

# Client Alert

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## Another Small Step Forward: China Further Clarifies its Notification Procedure for Simple M&A Transactions

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Earlier this year, China's Ministry of Commerce ("MOFCOM") implemented new regulations under the Anti-Monopoly Law ("AML") enabling "simple" M&A and joint venture transactions to be eligible for a potentially shorter and less burdensome "summary procedure." (See our prior alert [here](#) on the *Tentative Provisions on the Applicable Standards Relating to the Summary Procedure for Cases of Concentration of Business Operators* (关于经营者集中简易案件适用标准的暂行规定; "Tentative Summary Procedures"). MOFCOM has recently issued additional procedural rules (*i.e.*, the *Guiding Opinion on Filing of the Simple Cases of Concentration of Business Operators (Trial)* (关于经营者集中简易案件申报的指导意见 (试行), "Guiding Opinion"), as well as a simplified notification form and a "public notice" form, to clarify certain aspects of the operation and requirements of this new summary procedure.

While the Guiding Opinion provides further helpful clarity on how MOFCOM intends to implement the Tentative Summary Procedures, merging parties in seemingly "simple cases" are likely to continue to face some uncertainty and risk regarding the summary procedure's precise nature, scope and timing. Below we summarize the provisions of the Guiding Opinion and its key implications to parties involved in transactions requiring a China AML filing.

### I. SUMMARY OF GUIDING OPINION

The Guiding Opinion provides additional details regarding the procedures that MOFCOM will utilize and that merging parties should follow for eligible "simple cases," including the following steps:

- A. Consultation.** Before making a summary AML filing, a notifying party may elect to consult with the Anti-Monopoly Bureau of MOFCOM ("AMB") regarding whether the transaction will qualify as a simple case and a summary AML filing. The consultation appointment application should be made in writing.
- B. Notification and Public Notice Forms.** A notifying party choosing to make a summary AML filing is required to submit a newly published simplified case notification form ("Simplified Form"), as well as a *Form of Public Announcement of Simple Case of Business Operators' Concentration* ("Public Notice Form").

The Simplified Form is similar in many respects to the standard notification form and requires the parties to provide a significant amount of information, including the following materials and documents:

## Client Alert

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- A description and copy of the transaction agreement
- Information regarding the parties to the transaction, including basic corporate information, worldwide and China sales revenue, the identity of affiliates and the ultimate controlling entity, and a list of major shareholders
- Financial reports of each of the parties involved in the transaction
- Market research reports prepared by the parties or third parties
- A description of the relevant product and geographic market(s), the transaction's rationale, and its effects on competition in the relevant market(s)

The Simplified Form, however, eliminates certain sections of the standard notification form, including the necessity to provide the names and contact information of major suppliers and customers, detailed descriptions on the supply and demand structure of the market, the transaction's expected efficiencies, an analysis of entry barriers and entry events, cooperation agreements relating to the relevant markets, and the parties' scale and competition in other markets.

The Public Notice Form requires the following information:

- name of the case
- summary of the proposed concentration (within 200 Chinese characters)
- brief overview of the parties involved in the transaction
- election of the grounds on which the case is a simple case
- other remarks (if any)

**C. Filing Acceptance.** The AMB will review the filing documents and materials and determine whether the proposed transaction qualifies as a "simple case" eligible for the summary procedures. Before accepting a summary AML filing, the AMB may request the notifying party to supplement, amend, clarify or explain the filing documents if AMB views that the filing documents and materials are incomplete or contain inaccurate statements.

The AMB also retains discretion to determine that a case does not qualify for the summary AML filing procedure and require the notifying party to submit the standard notification form. Before the AMB makes such a decision, however, it will hear the notifying party's opinion and verify facts, reasons and evidence provided by such notifying party.

**D. Public Announcement.** Once the AMB accepts the summary AML filing and commences the Phase 1 review period, it will publicly post the content of the Public Notice Form on its portal at <http://fdj.mofcom.gov.cn>. This public announcement will trigger a 10-calendar-day period during which any entity or individual may submit to AMB their objection to the case's eligibility as a simple case, along with relevant evidence and their contact information.

**E. AMB's Decision on Summary Filing Procedure.** If there are no comments during the public comment period, then the transaction will be reviewed and treated as a simplified case. If objections are received, the AMB will review the relevant evidence and hear the notifying party's opinions. The AMB

# Client Alert

has the authority to revoke its earlier determination that the transaction qualifies for the summary procedure and require the parties to submit a standard notification form. If an objection is not verifiable or substantiated, however, the AMB will reject such objection and will review the transaction under the summary procedure.

**F. False and Misleading Information.** If a notifying party omits material information or provides false materials and/or misleading information, the AMB may, in addition to revoking its determination that the case was qualified for summary AML filing procedure, impose administrative fines or pursue criminal liabilities.

## II. KEY OBSERVATIONS

The Guiding Opinion represents another incremental positive step in the development of China's merger review system. The new procedural rules contain concrete changes to the notification form and review process that offer merging parties in "simple cases" the prospect of a less burdensome and potentially quicker review process. In addition, the use of the public notice process appears to be designed, in part, to streamline the process for obtaining feedback from interested stakeholders (e.g., customers, suppliers) and other relevant government agencies, which has resulted in delays in completing the pre-existing review process for standard notifications in the past.

Nevertheless, until we observe how the AMB will utilize these new procedures in practice on actual notifiable transactions, a number of uncertainties and risks will remain. For example:

- The Guiding Opinion does not contain any prescribed time period in which the AMB must make a determination on whether the transaction qualifies as a simple case and provides no guidance or promises on how quickly MOFCOM will issue approval decisions. Thus, it remains unclear whether parties to transactions that qualify as a "simple case" can expect the initial Phase 1 review period to be commenced promptly after submitting a filing. Moreover, while we believe MOFCOM will aim to issue approval decisions more promptly for a simple case, it has broad discretion and authority to initiate an extended Phase 2 investigation if it needs additional time to make a final decision (even when there are no substantive concerns about the transaction).
- Parties that elect to pursue the summary procedure also run the risk that the AMB rejects their simple case application or later revokes its determination that the transaction qualified for the summary procedure. If this occurs, the parties will essentially have to start the review process over by submitting the longer standard notification form. This could potentially result in a longer overall review period than choosing from the outset to submit a standard notification form. Likewise, the potential benefits of the Simplified Form may be negated if parties choose to mitigate this risk and minimize delays by collecting and including the additional information required in the standard notification form in their initial submissions.
- Finally, the public announcement process may attract attention and objections from third parties that may not have otherwise been contacted by the AMB or become aware of a transaction.

Accordingly, parties to transactions requiring a China AML notification should exercise caution and consult with knowledgeable counsel when determining whether to request treatment as a simple case under the summary procedures.

# Client Alert

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