noting that the question is a matter of discretion provides little guidance about how that discretion should be exercised.

The Second Circuit went on to provide that guidance by framing the issue as one of a clash between two competing obligations of US courts: on the one hand, the obligation of a district court to confirm an arbitration award pursuant to the Convention and, on the other, its obligation, based on international comity, to respect the judgment of a foreign court.

Thus, the central question for the Second Circuit in deciding whether to confirm an award that had been vacated by a judgment of the court at the seat is this: should a US court recognize the judgment of a court at the seat vacating an arbitral award? If it chooses to do so, the effect is to treat the arbitral award as extinguished. If, by contrast, it declines to recognize the judgment, the award remains effective and, barring other defenses to enforcement, should be recognize.

US courts have traditionally recognized foreign judgments based on the doctrine of comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation. . ." *Hilton v. Guyot*, 159 US 113 (1895). However, as the Second Circuit noted in *Pemex*, the doctrine of comity is not without limits. "[A] final judgment obtained through sound procedures in a foreign country is generally conclusive … unless … enforcement of the judgment would offend the public policy of the state in which enforcement is sought." And a judgment offends public policy when it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." The Second Circuit noted that this standard "is high and infrequently met."

In *Pemex*, the Second Circuit found that the high standard was met as a result of "four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriate without compensation."

The Second Circuit's approach in *Pemex*, which echoes its approach in *Baker Marine* and the DC Circuit's approach in *TermioRio,* is a practical, middle ground taking into account competing considerations. On the one hand, if US courts were to cavalierly ignore judgments of foreign courts vacating awards, there is a risk that foreign courts would disregard US court judgments doing the same. On the other hand, one of the main reasons parties choose international arbitration is neutrality; they want to arbitrate the merits of a dispute before a neutral arbitration panel, rather than take the risk that a national court may favor the local party. It is important, therefore, that there be some standard for reviewing foreign judgments vacating awards to ensure that any bias that was avoided through arbitration at the merits stage does not creep in at the enforcement stage as a result of a parochial approach to vacatur taken by a national court at the arbitral seat.

It is submitted that US courts have struck a reasonable balance between these competing considerations. US courts take an approach standard that would generally require US courts to respect the vacatur judgments of the courts at the seat of the arbitration. But it gives US courts the authority to disregard those judgments in those rare cases where there is clear evidence that the court at the seat engaged in "hometown justice."

Having said all this, I'm still no closer to a solution to Costello's and Bacharach's quandry about the extinguished candle.

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M&A under President Trump

On January 20, 2017, President Trump was sworn into office. A large set of new ideas and strategies came with him to Washington – some of which will have a profound impact on M&A, particularly international M&A. Obviously, the general principles and structures as well as the reasons for M&A transactions remain unchanged. Nevertheless, some of the laws initiated by President Trump as well as the changed and invigorated implementation and application of existing programs have the potential to change the M&A world.

It is still early in president Trump's tenure, and it would be unfair to draw a conclusion one way or the other at this stage. A number of cases and situations were inherited from the previous administration and needed to be completed or wound down. Also, one case or procedure, even if handled quite differently from the previous administration, cannot be used as a prediction for the future. Nevertheless, we can in some areas already discern what can be expected over the next few years.

I. Tax Reform

The Tax Cuts and Jobs Act became law on Dec. 21, 2017 (the "TCJA"), and, for legal entities, brought major changes. Most commentators agree that the TCJA will have a significant impact on the overall environment, the deal structures, and the contract negotiations of M&A transactions.

The TCJA is a massive legislation and makes changes to many sections of the tax code. To address all of them adequately in this article is impossible. Moreover, many changes are quite complex with a dizzying array of details that need to be complied with. Listing them is neither possible nor helpful to understand the general principles that will affect M&A transactions; accordingly, we refrain from exhaustive explanations. Having said this, it is, however, worth considering the following aspects which directly affect M&A.

(1) M&A Funding: More funds available for M&A

The TCJA was designed to reduce the tax burden of businesses. The objective of the TCJA was to allocate cash to the private sector rather than the government in the hopes that companies would use it for the creation of jobs and for other investments which will stimulate the economy.

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A portion of that cash, it is estimated, will be spent on M&A. This goal was implemented through a number of changes to the Internal Revenue Code (the "Code"), the most pertinent are the following: First, the tax rate for corporations was reduced by 40%, from 35% to 21%,[1] incentivizing corporations to move operations to, and generate more income in, the United States. There was rare consent in Congress that the U.S. corporate tax rate of 35% was too high in comparison with virtually every country in the Western World and, thus, that U.S. companies were handicapped. (There was less consent on what to do about it.) Second, a special tax rate of presently 10.5% (until 2025, thereafter 13.125%) is applicable to income derived by foreign subsidiaries from intellectual property (the "*global intangible low-tax income*" or so called GILTI tax). Finally, the United States moved closer to a territorial system for businesses and, thus, corporations may now "*bring home*" overseas profits from their subsidiaries (for more detail see (4) below) without additional U.S. taxes (before, repatriating profits taxed abroad resulted in these profits becoming subject to the 35% tax rate in the United States minus any tax paid abroad). While it is still too early to draw final conclusions, the first reports seem to confirm that the law's goals will be achieved. It was reported that after-tax earnings (25.3%) of all companies in the S&P 500 index during Q I/ 2018 rose twice as much as pretax-earnings (12.1%),[2] a direct result of the lower tax rate. These funds, apparently, drove M&A activity. Mergermarket reported that 3,774 deals worth $ 890.6BB (ca. 40% of which were in the United States) were announced worldwide in Q1/2018 which represents an 18% increase in deal value when compared to Q1/2017.

(2) M&A structures: Inversions and tax efficient structures on the way out

The lower Federal corporate income tax rate of 21% (instead of previously 35%) will also have a major impact on two areas of M&A practice which garnered much attention in the past.

First, so-called inversions will likely become obsolete. Inversions are acquisitions of U.S. corporations by foreign corporations in which the shareholders of the target U.S. corporation end up owning between 60% and 80% of the stock of the acquirer corporation, and, thus, the foreign corporate acquirer, after the transaction, will be majority owned by U.S. shareholders. The strategic idea behind inversions was not to reduce the tax on U.S. operations, but rather to reduce the tax on the non-U.S. operations which when repatriated into the United States would have been subject to the "old" 35% tax rate. The foreign corporate acquirer, into which the U.S. target is inverted, was typically subject to a much lower tax rate for its income arising out of those countries in which it transacted business. With a 21% tax rate, the difference to the tax rate of the foreign corporate acquirer narrows considerably. Moreover, additional "*inversion penalties*" were included in the TCJA for inversions that will take place before the end of 2027. Previous administrations had already tried to make inversions unattractive by tightening tax regulations. Now, the TCJA imposes a number of restrictions, the most draconian of which are the following: Subsequent to the inversion, the tax rate of the target U.S. corporation will be (the "old") 35% instead of (the "new") 21%; and, similarly, dividends to shareholders of the acquirer corporation will be taxed at ordinary rates of up to 37% instead of the capital gains tax rate of up to 20% (both rates quoted without the 3.8% Medicare tax).

Second, tax-efficient M&A structures will likely fall out of favor. These structures typically do not trigger tax, such as tax-free reorganizations or spin-offs or split-offs, but are cumbersome and costly, and come with restrictions and conditions that are difficult to comply with and often contrary to the business reality. A lower income tax rate for entities, thus, reduces the incentive for accepting the complexity of tax-efficient structures. Tax efficient structures may survive in situations where the benefit to the shareholders is of overarching importance, since the capital gains tax rate has not changed.

Judging by publicly available comments of practitioners, all indications in the first 4 months of 2018 point towards a significant loss of interest in both inversions and tax-efficient structures.

(3) Debt vs. Equity: Is Debt the biggest looser?

The TCJA limits the deductibility of net interest payments to 30% of EBITDA until 2021, and 30% of EBIT thereafter. (Any disallowed interest expense can be carried forward indefinitely and, as before, carryforwards are limited under §382 of the Code in case of ownership change.) This limitation will likely discourage corporate debt and, thereby, affect all M&A aspects relating to the use of debt. We can, thus, expect that the number of leveraged transactions will decline. Also, rather than financing M&A transactions with loans, it can be expected that the use of equity and lease or derivative acquisition structures will gain favor.[3]

(4) Stock vs. Asset Deals: The introduction of the territoriality principle

Because of offsetting provisions, cross border M&A will likely see an increased focus on asset rather than stock deals. The TCJA exempts from U.S. Federal income tax all dividends received by a U.S. corporate parent from its non-U.S. subsidiary, if the parent owns at least 10% (vote or value) of the foreign subsidiary which is a controlled (more than 50% by 10% shareholders) foreign corporation (CFC) for at least 1 year. Previously, dividends received were subject to the 35% corporate tax rate. That would seem a good source of income for U.S. corporate parents, available for M&A and other investments. For practical purposes, however, the global intangible low-tax income ("GILTI") tax, another new feature of the TCJA, could negatively affect the dividend flow from a CFC. GILTI, explained above (1), does not only apply to income derived from intangible assets, but to all net income of a CFC. The total net income of a CFC over a 10% statutorily assumed return on the CFC's aggregate tax basis in its tangible (!!), depreciable property is subject to the GILTI tax of 10.5% until Dec. 2024, and 13.125% thereafter, reduced by 80% of foreign tax credits on this income. Accordingly, dividends from a foreign subsidiary, while exempt from Federal income tax, might

1 In addition to Federal income taxation, U.S. businesses are also subject to state and, potentially, municipal/ city income taxes.

2 Thomson Reuters, Wall Street Journal (May 4, 2018).

3 Since existing debt is not grandfathered, many debtors will have to reconsider their capital structure and likely make changes.

nevertheless be taxed under GILTI. To minimize this result and considering that 10% of a company's tangible, depreciable property is, in effect, exempted, a U.S. acquirer will search for a target with a "*GILTI cushion*", *i.e.* tangible, depreciable assets. Since a foreign subsidiary (CFC) with a low tax basis in its tangible, depreciable assets is subject to a higher GILTI tax than a CFC with a high tax basis in its tangible, depreciable assets, the latter is a more attractive target. In summary, U.S. acquirers will likely prefer asset acquisitions of corporations rather than stock acquisitions, unless an election under § 338(g)[4] of the Code is available.

II. CFIUS

The fear that critical technology of a country could end up with foreign governments and used with hostile motives is not new to the Trump administration or restricted to the United States. Previous administrations have intervened in acquisitions before, from forcing M&A parties to modify their transaction to blocking the deal altogether. And this development is not easily stopped any more. Yet, all signs seem to indicate that we will see interventions in M&A transactions more pronounced and more frequently in the next few years.

The review of foreign acquisitions in the United States is conducted by the Committee on Foreign Investments in the United States ("CFIUS"). CFIUS is a multi-departmental Federal agency that can recommend to the President that he block an investment in the United States by foreigners due to national security concerns.[5] Not only have the filings by M&A parties with CFIUS increased, but so have CFIUS' objections and concerns.

The trend started some years ago. The record year of 2016 that produced ca. 170 filings with CFIUS was easily exceeded in 2017 as ca. 245 new cases were filed, and an even higher number is expected in 2018.

For years now, CFIUS has been particularly concerned with transactions by Chinese acquirers. In 2016, President Obama blocked the sale of Aixtron to Chinese Grand Chip Investment. Similarly, in 2017, CFIUS halted the $ 50 MM sale of Inseego Corp.'s MiFi business to Chinese smart phone manufacturer TCL Industries Holdings; Chinese HNA Group Co. Ltd.'s $ 416 MM investment in U.S. based inflight services company Global Eagle Entertainment Inc.; Chinese owned Zhongwang USA LLC's $ 2.3 BB acquisition of Aleris Corp.; the sale of the del Coronado Hotel in San Diego as part of a package of 13 hotels to Chinese investment firm Anbang Insurance Group because of its proximity to the naval headquarters for the Pacific fleet; and Chinese-owned Ant Financial's acquisition of MoneyGram International Inc., a U.S. money transfer company (noteworthy because Ant is owned by Jack Ma, Chairman, and other executives, of Alibaba Group Holding Ltd.).

The fear of sensitive technology finding its way into the hands of the Chinese Government is not restricted to the United States. A string of transactions, most recently the acquisition of robotics firm KUKA GmbH by the Chinese appliance manufacturer Midea, was equally decried in Germany.[6] Nor is that fear directed at transactions involving Chinese acquirers only.

Firms from German speaking countries can also attest to CFIUS's resolve in 2017. Infineon Technologies AG (IFX) could not secure approval for its $ 850 MM acquisition of Cree Inc. and Cree Sweden's Wolfspeed Power & RF Division, as CFIUS saw national security risks in IFX gaining access to Cree's silicon carbide substrate business. Similarly, Audi AG, BMW Group and Daimler AG as indirect shareholders of Amsterdam based location-company HERE were not allowed to sell 10% to an investment group led by Chinese internet giant Tencent Holdings Ltd. and Chinese digital map company NavInfo Co.

The increased activities of CFIUS had been noticed before. The Trump administration seems to be inclined, however, to use the full arsenal of weapons provided by the CFIUS program even more frequently than its predecessors. On March 12, 2018, President Trump blocked the proposed $117BB takeover of Qualcomm Inc. by Chinese owned Broadcom Ltd., Singapore, Broadcom Corp., California, and Broadcom Cayman L.P., even though the parties had not entered into an acquisition agreement that they wanted to have approved by CFIUS. Rather, Broadcom intended to launch a hostile tender offer for Qualcomm's shares. Qualcomm had called its annual shareholders' meeting to elect its Board of Directors and Broadcom had suggested 15 individuals for the Board who would have been in favor of approving the proposed takeover of Qualcomm by Broadcom. By Executive Order, President Trump disqualified all 15 candidates from standing for election. Qualcomm's chip technology, especially for the new 5G network, was considered too valuable to allow it to fall into Chinese hands. Also, on September 13, 2017, President Trump rejected the $ 1.3 BB purchase of Lattice Semiconductor Corp. by private equity fund Canyon Bridge Fund I, LP in conjunction with state owned China Venture Capital Fund Corp. Ltd. The transfer to Chinese acquirers of Lattice's technology relating to computer chips that can be reprogrammed after manufacture for specialized uses, especially for complex video circuitry used in aerospace and defense applications, was held to pose an unacceptable national security risk. President Trump, thus, has within 15 months of his presidency blocked as many deals as President Obama in his 8 years, and twice as many as President Bush in his 8 years, in the White House. We must expect that President Trump will continue to wield the CFIUS authority aggressively, especially against Chinese investors.

Another trend, however, seems to continue rather than being pushed by the new administration. The discussions with CFIUS with a view toward finding deal modifications that assuage CFIUS' concerns are under intense time pressure, due to formal statutory limitations. CFIUS has 30 days from filing to approve or reject an application or to grant an extension of

4 If a §338(g) election is made for a foreign target, the acquirer is considered as forming a new foreign corporation that acquires the assets, and assumes the liabilities, of the foreign target. As a result, the basis of the assets of the foreign target are stepped-up to fair market value, all historic tax attributes are eliminated, and the foreign target begins a new taxable year. However, the election is subject to §901(m) of the Code which substantially reduces the foreign tax credit benefits. The buyer generally does not bear any U.S. tax costs as a result of the election.

5 The committee consists of the heads of the following Federal departments and offices: Treasury Department (chair), Commerce Department, Defense Department, Energy Department, Homeland Security Department, Justice Department, State Department, Office of the U.S. Trade Representative, and Office of Science & Technology Policy. The Council of Economic Advisers, the Homeland Security Council, the National Economic Council, the National Security Council, and the Office of Management & Budget have observer status and participate as appropriate. The Director of National Intelligence and the Secretary of Labor are non-voting, ex-officio members.

6 The transaction triggered a change in Germany's Foreign Trade and Payments Ordinance in July 2017, allowing the German Federal Ministry for Economic Affairs and Energy to block acquisitions more easily based on security reasons.

45 days. In that 45 day period, applicants may be able to resolve all issues CFIUS has identified. Often, however, 45 days prove to be an insufficient time period for both sides to negotiate remedial actions. Since a further extension is not allowed under the law establishing CFIUS, applicants – with CFIUS's consent – withdraw their application only to refile and start the 30 and 45 day period all over. 2017 saw a significant increase in cases that involved re-filings, maybe most prominently the acquisition of Monsanto Co. by Bayer AG. The filing and refiling process is likely going to be the new norm.

Finally, a bill introduced in November 2017, and expected to become law in 2018, is noteworthy as it would significantly enlarge CFIUS's reach. Among others, the bill would expand the committee's jurisdiction to all investments by foreigners in "*critical technology companies*" or "*critical infrastructure companies*", make CFIUS filings become mandatory (presently, CFIUS filings are voluntary), increase the number of days allowed for review, and set significant filing fees of up to $ 300.000 (presently, the request for review is free).

III. Cryptocurrencies

A new phenomenon has been emerging over the last few years: Cryptocurrencies. While they were neither created since the new President took office nor pushed to advance economic interests, the new administration will have to deal with them (and the SEC has already started to do so). At this time, both exciting and disturbing to note, few have a clear sense of where the technology is headed.

Cryptocurrencies are based on so-called "*blockchain*" or distributive ledger technology, meaning a multitude of decentralized users control an immutable set of time-stamped transactions without a central authority. In its original state, blockchain was considered the basis for so-called "*smart contracts*"[7] which can be utilized in a variety of industries.[8] One aspect of block chain technology is its use in creating and utilizing narrowly defined units or tokens that can be used as an alternative currency system, often referred to as "*cryptocurrencies*". These alternative currencies are on the cusp of being used as transaction payment and are then designed to replace cash or securities as consideration.

The times in which this technology was reserved for a few computer nerds are long gone. As of March 14, 2018, there had been 488 initial coin offerings in 2018, raising $ 1.66 billion. Also, earlier this year the U.S. Commodity Futures Trading Commission estimated the current market cap of Bitcoin, the most widely owned cryptocurrency, at ca. $ 130 billion. While opinions on cryptocurrencies are wide spread, it is undeniable that they already have a significant impact on the capital markets and financial systems of the United States. Moreover, Venezuela, crushed by hyper-inflation, a rapidly declining economy, and a lower oil output, issued the first nation-state cryptocurrency, the Venezuelan Petros, on Feb. 20, 2018. The United States quickly issued an order forbidding U.S. persons from dealing in it.[9]

The use of cryptocurrencies for M&A transactions is one of the developments which come with great fanfare, but also with great risk. Without a clear legislative road map, various Federal agencies claim jurisdiction over cryptocurrencies, and none of them has taken a final position. Rather, these agencies take a cautious approach and, while they become active in case of obvious fraudulent or illegal activity, they have not laid out a comprehensive regulatory plan.

On the forefront of this new technology is the Federal Securities and Exchange Commission ("SEC"). It has made it clear that it views cryptocurrency sold in connection with so-called Initial Coin Offerings ("ICOs") as securities, subject to the same rules as any other security. This principled approach was thought to leave unregulated the use of tokens that are not used in ICOs, often referred to as "utility tokens". It had been postulated that utility tokens can be used in a closed community for goods and services within that community and, thus, are not securities.[10] While the distinction holds true in principle, it does not in practice. For instance, Ethereum tokens were designed to act as "utility" tokens only, to be used for smart contracts on the Ethereum protocol, in effect creating an electronic barter system. Even participants on the Ethereum protocol, however, are purchasing the tokens and holding them without any intention of using them to power any smart contract, likely in the hope that these tokens will appreciate in value when they can be used for other purposes. That was the case in a recent determination by the SEC involving a so called Decentralized Autonomous Organization ("DAO")[11], a platform based on computer codes and executed on a blockchain protocol or other distributed ledger system. In the case investigated by the SEC, participants in the DAO could exchange Ethereum tokens for DAO tokens and use the DOA tokens to fund projects in which the investors would share in anticipated earnings. The DAO tokens could then be resold. The SEC

7 For instance, §44-7061 E. of the Arizona Revised Statutes defines "*Blockchain technology*" as "*distributed ledger technology that uses a distributed, decentralized, shared and replicated ledger, which may be public or private, permissioned or permissionless, or driven by tokenized crypto economics or tokenless. The date on the ledger is protected with cryptography, is immutable and auditable and provides an uncensored truth*." and "*Smart Contracts*" as "*an event driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger*". §47-10-201 of the Tennessee Code Annotated, Title 47, Chapter 10, uses the same definitions. But see the slightly different definitions used in the 2017 bill HB 5553, Blockchain Technology Act, state of Illinois. States are dealing with blockchain technology more actively than the Federal Government. Wyoming committed to not tax cryptocurrency (SF111; but see also, HB 19, HB 70, and HB 101, all passed in 2018) and Delaware is considering allowing corporate records to be kept as blockchains (see Senate Bill 69, May 5, 2017). On the other hand, Massachusetts and Texas apply a more restrictive approach and, similar to the U.S. SEC view cryptocurrencies as securities and, thus, subject to state securities laws, the so-called blue sky laws. There are a number of other state initiatives too numerous to describe here.

8 See, for instance, (i) Abra, BitPesa, and Circle for financial services, remittance, (ii) Blockstream, Chain, and Digital Asset Holding for financial services, trade finance, (iii) Everledger and Hyperledger for supply chain, (iv) MedRec and Pokitdok for medical records, (v) Ascribe, Brave and Open Music Initiative for digital rights, (vi) Uport for identity, etc.

9 The Petros were designed to circumvent U.S. sanctions against Venezuela; see Executive Order No. 13287, 83 Fed. Reg. 12469-70 (March 19, 2018)

10 See, *e.g.* BYTOM, a digital asset layer protocol (https://bytom.io), and the exuberant conclusion that BYTOm is not a security (https://cointelegraph.com/press-releases/bytom-passed-the-sec-howey-test-becomes-the-first-non-securities-public-blockchain-project-in-the-usa), although no governmental agency has passed on this proposition.

11 Release No. 81207 (July 25, 2017); the SEC has taken 7 enforcement actions from 2013-2017, 4 agency cases and 3 cases in Federal District Courts. See, *SEC v. Trendon T. Shavers and Bitcoin Savings and Trust*, CA No. 4:13-CV-416 (E.D. Tex, 2013), In re Erik T. Voorhees, Rel. No. 33-9592 (June 3, 2014), In re BTC Trading, Corp. and Ethan Burnside, Rel. No. 33-9685 (Dec. 8, 2014), *SEC v. Homero Joshua Garza, Gaw Miners, LLC, and Zen Miner, LLC,* CA No. 3:15-CV-01760 (D. Conn. 2015), In re Bitcoin Investment Trust and SecondMarket, Inc., Rel. No. 34-78282 (July 11, 2016), In re Sunshine Capital, Inc., File No. 500-1 (Apr. 11, 2017), and *SEC v. Recoin Group Foundation LLC, et al.,* CA 1:17-CV-05725 (E.D. NY 2017). In late 2017, the SEC's newly created Cyber Unit took action against an ICO by Plex-Corps, a Canadian company.

determined that the DAO tokens were securities subject to the Federal securities laws.

Moreover, in the last 12 months or so, the SEC has aggressively approached every sponsor of a transaction issuing tokens with subpoenas or other requests demanding back up documentation and information. Due to the high costs of a SEC investigation and the uncertainty of outcome, market participants have become conservative and treat every token as a security. In other words, without waiting for the issuance of regulation, the market has accepted that tokens are securities.

Accordingly, the typical issuance of tokens is treated as a private placement, *i.e.* it can be offered or sold to a very small group of unaccredited investors only, the issuer is required to prepare a private placement memorandum, and the sale requires registered brokers/ dealers. The private placement memorandum for tokens, especially, cryptocurrencies, typically uses as a description for the business model the so-called "*white paper*" of the company. It is prepared by the founders often with scant details.

Moreover, neither the SEC nor other agencies provide oversight of the exchanges on which cryptocurrencies are traded. Larger, more sophisticated exchanges on which cryptocurrencies such as Bitcoin, Litecoin or Ethereum are traded, are considering becoming fully SEC-regulated exchanges for those currencies. Others, however, so-called "alt"-coins and related exchanges, are, or are moving, offshore to avoid U.S. regulation.

Similarly, the Federal Commodity Futures Trading Commission ("CFTC") considers cryptocurrencies, including the DAO tokens which were the subject of the SEC investigation referred to above, to be a commodity and, thus, subject to all the rules governing the sale of commodities. Accordingly, the CFTC has jurisdiction over cryptocurrency derivatives or any fraud or manipulation relating to them, but not spot or cash market transactions that do not utilize margin, leverage or financing.[12] The CFTC oversees the 2 exchanges on which cryptocurrency futures are being traded.[13] Also, the CFTC stated that the following constitutes permitted activities: (i) Trading of cryptocurrency swaps on a registered platform by eligible participants; (ii) trading of cryptocurrency options on a swap execution facility and clearing and settling through a derivatives clearing organization; and (iii) establishing a designated contract market for binary options for trading by institutional and retail customers, such as the binary options on a Bitcoin price index which were listed on the North American Derivatives Exchange Inc. from Nov. 2014 to Dec. 2016.

The Federal Financial Crimes Enforcement Network ("FinCEN"), an agency in the Treasury Department, charged with tracking down illegal, especially terror financing, is concerned that cryptocurrencies could be used to finance terroristic and organized crime activities, bypassing the monitoring abilities of the U.S. law enforcement agencies.[14] In particular, FinCEN qualifies most cryptocurrency systems as a "*money transmitter*" under the Bank Secrecy Act.[15] As such, a money transmitter must comply with all risk management, risk mitigation, recordkeeping, reporting and transaction monitoring requirements corresponding to money transmitters. There is an exemption for so-called payment processors, but, to fall into that exemption, an applicant must, among other requirements, "*operate through clearance and settlement systems that admit only Bank Secrecy Act-regulated financial institutions*".[16] Typically, however, payment by Bitcoin, or other cryptocurrencies, to someone who provides goods or services is made to a virtual exchange or a merchant owned virtual currency wallet, and not through the required clearing and settlement system.

Finally, the position of the Federal Tax Authorities ("IRS")[17] is that cryptocurrency is misnamed and is not a currency at all, but property.[18] As such, a trade on an exchange or the transfer from one wallet (the blockchain name for account) to another wallet is a taxable event, very similar to a security transaction, requiring the tax payer to determine her taxable profit by deducting the tax basis from the fair market price for which no official value may be available. The creation of tokens, the so called "mining", on the other hand, is considered by the IRS a trade or business, subject to income and self-employment taxes.

Finally, the TCJA (see Tax Reform above) changed § 1031 of the Code, dealing with tax free exchanges, dramatically by eliminating all exchanges except real estate for real estate. Thus, an exchange of one cryptocurrency for another cannot be treated as a tax free exchange anymore and therefore is taxable. Prior to 2018, most tax practitioners felt that the Code allowed for trade or exchange with no tax cost because the "*coins*" were property under § 1031.

IV. Conclusion

It seems that there will be a significant increase in M&A transactions involving U.S. companies (whether as seller, as buyer or as target) during the next few years due to the good economy and, particularly, due to the tax reform passed at the end of last year. These M&A transactions will be impacted by the new tax rules and by a discrete number of issues that have been on the radar for some time, but are now coming to the forefront. Developments in these areas will need to be monitored closely.

12 Based on these principles, the CFTC held the following to be in violation of its regulations: Put and call options traded on Coinflip Inc.'s Derivabit platform (non-compliance with "*swap regulations*"), Release No. 7231-15; wash trades, *i.e.* two offsetting non-deliverable forwards, of Bitcoin and U.S. Dollars on TeraExchange LLC's swap execution facility (prohibited "*pre-arranged trades*"), Release No. 7240-115; and spot transactions in cryptocurrencies on the Bitfinex platform, British Virgin Islands, because purchasers received the cryptocurrency in deposit wallets owned and controlled by Bitfinex or in multi-signature wallets controlled by Bitfinex until outstanding loans were repaid (failure to "actually deliver"), CFTC Docket No. 16-19.

13 Chicago Mercantile Exchange and CBOE Futures Exchange; both since Dec. 17, 2017.

14 In addition, all states, except Montana, New Mexico and South Carolina regulate money transmission.

15 See Administrative Rulings of Oct. 27, 2014; available on www.fincen.gov. On May 5, 2015, FinCEN levied a $ 700.000,- fine against Ripple Labs Inc. for willful violation of the anti-money laundering laws for issuing and selling its own digital currency without registering it with FinCEN.

16 See FIN-2014-R012; FIN-2013-G001.

17 Notice 2014-21; Guidance IR-2014-36 (Mar. 25, 2014).

18 Opposition to cryptocurrency in Congress is considerable and legislative action against cryptocurrencies is not unlikely.