO) to elect to use telehealth and/or RPMs to satisfy basic coverage requirements without the prohibitions imposed by section 1834(m). The MAO must also make these services available in-person. The proposed legislation requires that the MAO collect and report data on telehealth and RPM services expenditure and utilization.
- **Fraud and Abuse:** The proposal clarifies that provision of telehealth and/or RPM technologies for furnishing these services is not "remuneration" and would not trigger fraud and abuse exposure.

If this bill were to pass, it would enable the Medicare program to pay for much more telehealth and remote patient monitoring services. This would open up a new market of use of these tools by health care providers serving patients that are over 65 years old. It would also likely be replicated by private health insurers. This would provide a more open environment for innovation technologies in the U.S. Health Care Market. This bill has bipartisan suupport in both houses of Congress and a lot of public support, and therefore, has a good likelihood of success if it gets moved forward.

***Jodi G. Daniel** is a partner in the firm's Health Care Group. She is former director of the Office of Policy in the Office of the National Coordinator for Health Information Technology (ONC), U.S. Department of Health and Human Services (HHS). She served for a decade as the director at the ONC and 15 years at HHS, where she helped spearhead important changes in health information privacy and health information technology to improve health care for consumers nationwide.*

***Jim G. Flood** is a partner in the firm's Government Affairs Group. He also works with the firm's Health Care Group and Health Care Fraud Practice team to counsel clients on issues related to Medicare, Medicaid, Part D, long-term care, health care fraud, the False Claims Act (FCA), and the anti-kickback statute.*

Privacy & Cybersecurity: EU-U.S. Privacy Shield Principles Released

By Jeffrey L. Poston, Emmanuel Plasschaert, and Jeane A. Thomas

In February, the U.S. Department of Commerce published the EU-U.S. Privacy Shield foundational documents, including the framework's updated principles. The European Commission (EC) published the draft adequacy decision for the new framework. While there are no major surprises in the documents, given the earlier press releases, publication will allow companies to begin planning compliance strategies.

Crowell & Moring recently discussed the differences between the previous framework (U.S.-EU Safe Harbor) and the new one, during the March 9th seminar on the EU-U.S. Privacy Shield and the forthcoming EU Data Protection Regulation (GDPR).

Crowell & Moring attorneys from our Brussels and D.C. offices were joined by U.S. Department of Commerce Deputy Assistant Secretary Ted Dean, lead U.S. negotiator for the EU-U.S. Privacy Shield; and Oracle Vice President of Global Public Policy and Chief Privacy Strategist, Joseph Alhadeff. The seminar focused on how the proposed framework/ regulations differ from predecessors; adjustments to existing compliance programs that may be necessary to meet the new requirements; and hurdles/risks that may arise.

As for the implementation timeline of the EU-U.S. Privacy Shield, there remain several steps before the program is operational. The draft EU-U.S. Privacy Shield adequacy decision will now be subject to consultation by a committee of representatives of the EU Member States and their Data Protection Authorities (Article 29 Working Party), which will issue a (non-binding) opinion on April 12-13, 2016. Afterwards, the draft will have to pass the so called "comitology" (approval) process for EC decisions, which according to the EC, may take until June 2016. During that time, the U.S. will finalize the framework and put the agreed upon redress mechanisms in place.

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

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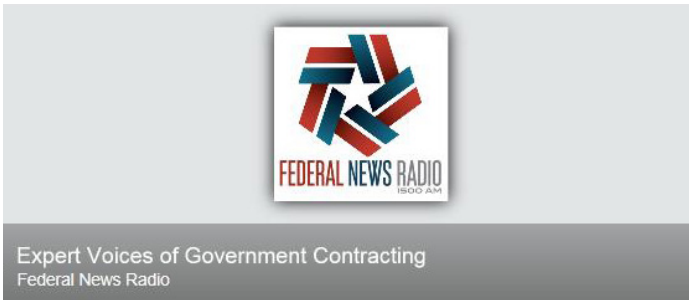
***Emmanuel Plasschaert** is a partner in the firm's Brussels office. He primarily focuses on labor law and advises companies on how to handle HR data protection and privacy issues.*

***Jeane A. Thomas** is chair of the firm's E-Discovery & Information Management Group and partner in the firm's Antitrust Group. She regularly counsels clients on Information Governance, including the development and application of effective information management policies, legal hold practices, and E-Discovery response plans.*

The Federal and Corporate Cybersecurity Landscape in the U.S.

Information has become foundational in today's federal and corporate arenas and is increasingly under threat and exploitation. Crowell & Moring partner Evan D. Wolff hosted a segment of Expert Voices. Evan and colleagues Harvey Rishikof and Kate M. Growley surveyed the landscape and what both the public and private sectors are doing to secure the nation's most sensitive information. Visit Federal News Radio to listen to Evan's full show.



http://federalnewsradio.com/expert-voices-of-government-contracting/2016/02/the-federal-and-corporate-cybersecurity-landscape/

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Medical Devices: Design Considerations and Pre-Market Submision Recommendations for Interoperable Medical Devices

By Jodi G. Daniel and John Fuson

In January, the U.S. Food and Drug Administration (FDA) released draft Guidance on interoperable medical devices. This provides important direction for medical device manufacturers to consider in the design of their products. Comments on the draft Guidance will be accepted by FDA for 60 days.

The draft Guidance is directly aligned with the Department of Health and Human Service's (HHS) continuing efforts to promote interoperability for health information and technology innovation in order to improve the efficiency and effectiveness of health care delivery, as outlined in the HHS Interoperability Roadmap. As FDA noted in the draft Guidance, when done right, interoperable medical devices can "foster rapid innovation at lower cost." It also extends FDA's emphasis on software verification and validation to ensure patient safety and product reliability, which the agency highlighted in its 2005 Guidance on software in medical devices, and its 2014 Guidance directed at mobile medical app makers.

The latest draft Guidance focuses on the availability of safe and effective medical devices and the exchange and use of medical information from these devices. Its principal concerns, of course, relate to patient safety and effectiveness, and in particular that the exchange and use of medical device information is accurate, timely, and not misleading. The draft Guidance provides

manufacturers with design considerations for interoperable medical devices, and describes the information the FDA will expect to see in pre-market submissions to show that safety features on interoperable devices have been carefully addressed.

Specifics of the draft Guidance

Definition: In the draft Guidance, FDA defines an interoperable device as a medical device having "the ability to exchange and use information through an electronic data interface with another medical device, product, technology, or system."

Product Development Considerations: To mitigate potential safety concerns from such cross-device data exchanges, the agency encourages careful consideration of the following during product development:

- What is the purpose of the device's electronic data interface?

  Specifically, manufacturers should think through and identify the types of devices their product will connect to, how that connection will be made, the type of data the device will exchange and the method of transfer, the frequency of data exchanges, and how receiving devices will use that data.

- Who are the anticipated users of the data?

  Specifically, manufacturers should identify expected users of shared data. For example, will it be used by professional care givers or information technology experts? Manufactures should also think about how recipients will use the shared data.

- What security risks might flow from intended and unintended access to the data?

  Specifically, manufacturers should consider whether unintended access to the device might compromise the device's safety or the safety of other integrated devices. They should evaluate whether adequate security features are in place, and whether the device can handle and dispose of data that is corrupted. They should also evaluate whether the device can deal with and move past basic failures and malfunctions.

- Does the device have appropriate user verification and validation controls?

  Specifically, manufacturers should consider whether controls are necessary to limit access to authorized users, and if so, whether such restrictions are adequate.

- Is the device appropriately labeled, with adequate directions for use?

  Specifically, manufacturers should ensure that the product labeling is sufficient to ensure proper use of the product.

Premarket submissions: The draft Guidance describes the information FDA will look for in pre-market submissions for devices that claim interoperability. The requested information is largely to ensure that manufactures have given thorough consideration to the questions listed above. Those include:

- A device description that discusses in detail the electronic data interfaces found on the device, including the purpose and use of each interface and an explanation of how data will be exchanged.

- A risk analysis that considers risks associated with interoperability, including risks from reasonably foreseeable misuse of the device's interoperable capabilities.

- Results from verification and validation testing for the electronic data interfaces.

- Labeling that enables users to connect and use the interoperable features of the device.

Jodi G. Daniel *is a partner in the firm's Health Care Group. She is former director of the Office of Policy in the Office of the National Coordinator for Health Information Technology (ONC), U.S. Department of Health and Human Services (HHS).*

John Fuson *is a partner in the firm's Health Care Group and focuses on U.S. Food and Drug Administration (FDA) enforcement and counseling matters. He served as associate chief counsel at the FDA from 2007-2012.*

Government Contracts in the U.S.: Minority Ownership Interests Can Create Affiliation and Defeat Small Business Size Status

By Amy Laderberg O'Sullivan

Far too often, investors, including venture capital companies, assume that as long as they do not retain the largest shareholder interest in a company, that they cannot create affiliation problems impacting what is a key to companies' initial success in government contracting: small business status. Wrong. A recent U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision makes this a stark reality, upholding a determination that an apparent awardee in a set-aside procurement is other-than-small based on affiliation arising from its mere 4.16 percent stock ownership interest in another company.

Affiliation Generally

If a contractor has ever thought about certifying its size as small under a particular NAICS code, hopefully they reviewed the SBA regulations on affiliation in advance. The analysis of whether a company is small in size does not start and end with the receipts or number of employees for that company, but is instead considered as a spider web of connections with other individuals and entities. In order to determine a concern's size, SBA counts not only the receipts or employees of the concern but also the receipts or employees of each of the concern's domestic and foreign affiliates.

Concerns and entities are affiliates of each other when one controls or even has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a). In determining affiliation, there are numerous factors that the SBA must consider – including, ownership, management, and previous relationships with or ties to other concerns. SBA's analysis concerns the totality of the circumstances; the absence of any single factor will not be considered dispositive.

Affiliation Based on Stock Ownership

For a concern that has issued stock or owns stock in other entities, a size determination should take into consideration affiliation based on stock ownership. The SBA regulations contain three different tests to determine affiliation (at 13 C.F.R. § 121.103(c)). See Chart 1 on page 9.

Although absolutely crucial concepts, the SBA regulations on their face provide no further definition of when a block of voting stock is "large compared to other outstanding blocks of voting stock," when blocks of stock are "approximately equal in size," or what it means to be "widely held." Instead, contractors have to look to scores of fact-specific SBA OHA decisions to understand these terms. For example, in a seminal case on what it means for a block of voting stock to be large when compared to other blocks (the first test discussed in chart 1), OHA determined that a 49 percent block of stock is large in comparison to a 36 percent block (causing affiliation), whereas a 49 percent block of stock is not large in comparison to a 41 percent block (not causing affiliation). The H.L. Turner Grp., SIZ-4896 (2008); Novalar Pharmaceuticals, Inc., SIZ-4977 (2008) (discussing H.L. Turner). Having to parse through the nuances of OHA's decisions on stock ownership percentages to see where a concern's stock distribution falls within the case law can leave a contractor with a lot of uncertainty, particularly in cases on the margins. But, a recent decision out of OHA demonstrates that even when stock ownership falls squarely within the plain meaning of these tests – in this case, where there were equal blocks of stock – contractors can still get tripped up.

OHA's Finding of Affiliation Based on a Mere 4.16 percent Stock Ownership Interest

In Government Contracting Resources, Inc., SIZ-5706 (2016), OHA upheld an Area Office size determination concluding that the concern at issue exceeded the NAICS size standard due to affiliation arising from its 4.16 percent ownership in another company, Valley Indemnity, Ltd. (Valley), under the minority shareholder test. The contractor at issue, Government Contracting Resources, Inc. (GCR), was the apparent awardee in a service-disabled veteran-owned small business (SDVOSB) set-aside procurement. Two unsuccessful offerors promptly filed size protests. The Area Office determined that GRC was not small, a determination that was appealed to OHA. Although OHA remanded once to the Area Office for further development, the second time around, OHA upheld the finding that GRC was other-than-small.

At issue was GRC's investment in Valley. Approximately twenty companies, including GRC, each owned an equal minority interest in Valley (of 4.16 percent). Under the applicable stock ownership test (the second test discussed in chart 1), each

IF	THEN	UNDER SBA REGULATIONS
A person owns/controls at least 50% of a concern's voting stock or a block of voting stock which is large when compared to other blocks	→	A person owns/controls at least 50% of a concern's voting stock or a block of voting stock which is large when compared to other blocks
Two or more persons own/control less than 50% of a concern's voting stock and these minority holdings are equal or approximately equal in size and the aggregate of these minority holdings is large as compared with any other stock holding	→	Two or more persons own/control less than 50% of a concern's voting stock and these minority holdings are equal or approximately equal in size and the aggregate of these minority holdings is large as compared with any other stock holding
A concern's voting stock is widely held and no single block of stock is large as compared to all of the others	→	The concern's Board of Directors and CEO or President are deemed to have the power to control the concern in the absence of evidence to the contrary.

Chart 1

minority owner – including GRC – controls or has the power to control Valley. GRC does not appear to have appealed the application of that specific stock ownership test.

Rather, the fight turned to whether GRC had rebutted the presumption that it controlled Valley based on its 4.16 percent ownership interest. The President, CEO, and majority owner of GRC also served on Valley's Board of Directors. Among other arguments, GRC asserted that because it only has a 4.16 percent ownership interest and that its President/CEO/majority owner is just one of 26 board members, GRC's interest in Valley is not large enough to "create a quorum, prevent a quorum, cause any vote to pass, block any vote nor cast a tie-breaking vote." But, as OHA pointed out, if it were to accept this argument, then none of the owners who have an approximately equal share in Valley would control, with the result that no one controls Valley. And, under OHA's precedent, a concern must be controlled by at least one person or entity. Accordingly, GRC failed to rebut the presumption of control, and OHA upheld the Area Office's finding of affiliation between GRC and Valley and the determination that GRC exceeds the applicable size standard based on the combined receipts of it and its affiliates, including Valley.

Takeaways Regarding the Minority Shareholder Test for the Prudent Investor

First, the affiliation analysis is not limited to who owns or manages the particular concern whose size status is at issue – rather the analysis also extends to which entities that concern manages, controls or has the power to control.

Second, be mindful about entering into scenarios in which the largest shareholders have equal minority interests (and the aggregate of these minority holdings is large as compared with any other stock holding) because it expands the number of individuals/entities who control and can create affiliation problems.

Third, if your largest shareholders must have an equal minority share in a company or entities have equal minority shares in

your company, the key to rebutting the presumption of control under the "minority shareholder rule" is that a concern must show that someone else (preferably someone who does not create affiliation problems) actually controls the entity through corporate decision making (i.e., the Chairman of the Board). OHA has repeatedly refused to accept the argument that a concern with multiple owners is not controlled by any person or entity. The "minority shareholder rule" was created precisely for circumstances where no single person has actual affirmative or negative power to control a concern – so an argument that an interest is simply not large enough to control is going to be insufficient to rebut the presumption.

Amy Laderberg O'Sullivan *is a partner in the firm's Government Contracts Group.*

International Trade: Cuba Re-Establishment of Air Services, A Presidential Visit, and More

By DJ Wolff

In February, President Obama announced he would visit Cuba on March 21, marking the first visit by a current U.S. President to the island in decades. During his trip, the President will be meeting with Cuban President Raul Castro to discuss the thawing relationship between Cuba and the United States as well as ways to promote the establishment of U.S. business interests on the island.

Ahead of the president's visit, the two governments continued to meet in various capacities throughout February. The second U.S.-Cuba Regulatory Dialogue, hosted by the U.S. Departments of Commerce and Treasury, was held in Washington on February 17-18. The Cuban Minister of Foreign Trade and Investment (MINCEX), Rodrigo Malmierca Diaz, led the Cuban delegation, which also included the president of the Cuban Chamber of Commerce. The talks were designed as a mechanism to build commercial ties between the United States and Cuba in support of the recent regulatory relaxations.

While in Washington, the Cuban delegation also met with the U.S. Chamber of Commerce. Although Minister Diaz emphasized the need to end the embargo against Cuba, he also acknowledged the important role the U.S. Chamber of Commerce has had in promoting the reestablishment of relations between the two countries and building the willingness of the governments to improve economic ties.

On February 16, the U.S. Secretary for Transportation, the Assistant Secretary of State for Economic and Business Affairs, the Cuban Minister of Transportation, and the President of the Cuban Civil Aviation Institute (IACC), signed an arrangement that provides for the reestablishment of scheduled air services. The U.S. Department of Transportation (DOT) invited U.S. air carriers to apply for the necessary licenses to in order to participate in the return of regularly scheduled passenger and cargo flights. This agreement was necessary to give effect to the previous partial relaxations by the U.S. Departments of Treasury and Commerce of the pre-existing prohibitions on U.S. air carriers traveling to Cuba.

Furthermore, working-level representatives of the two governments met in Havana on February 22-23 to exchange information and discuss best practices related to the prevention of on-line fraud and cybercrime.

Additional intergovernmental meetings are expected in March in preparation for, and resulting from, President Obama's visit.

DJ Wolff *is a counsel in the firm's International Trade Group and a consultant with C&M International, the firm's trade policy affiliate.*

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.

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

International Business: SEC Sets Precedent with Individual Deferred Prosecution Agreement (DPA) in FCPA Case

By Thomas A. Hanusik, Carlton Greene, and Cari N. Stinebower

Israeli companies that trade securities in the United States should be aware that the Securities and Exchange Commission (SEC) set a precedent in February when it entered into its first-ever individual deferred prosecution agreement (DPA) in a Foreign Corrupt Practices Act (FCPA) case. Massachusetts-based technology company PTC Inc. (NASDAQ: PTC) and two of its Chinese subsidiaries (collectively, PTC China) together agreed to pay more than $28 million to settle parallel civil and criminal actions for violations of the FCPA.

The SEC entered into the individual DPA with Yu Kai Yuan, a former employee of one of PTC's Chinese subsidiaries, due to his significant cooperation. Under the DPA, civil charges against Yuan will be deferred for three years. DPAs are designed to facilitate and reward cooperation in investigations by requiring the deferred party to cooperate fully and truthfully throughout the deferral period.

As for the entities themselves, PTC agreed to pay $13.6 million to the SEC pursuant to a cease-and-desist order, while PTC China agreed to pay $14.5 million to the Department of Justice (DOJ) pursuant to a non-prosecution agreement (NPA).

In addition, even if your company does not trade securities in the U.S., but is considered a (or has subsidiaries that are) U.S. domestic concern, or otherwise engages in conduct in the U.S., it could be subject to the jurisdiction of the U.S. Department of Justice for FCPA violations.

The related case involving PTC China is also noteworthy as it provides rare insight and some clarity with respect to DOJ's decision-making process. DOJ commented in the PTC China NPA that "PTC China did not receive voluntary disclosure credit or full cooperation credit because, at the time of initial disclosure, it failed to disclose relevant facts…"

Even so, the NPA gave PTC China "partial cooperation credit of 15% off the bottom of the Sentencing Guidelines fine range for their cooperation with the Office's investigation, including collecting, analyzing, and organizing voluminous evidence and information for the Office…"

This focus on "complete transparency" in order to gain full mitigating credit emphasizes the need to tailor internal reviews from the onset with this in mind.

***Thomas A. Hanusik** is chair of the firm's White Collar & Regulatory Enforcement Group. His practice focuses on white-collar defense, SEC Enforcement and internal investigations.*

***Carlton Greene** is a partner in the firm's International Trade and White Collar & Regulatory Enforcement groups. He provides strategic advice to clients on U.S. economic sanctions, Bank Secrecy Act and anti-money laundering (AML) laws and regulations, export controls, and anti-corruption/anti-bribery laws and regulations.*

***Cari N. Stinebower** is a partner in the firm's International Trade and White Collar & Regulatory Enforcement groups. She counsels clients on compliance with U.S. economic sanctions, Bank Secrecy Act and anti-money laundering (AML) laws and regulations, export controls and anti-corruption/anti-bribery laws and regulations.*

Crowell & Moring Speaks

OurCrowd Investor Reception

Washington, D.C.

Yossi Bahagon of Sweetch

On **February 24, 2016** Crowell & Moring hosted OurCrowd, for an investor program featuring **Yossi Bahagon**, Chief Medical Officer of OurCrowd portfolio company **Sweetch**.

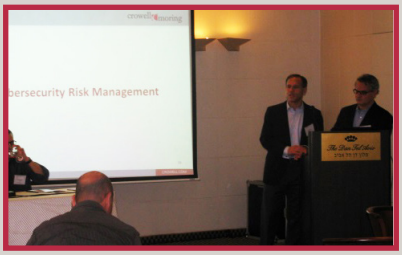
Cybersecurity Leadership Dinner

Tel Aviv

On **November 18, 2015** Crowell and Moring hosted a program that featured Israeli and global leaders in cybersecurity. The program focused on the current U.S. corporate cybersecurity environment; current U.S. government cybersecurity environment; best practices in cybersecurity protocols and breach response; U.S. market for cybersecurity technology; and building and maintaining your U.S. presence.

U.S. Cybersecurity and Homeland Security: Market Opportunities and the Legal Landscape

Tel Aviv



C&M's Sam Feigin and Evan Wolff

On **November 17, 2015** Crowell & Moring, in conjunction with the Fairfax County (Virginia) Economic Development Authority and Israel Advanced Technology Industries (IATI), led a program for leading Israeli cyber technology companies and executives. The program included topics such as business opportunities in the U.S. market; establishing presences in the U.S.; trends in U.S. cybersecurity; best practices for developing U.S. cybersecurity protocols and data breach responses; solution-ready preparedness to accelerate and maximize sale opportunities; and unique market opportunities of the U.S. cybersecurity hub in Fairfax County, Virginia.

The U.S. Legal Landscape in Cybersecurity, Data Protection, and Privacy: Understanding the Law, Implementing Policies, and Responding to Crises

Tel Aviv

C&M's Evan Wolff

On **November 16, 2015** Crowell & Moring and The Association of Corporate Counsel of Israel (ACCI) hosted this seminar in Tel Aviv. The seminar delved into US and international cybersecurity and privacy legal and regulatory issues; digital risk management from policy to practice; and cybersecurity and data breach case studies. The program included C&M speakers **Sam Feigin**, **Mark Kass** and **Evan Wolff** and featured lively Q&A with in house counsel from many of Israel's leading companies.

mHealth Technology Program and Reception

Washington, D.C.

On **November 11, 2015** Crowell & Moring hosted an mHealth technology program and reception, which included leadership from more than a dozen Israeli mHealth companies, plus experts in business, regulatory and legal aspects relevant to Israeli companies and healthcare companies doing business in the U.S. Crowell & Moring Health Care partners **Jodi Daniel** and **John Fuson** presented on the regulatory landscape for mobile health applications – HHS and FDA. Crowell & Moring Health Care partner **Troy Barsky** and Corporate Group partners **Bryan Brewer**, **Sam Feigin**, and **Mark Kass** discussed contracting strategies in the regulated U.S. health care environment; mHealth and fraud and abuse laws; and establishing operations in the U.S. for Israeli companies.

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.

Israel Practice Chair

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Sam Feigin is chair of C&M's Israel practice, co-chair of the Emerging Companies/ Venture Practice, and a member of the Life Science Steering Committee. He is a Chambers-ranked M&A/Corporate attorney and leading Employment attorney with more than 20 years of legal experience who is also the founder of the Network for U.S.-Israel Business.

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.

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