

# ClientAlert

## Financial Markets Developments

Bank Advisory  
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### Guidelines on Computation of Financial Merger Reporting Thresholds Released



As one of the world's fastest growing economies, China has been a favorite destination for foreign investment since it opened its doors to foreign investors almost three decades ago. While its growth has slowed, the Chinese economy continues to grow moderately amid the global financial crisis, and China will keep attracting foreign capital. As China continues to liberalize its financial services market and allows greater foreign participation in this sector, financial institutions from abroad will be able to expand their presence in China not only by organic growth but also through acquisitions of their Chinese counterparts. For companies interested in pursuing cross-border transactions involving the financial sector in China, the recent release of official guidelines on the computation of financial merger reporting thresholds under China's merger control regime is noteworthy.

The PRC Ministry of Commerce (MOFCOM), together with China's key regulatory agencies overseeing the financial services industry, recently issued long-awaited guidance on how parties to proposed transactions in the financial services industry should compute their turnover for purposes of determining whether the notification thresholds under the Anti-Monopoly Law (AML) are met. The *Measures for Computing Turnover for Notification of Concentration among Financial Services Companies* (the "Measures") were jointly promulgated by MOFCOM, the People's Bank of China (PBOC), the China Banking Regulatory Commission (CBRC), the China Securities Regulatory Commission (CSRC) and the China Insurance Regulatory Commission (CIRC) on July 15, 2009, after the Anti-Monopoly Commission (AMC) under the State Council had reviewed and approved it. The Measures will become effective in mid-August 2009, thirty days after their promulgation.

#### Background

The Measures supplement the *Rules on the Notification of Concentration of Business Operators* the State Council promulgated in August 2008 (the "Notification Rules") and provide specific guidance on the computation of turnover in transactions involving the financial services industry. Under the Notification Rules, transactions in which the turnover figures of the transacting parties exceed particular thresholds must be notified to MOFCOM, the authority in charge of merger control. The Notification Rules state that the particular circumstances of certain industries, such as the financial services industry, should be taken into account in turnover computation, and that the relevant authorities under the State Council would issue pertinent guidance in due course. Such guidance has now been promulgated in the form of the Measures.

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## Scope of Application

The Measures apply to turnover computation in transactions involving banking institutions, companies dealing in securities and futures, fund management companies, insurers and other financial institutions. Banking institutions in this context include commercial banks, credit cooperatives and other deposit-taking institutions, as well as policy banks. The Measures are also applicable to turnover computation for asset management companies, trust companies, leasing companies, automotive finance companies, currency brokers and other institutions regulated by the relevant financial regulatory agencies.

## Computation of Turnover

The Measures list particular categories of revenue that should be included in computing the turnover for companies in each of four specific sub-sectors, namely: banking institutions, securities companies, futures companies and fund management companies. Despite differences in the revenue items to be considered in each sub-sector, the Measures set out a unified approach to arrive at a turnover figure for purposes of determining whether the notification thresholds are met. Specifically, a given party needs to identify the amount for each category of revenue (e.g., interest income, commissions, fees, investment gains, gains on changes in the fair value of assets, gains of currency exchange, income from insurance premium, etc.), sum up the amounts for all applicable categories of revenue, then deduct any business taxes and other applicable charges to arrive at a net aggregate revenue. The turnover of the party—for purposes of determining if the notification thresholds are met—is 10 percent of its net aggregate revenue.

## Significance and Potential Implications

The issuance of the Measures is a welcome development, providing needed guidance to financial services companies on how they should compute their turnover figures in order to determine whether a proposed transaction in the financial sector must be notified to MOFCOM for clearance under the AML. Further details and nuances will evolve over time as the Measures are put into practice.

It has taken almost a full year for the five authorities to issue the Measures. The long gestation period of the Measures indicates there were some differences in priorities among the agencies on the subject, as well as the complexity of completing such an interagency task. In any event, the Measures now have received the AMC's stamp of approval, so the industry can look to the Measures as a definitive source of guidance in ascertaining if a proposed deal is reportable.

While MOFCOM will focus on scrutinizing the competitive implications of proposed transactions, the four regulatory authorities that joined MOFCOM in issuing the Measures (i.e., PBOC, CBRC, CSRC and CIRC) also may be involved in the AML review of proposed transactions involving financial services companies. The level of the each authority's involvement in whether to clear a transaction, and whether to impose conditions on clearance, will depend largely on the authority's assessment of the transaction's effect on the industry segment for which it has regulatory responsibility. Financial services companies who conclude they must notify a proposed deal to MOFCOM under the AML should bear this in mind.

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