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CFIUS signals heightened attention on bankruptcy-related transactions

Back in September of 2020, we covered how the House Appropriations Committee was supportive of strengthening the capacity of CFIUS, "particularly with respect to the need to train federal bankruptcy judges" that approve plans for reorganization or liquidation. The reason? Investors that acquire assets out of bankruptcy may be foreign, and the technology involved might be sensitive. "Given the relative lack of knowledge about CFIUS," one expert told us at the time, "it wouldn't surprise me if bankruptcy judges are approving plans without either knowing themselves, or being informed by the parties, that a covered transaction is involved." To get updated on bankruptcy-related transactions, and to understand some of the latest developments on CFIUS and the bankruptcy courts, we turned to Richard Sofield, George Howard, and John Satira of Vinson & Elkins.

In a provocative demonstration that it scrutinizes all types of transactions, no matter their origin, CFIUS has reportedly been vetting the proposed $1 billion sale of bankrupt crypto lender Voyager Digital's assets to Binance.US.

For Foreign Investment Watch readers who might not be following the story, Voyager Digital is a cyptocurrency brokerage that filed for Chapter 11 bankruptcy in July 2022. After an initial agreement to sell its assets to FTX crumbled, Binance.US provided Voyager Digital with the winning offer for its assets in December 2022.

However, shortly after the sale's announcement, the U.S. government filed a notice on the Voyager Digital bankruptcy court docket, stating that transactions contemplated by Voyager Digital may be subject to CFIUS review, "which could affect the ability of the parties to complete the transactions, the timing of completion, or relevant terms."

As most readers know, CFIUS has the power to review and mitigate national security concerns arising from certain foreign investments in U.S. businesses, including transactions that take place in a company's U.S. bankruptcy case. Although the notice does not reference Binance.US explicitly, the circumstances of the bankruptcy make clear that Binance.US's involvement piqued CFIUS's interest in the sale.

Binance.US is the U.S. operating company of Binance Holdings Ltd., whose global headquarters location — if any — is unclear. However, Binance Holdings Ltd.'s founder is reportedly a Chinese-born Canadian citizen, and Binance Holdings Ltd. was initially headquartered in China before removing its headquarters from the country and moving to a decentralized model. Additionally, Binance Holdings

Ltd. and its founder are reportedly under investigation by the U.S. Department of Justice for money laundering allegations. Accordingly, the sale of Voyager Digital's assets to Binance.US, and the U.S. government's notice acknowledging potential CFIUS jurisdiction and review, touches on a variety of areas that illustrate current CFIUS priorities.

Here are three important takeaways related to the impact of this case:

1. CFIUS is becoming more aggressive in reviewing bankruptcy proceedings for transactions that fall within its jurisdiction.

CFIUS can review virtually any type of transaction, including those arising in the context of U.S. bankruptcy cases. CFIUS has jurisdiction over transactions where a foreign person acquires control over a U.S. business, or where a foreign person acquires less-than-controlling triggering rights in certain sensitive U.S. businesses. Even assets *alone* without any attached corporate entity can qualify as U.S. businesses under CFIUS regulations. This is an important scope in the context of U.S. bankruptcy proceedings where most bankruptcy sale transactions are structured as asset sales under the Bankruptcy Code.

As Foreign Investment Watch has covered extensively, CFIUS maintains an active monitoring and enforcement team that searches for future and completed transactions within its jurisdiction for which the parties have not made a CFIUS filing; these are known as "non-notified transactions." If a transaction catches its interest, CFIUS may ask questions of the parties and/or request that they make a CFIUS filing in order for CFIUS to make a jurisdiction determination and assess the transaction's national security consequences.

Due to the public nature of bankruptcy proceedings, transactions resulting from bankruptcies can be a prime target for CFIUS inquiries, potentially resulting in additional time and effort for parties to respond to CFIUS's inquiries and/or make a filing if requested. To be sure, the U.S. government's interest in a potential CFIUS review on the Voyager Digital bankruptcy docket is not unique — CFIUS has made similar inquiries in other bankruptcy cases, illustrating that CFIUS is actively monitoring bankruptcy dockets for potential non-notified transactions.

2. If undertaken, a CFIUS review can significantly impact the timeline and expectations for bankruptcy proceedings.

Whether completed voluntarily or at CFIUS's request, a CFIUS review is a formalized process with statutory and regulatory deadlines, meaning that parties to both bankruptcy proceedings and a CFIUS review must navigate two different schedules that could be moving in parallel.

As most readers already know, a CFIUS review requires parties to collect extensive information about themselves and present it to CFIUS. CFIUS then has either 30 days to review a short-form declaration filing or up to 90 days to review a long-form notice filing. Different variables can shorten or lengthen the time it takes to complete a CFIUS review. For instance, at the end of the 30-day declaration review, CFIUS may request that the parties file a notice instead of approving the transaction, thus elongating the review if the parties oblige.

Additionally, CFIUS may only approve a transaction after requiring that the parties institute certain mitigating actions to lessen the national security concerns in a transaction. Such measures often represent additional compliance requirements for the purchaser of an asset, thus altering the parties' expectations and valuations. Further, CFIUS may even block a transaction from taking place or unwind a transaction that has already closed when its national security concerns

are unmitigable, completely upending an intended sale or purchase.

The U.S. government's filing on the Voyager Digital bankruptcy docket acknowledges all of these possibilities, stating that a CFIUS review "could affect the ability of the parties to complete the transactions, the timing of completion, or relevant terms." Thus, parties to a bankruptcy sale should account for such outcomes when a CFIUS review is possible. While the Bankruptcy Code has other provisions that can shorten (or eliminate) certain regulatory approvals, like the expedited timeline for antitrust review under Section 363(b)(2) of the Bankruptcy Code, the Bankruptcy Code does not alter the timing of CFIUS review.

3. CFIUS has a reputation for closely scrutinizing an investor's direct or indirect foreign ties, especially when the foreign ties are with companies or countries of concern, and for closely scrutinizing a U.S. business engaged in areas important to U.S. national security.

Binance.US's purchase of Voyager Digital assets represents two areas that CFIUS closely scrutinizes: (a) potential ties to Chinese investors through a related entity; and (b) a U.S. business that operates in a sensitive national security-related industry.

Binance.US has Chinese ties, given its related entity Binance Holdings Ltd. was founded by a reportedly Chinese-born individual and was previously headquartered in China. CFIUS has a reputation for heavily scrutinizing not only Chinese investors, but also other foreign investors that have Chinese ties, making CFIUS's interest in Binance.US completely unsurprising. This is especially true where the source of Chinese ties — Binance Holdings Ltd. and its founder — are under criminal investigation by DOJ.

Further, Voyager Digital itself exists in the financial services industry as a crypto lender, meaning that its business may be involved in areas that CFIUS considers critical to U.S. national security. In 2020, CFIUS jurisdiction expanded for certain types of U.S. businesses, including those involved with sensitive personal data and critical infrastructure. This expanded jurisdiction serves as a proxy to understand which U.S. businesses CFIUS may be particularly interested in.

For example, financial services companies regularly collect or maintain U.S. citizens' financial information, which can qualify as sensitive personal data under CFIUS regulations, and CFIUS is interested in how such information is managed and protected. Although the question of whether cryptocurrencies are securities is an emerging area of the law, securities exchanges can be critical infrastructure under CFIUS regulations, and so CFIUS is generally interested in U.S. businesses that may be involved with owning or operating securities exchanges. Accordingly, as a cryptocurrency company, Voyager Digital is engaged in an industry ripe for CFIUS scrutiny.

CFIUS regulations, guidance, and enforcement is ever-changing, and can implicate areas that may not appear particularly obvious at first thought — like bankruptcy proceedings. Anyone contemplating a transaction of any size should seek CFIUS counsel if the deal involves a non-U.S. investor and a U.S. business (including U.S. assets), whether or not the transaction arises in the context of a bankruptcy proceeding.

About the authors

Richard Sofield is a partner at Vinson & Elkins. Previously Director of the Foreign Investment Review Staff for the National Security Division at the DoJ, Sofield has also served as Chair of Team Telecom. He can be reached at rsofield@velaw.com.

George Howard is also a partner at Vinson & Elkins. An expert on restructuring and reorganizations, Howard's practice focuses on Chapter 11 cases, out-of-court restructurings, and special situation investments and acquisitions. He can be reached at ghoward@velaw.com.

John Satira is a senior associate at Vinson & Elkins, where he focuses on government contracts and national security. Satira represents clients in disputes with the government and in matters before government agencies, including in filings with CFIUS. He can be reached at jsatira@velaw.com.