

**美国律师协会反托拉斯法部、知识产权法部和国际法部
关于国家工商行政管理总局起草的
《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定（征求意见稿）》的联合意见**

2014 年 7 月 9 日

声明：本意见书仅代表美国律师协会反托拉斯法部、知识产权法部和国际法部的观点，没有经过美国律师协会会员代表大会或理事会的批准，因此不应被视为代表美国律师协会的政策。

美国律师协会反托拉斯法部、知识产权法部和国际法部（简称“三部门”）分别就中国国家工商行政管理总局（简称“工商总局”）起草的《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定（征求意见稿）》（简称“《征求意见稿》”）提出意见。¹三部门赞赏工商总局为起草《征求意见稿》作出的巨大努力和诸多思考²，并借此机会提出我们的意见，希望能够为最终定稿提供帮助。在贵局认为适当的情况下，三部门可以进一步提供补充意见或参与同贵局的商谈。三部门提交的意见反映了其成员在竞争法、竞争法与知识产权法交叉领域以及背后的经济原理等方面的专业知识和经验。

总体意见

三部门赞许工商总局在《征求意见稿》中做出的改进，包括删除部分关于某些涉及知识产权的行为具有反竞争效果的推定，而是采用一种类似于“合理原则”的方式，仅禁止没有正当理由排除或限制竞争的行为。

三部门希望工商总局能够重新考虑并颁布关于知识产权领域反垄断执法的“指南”而非“规定”。正如工商总局所指出的，在知识产权领域实施反垄断法对各个国家和地区都是一个重要并且复杂的问题。³指南能够为工商总局执法提供更多的灵活性。

¹ 《征求意见稿》与关于《征求意见稿》的起草说明（简称“《起草说明》”）共同发布，见 <http://www.chinalaw.gov.cn/article/cazjgg/201406/20140600396223.shtml>。本意见书以《征求意见稿》的非官方翻译版为基础。《征求意见稿》非官方翻译版及《起草说明》非官方翻译版详见附件一和附件二。

² 美国律协三部门十分感谢工商总局考虑了我们于 2012 年提交的关于《关于知识产权领域反垄断执法的指南草案（第五稿）》（简称“《指南草案》”）的建议（简称“2012 年评论意见”）（见附件三）。

³ 《起草说明》二。

第2条

三部门支持《征求意见稿》第2条关于《反垄断法》在知识产权领域仅适用于滥用知识产权导致排除、限制竞争的行为的原则，这一点与《反垄断法》第五十五条相符。同时，三部门建议明确规定该原则适用于《征求意见稿》的所有条款（包括第3条、第6条、第8条、第11条、第13条和第17条）。三部门同样赞赏第二条及贯穿于整个《征求意见稿》中关于反垄断法与保护知识产权具有共同的目标，即促进创新和竞争，提高效率，维护消费者利益的原则。同时，三部门建议将《征求意见稿》中涉及知识产权的行使没有正当理由即属于滥用知识产权行为的规定（例如，第8条限定交易和第11条差别许可）进行修改，明确执法机构在得出一个行为违反《反垄断法》的结论前，必须审查该行为的竞争效果，确认权利人使用知识产权的行为已经产生排除或限制竞争的后果。

第3条

第3条关于“相关技术市场”的定义为“由行使知识产权所涉及的技术和可以相互替代的现有同类技术之间互相竞争所构成的市场”。三部门建议将“现有”一词删除。“现有”一词会引起歧义，在定义相关市场和判断“相互替代技术”时，到底应当以哪个时间点为准？同样的，“同类”的表述也很模糊，是否意味着要限制评估“互相替代”技术时应当考虑的范围。

第5条

第5条为存在“可以以合理成本得到的其他替代性技术”的情况提供了安全港。三部门建议将“合理成本”修改为“用户的类似成本”⁴。这样的修改可以消除认定“合理成本”造成的模糊，同时也符合认定真正的替代技术的目的。

此外，三部门还建议删除第一款最后一句或者将其修改如下：“但是有相反的证据证明该协议属于《反垄断法》第十三条第（一）项至第（五）项规定的类型具有排除、限制竞争效果的除外”。

第7条

三部门担心第7条将必需设施原则大范围运用在知识产权领域。存在必需设施原则的法域很少运用该原则，更没有任何法域将该原则运用在专利领域⁵。三

⁴ 见美国司法部和联邦贸易委员会，《知识产权许可反托拉斯法指南》（ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY，简称“《美国知识产权反托拉斯指南》”）3.2.2 范例三，3.3 范例六，3.4 范例七，4.3，5.1 范例九（1995）。

原文请参考 <http://www.justice.gov/atr/public/guidelines/0558.pdf>。

⁵ 反托拉斯法的代表学者 Herbert Hovenkamp 指出：“尽管‘必需设施’原则总体上有很多优点，但是将该原则适用在知识产权领域是非常有问题的。”见 Herbert Hovenkamp，《知识产权与反托拉斯法》，第十三章“单方拒绝许可”，第13-15页，2013年（第二版）。在知识产权领域，即使欧洲最大限度地应用了该原则，也仍然没有在专利领域适用。根据 IMS Health GmbH &

部门建议删除第7条，并依旧担心⁶，将必需设施原则应用在知识产权领域，将严重损害权利人核心的排除他人使用的权利，使得专利权人的竞争对手丧失自己开发具有竞争力的知识产权的动力，并在长期内造成遏制创新的后果。⁷强制许可将降低知识产权的价值，遏制权利人取得技术上进一步突破的动力，也限制了竞争者开发更好的技术以取代现有行业领先技术的动力。⁸

如果工商总局决定保留必需设施原则，三部门谨敦促工商总局接受三部门2012年评论意见关于《指南草案》第17条第二项的修改意见，至少明确要求在认定一项知识产权构成必需设施前，必须证明该知识产权满足第7条第二款所列的全部三个要素。

此外，鉴于第7条的规定意在规范标准必要专利，三部门谨认为没有必要特别适用必需设施原则以确保标准必要专利许可是可获取的。标准制定组织通常会要求会员承诺以“公平、合理和非歧视”的原则（“FRAND原则”）许可其标准必要专利，以此作为将其知识产权纳入标准的条件。⁹《征求意见稿》第13

Co OHG v NDC Health GmbH & Co KG, [2004] All ER (EC) 81 3 (2004)（简称“IMS 决定”），欧洲司法法院仅在极个别的情况下允许适用该原则，即使用权构成生产新产品或新服务的必要设施，并且没有其他方法可以替换。近期，欧盟委员会在《Guidance in Its Enforcement Priorities in Applying Art. 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings》（简称“《102 条指南》”）中表示，在拒绝许可的情况下，如果至少在长期不存在下游市场竞争者可以依赖的实质性或潜在的替代，用以抵消拒绝许可带来的负面效果，那么此要素就是必需的。《102 条指南》，2009 O.J. (C45) 7，第 83 条，见 <http://ec.europa.eu/competition/antitrust/art82/>。《102 条指南》与 IMS 决定一致。

⁶ 该建议的详细说明见 2012 年评论意见对《指南草案》第 17 条第（二）项的意见。《征求意见稿》第 7 条扩大化的强制许可与《中国专利法》（2008 年修正）第 11 条关于专利权人权利的规定不一致，即未经权利人许可，任何单位或个人不得为生产经营目的制造、使用、许诺销售、销售、进口专利产品。

⁷ 美国最高法院对“必需设施”原则持有很大怀疑，并表示强制性资产共享“与反托拉斯法的根本目的相冲突”（*Verizon Commc' ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 407-08, 2004）。“必需设施”原则的广泛应用会潜在地取代市场经济，并且“要求反托拉斯法庭承担他们无法胜任的中央计划者的任务，包括确定合适价格、数量以及其他交易条件。”虽然一方面强制共享知识产权似乎会在短期内促进竞争，这是因为有更多的供应商可以提供下游产品，但是从长远的角度来看，最终将破坏经济及消费者利益，因为投资于技术创新的资源更少了。见 Richard J. Gilbert & Carl Shapiro, *Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 PROCEEDINGS OF THE NAT' L ACAD. OF SCIENCES OF THE U.S.A. 12749-12755 (1996)。原文见 <http://www.pnas.org/content/93/23/12749>，说明了强制许可会造成低效企业进入并降低经济效率）。

⁸ *Trinko*, 540 U.S., 407-08.

⁹ 例如，可见 *Standard Essential Patent Disputes and Antitrust Law: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013)，Suzanne Munck，联邦贸易委员会首席知识产权顾问，原文见

条涵盖了标准必要专利，并已经能够协助实现这一目标。

第 8 条

第8条禁止具有市场支配地位的企业，在行使知识产权的过程中，“无正当理由”实施限定交易。三部门赞许工商总局使用“无正当理由”描述禁止性行为。同时建议在第8条中明确规定工商总局在认定权利人违反《反垄断法》之前，先根据《反垄断法》第55条和《征求意见稿》第2条确认该行为已经产生排除或限制竞争的后果。

“无正当理由”这一表述似乎在表明限定交易通常具有促进竞争的效果。“例如，禁止被许可人参与其他技术交易的许可安排可以激励被许可人开发和推广被许可技术或专门适用该技术的应用”¹⁰。此外，“知识产权在某些情况下可能比其他形式的财产更容易被盗用的事实，可以为一些限制性条件的使用提供正当理由，尽管这些条件在其他情况下可能会产生反竞争效果。”¹¹明确第 8 条仅适用于产生排除或限制竞争效果的限定交易，与国际惯例保持一致，即重点关注真正实施的行为及产生的效果，而不是协议的正式条款。¹²

第 11 条

第 11 条禁止具有市场支配地位的企业，在行使知识产权的过程中，对条件相同的交易相对人实行差别待遇。三部门建议修改第 11 条，明确该条仅适用于没有正当理由排除或限制竞争的行为，使其与《反垄断法》第 55 条和《征求意见稿》第 2 条保持一致。这样的修改将认可在某些情况下价格歧视等行为有助于增加消费者福利。¹³ “比方说，允许价格歧视可以保证对价格敏感的消费者也可

http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730standarlessentialpatents.pdf。

¹⁰ 《美国知识产权反托拉斯指南》第 4.1.2 条（引用范例 8 及第 4.2 条）

¹¹ 同上。

¹² 例如，可见同上；欧盟通讯，Communication from the Commission – Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, § § 2.2, 4.2.2, 4.2.2.1（2014 年 3 月 28 日），见 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:089:FULL&from=EN>；韩国公平交易委员会，Fair Trade Commission of the Republic of Korea Review Guidelines on Unfair Exercise of Intellectual Property Rights, § II.2（2010 年 3 月 31 日），见 http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Unfair%20Exercise%20of%20Intellectual%20Property%20Rights_mar%2014%202012.pdf；加拿大竞争局，《知识产权执法指南》第 5.4 节和第 7 节范例 3.1，见 [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/\\$FILE/ipege.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/$FILE/ipege.pdf)。

¹³ 例如，见 Anne Layne-Farrar, Non-Discriminatory Pricing: What is Different (and What is Not) About IP Licensing in Standard Setting, J. OF COMPETITION LAW & ECON. 1, 1,

以享受商品或服务，否则，如果强制推行统一价格的话，这些消费者很有可能会因价格过高而被排挤出市场。”¹⁴当存在两个消费者群体，其中一个群体对价格高度敏感，另外一个却不敏感时，如果不允许价格歧视，经营者会针对第二个消费者群体而制定较高的价格，以实现利润最大化，而第一个消费群体则因此被排挤出市场。¹⁵另外，“在某些市场结构下，价格歧视反而会给消费者带来与统一定价相比更低的总体价格。”¹⁶

有区别地拒绝许可或给予不同被许可人不同的许可条件可以实现合理的、促进竞争的目的。例如，通过为部分而非全部感兴趣的潜在被许可人提供许可，可以确保被许可人有动力促进宣传许可人的技术。企业也可以向销售量较少的被许可人收取较高的许可使用费，或者向能够通过提供交叉许可用以抵消部分许可费等方式建立对价关系的被许可人收取较低许可费，以实现专利收益最大化。总体而言，竞争政策不能因知识产权权利人实现高风险、高成本的科研投资收益最大化而惩罚权利人。因为如果这样做的话，将剥夺创新所带来的利益以及所激发的经济增长，¹⁷尤其是在以促进高风险高成本的科研投资为目的的知识产权领域。

第 12 条

值得赞许的是，《征求意见稿》第 12 条删除了《指南草案》第 21 条中关于某些专利联营具有反竞争效果的假设。这样的修改与普遍观点相符，即专利联营可以通过联合互补技术，为感兴趣的潜在被许可人提供许可，降低交易成本，为

4-7 (2010 年 8 月 5 日)关于传统商品或服务市场以及知识产权许可市场上价格歧视的现有著作表明“价格差别不一定会产生危害，在一些情况下甚至可以增加消费者福利；大多数知识产权许可都有“歧视”，因为不同的知识产权许可的价格和条款一般不相同；在任何关于知识产权歧视性许可造成反竞争效果的审查中，证明市场支配力量必须是第一步；目前尚未形成能够广泛适用的准则，用以区分许可歧视是有害还是有益，或者认定无害许可歧视，这意味着量化的、细致的、以效果为基准的分析依旧是目前最好的方法。(以下简称 Layne-Farrar “非歧视性定价”)”。

¹⁴ 见注释 5，引用 Benjamin Klein & John Wiley, Jr., *Competitive Price Discrimination As an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003); Lars A. Stole, *Price Discrimination and Competition*, 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2223, Mark Armstrong & Robert Porter eds., 芝加哥大学, (2007); Hal R. Varian, *Price Discrimination*, HANDBOOK OF INDUSTRIAL ORGANIZATION 597, Richard Schmalensee & Robert D. Willig eds., North-Holland 1989, 涉及价格歧视理论与实践的调研; Richard Schmalensee, *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination*, 71 AM. ECON. REV. 242 (1981)。

¹⁵ 执法部门也许会认为，只有统一降低价格才能消除歧视，以防止消费者因高价被排挤出市场。但是，这样做却会形成价格管制，从而遏制创新。

¹⁶ 见 D. Fudenberg & J. Tirole, *Customer Poaching and Brand Switching*, 31 RAND J. ECON. 634 (2000); Layne-Farrar 《非歧视性定价》第六页，引用 Jacques F. Thisse & Xavier Vives, *On the Strategic Choice of Spatial Price Policy*, 78 AM. ECON. REV. 122 (1988)。

¹⁷ 见 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)。

清除特定技术障碍以及避免昂贵的侵权诉讼等方式来提高效率。¹⁸然而，三部门建议对第 12 条第二款作进一步说明。从文字表述来看，该款似乎假定特定行为本身违法，并将证明协议符合《反垄断法》第 15 条规定的证明责任加到专利联营成员的身上。

三部门建议，与其通过分类方法评估专利联营，不如在第 12 条中明确规定适用合理原则分析专利联营，权衡每一个专利联营带来的益处与潜在的反竞争危害。通过使用合理原则，可以确认“通过推进技术传播，联营通常能够促进竞争”这一事实。¹⁹

美国反垄断执法机构一般利用合理原则分析专利联营，并为其分析提供了大量指导。²⁰这一经验也许对工商总局的考量有所帮助。从三部门的经验看，商界将美国机构的指南视作一种安全港，概括了可被接受的行为，而不是一份严格责任规则清单。

美国机构指南的具体例子包括由美国司法部发布的商业评论信件，以及由美国联邦贸易委员会发起和解决的执法行动。²¹在每个案件中，美国机构均通过权衡联营促进竞争的益处和潜在反竞争危害，从而决定各个联营中的特定事实是否涉及反垄断法律问题。在这些案例中，美国机构会综合考虑多个因素，包括：（1）

¹⁸ 见《美国知识产权反托拉斯指南》§ 5.5（1995）。

¹⁹ 同上。

²⁰ 例如，见美国司法部和联邦贸易委员会联合发布的《ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 62-85（2007）》（“FTC/DOJ 2007 IP REPORT”），总结了至 2007 年的美国专利池机构指南，见 <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>；《美国知识产权反托拉斯指南》§ § 3.4, 5.5。

²¹ 例如，见 Letter from Charles A. James, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Ky P. Ewing, Esq. (November 12, 2002) (“2002 3G Platform Letter”), 见 <http://www.justice.gov/atr/public/busreview/200455.pdf>; Decision and Order, In re Summit Tech., Inc., 127 F.T.C. 208, 217 (1999) (No. 9286) 见 http://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-127/volume127a.pdf; Decision and Order, In re VISX, Inc., 127 F.T.C. 236 (1999) (No. 9286) 见 http://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-127/volume127a.pdf, Letter from Joel I. Klein, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Carey R. Ramos, Esq. (1999 年 6 月 10 日) (“6C DVD Letter”), 见 <http://www.usdoj.gov/atr/public/busreview/2485.pdf>; Letter from Joel I. Klein, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Garrard R. Beeney, Esq. (1998 年 12 月 16 日) (“3C DVD Letter”), 见 <http://www.usdoj.gov/atr/public/busreview/2121.pdf>; Letter from Joel I. Klein, Acting Ass’t Attorney Gen., U.S. Dep’t of Justice, to Garrard R. Beeney, Esq. (1997 年 6 月 26 日), 见 <http://www.usdoj.gov/atr/public/busreview/215742.pdf>, (“MPEG-2 Letter”)。

联营成员是否能够在联营之外独立许可专利；²²（2）联营成员是否能独立研发具有竞争性的技术；²³（3）被许可人是否必须向联营成员提供独占性回授；²⁴以及（4）是否禁止被许可人质疑联营专利的有效性²⁵。此外，美国机构注意到联营的管理可能要求成员交换竞争性敏感信息。为削弱共谋的可能性，机构建议联营成员吸纳可限制或约束竞争性敏感信息传播的机制²⁶，例如，使用独立的许可代理来管理联营²⁷，或建立“防火墙”以限制获取敏感信息的途径。²⁸

美国机构关于适用合理原则分析专利联营的指南还包含了其他的一些因素，值得工商总局考虑纳入《征求意见稿》。首先，关于《征求意见稿》第12条第（五）项描述的“差别待遇”，美国机构并不认为联营必须向相关市场所有潜在被许可人提供相同的许可条件，而是表明他们“不会因不同的被许可人（例如成员与非成员）适用不同的许可费，而假定该联营是反竞争的。至于这种安排是否存在反竞争效果，是根据具体案件的具体事实来决定的”。²⁹其次，美国机构提出当联营不局限在技术上的必要专利，而是也包含了替代性专利时，竞争问题就可能出现³⁰。最后，美国指南表明在分析联营的潜在影响时，应当考虑其所具备的功能是怎样推动联营技术的研发和商业化的。³¹

三部门赞赏第12条将交叉许可从“专利联营”的定义中排除。与《指南草案》相比，该条款确认了交叉许可具有促进竞争的潜力，以及与专利联营相比，对交叉许可应有不同考虑，是一项进步。³²

第13条

第13条第（一）款禁止具有市场支配地位的经营者在知道其专利可能会被纳入有关标准的情况下，故意不向标准制定组织披露其权利信息或者明确放弃其权利，但是在其专利成为某项强制性标准后却对该标准的实施者主张其专利权。三部门谨此建议工商总局重新采纳2013年《禁止滥用知识产权排除、限制竞争

²² 例如，见 MPEG-2 Letter，第11页；6C DVD Letter，第15页。

²³ 见 MPEG-2 Letter，第12页；3C VD Letter，第13-14页。

²⁴ 见 MPEG-2 Letter，第12-13页；3C DVD Letter，第14页。

²⁵ 6C DVD Letter，第8-9页。注意美国司法部指南虽然建议，通常被许可人应该可以有权质疑参与联营专利的有效性，同一指南也建议如果收到被许可人的质疑，许可人应该有权暂停或终止自己参与联营专利的许可。

²⁶ 见 FTC/DOJ 2007 IP REPORT，第81页

²⁷ 见 MPEG-2 Letter，第4页，第11页。

²⁸ 例如，见 6C DVD Letter，第9页。

²⁹ 见 FTC/DOJ 2007 IP REPORT 第81页。反映了不同被许可人带着不同的资产坐在谈判桌上的事实，并且会将条件不同的被许可人区别对待，包括在许可费问题上，从而推动形成有效的商业结果，并且有利于竞争。

³⁰ 见 MPEG-2 Letter，第9-10页；3C DVD Letter，第10-11页；6C DVD Letter，第11-12页。

³¹ 见 MPEG-2 Letter，第14-15页；6C DVD Letter，第15页；2002 3G Platform Letter，第11页。

³² 例如，见 FTC/DOJ 2007 IP REPORT，第58页，注意专利池与交叉许可在竞争考量因素上的区别。

行为的规定（征求意见稿）》（“《第 6 次征求意见稿》”）第 12 条中的规定。该等规定与国际通行的惯例是一致的。³³

《第 6 次征求意见稿》将未履行披露义务的责任限定于以下条件的同时满足：

（1）专利权人或专利申请人是标准制定组织中有投票权的积极参与者；（2）标准制定组织公布的书面政策中要求将某些披露义务作为加入标准制定组织的条件；（3）专利权人或专利申请人欺骗性地或故意违反标准制定组织制定的披露义务；（4）标准通过后，专利权人或专利申请人以其必要专利主张对抗标准的强制性部分的实施者；（5）如果专利权人或专利申请人在标准制定过程中履行披露义务，那么另一项不同的技术将被纳入标准；且（6）专利权人或专利申请人的行为对相关市场的竞争产生或可能产生不利影响。

上述限定条件对确保第 13 条第（一）款不适用于专利权人以外的其他人申请将专利纳入标准，且仅适用于排除或限制竞争的行为是必要的，这与《反垄断法》第 55 条及《征求意见稿》第 2 条的规定相吻合。《征求意见稿》第 13 条第（一）款从字面意思上看是对非相关标准制定组织参与成员的经营者创设了一项披露义务。进一步地，就目前起草的规定来看，第 13 条第（一）款可能会产生超出相关标准制定组织成员同意的要求对相关经营者施加披露义务的效果。三部门谨此建议，应由各标准制定组织就其各自标准制定活动确定披露要求的适当程度。

第 13 条第（二）款禁止专利权人在其专利成为标准必要专利后，拒绝以公平、合理、无歧视的原则进行许可。第 13 条第（二）款从字面上看似似乎将任何拥有一项标准必要专利的经营者均应做出公平、合理、无歧视的承诺作为了一项强制性义务，而不考虑：（1）该等经营者是否加入了标准制定组织，并就相关标准对标准制定组织做出了公平、合理、无歧视承诺，或者（2）该标准制定组织是否要求做出公平、合理、无歧视承诺。三部门谨此建议删除第 13 条第（二）款。就三部门所知，还未有任何法院在专利权人并未事先做出公平、合理、无歧视承诺的情况下，对仅就标准必要专利拒绝授予许可的行为要求承担反垄断责任。³⁴

³³ 三部门谨指向我们的 2012 年评论意见，以解释三部门支持采纳《第 6 次征求意见稿》第 12 条的理由。

³⁴ 美国对于违背公平、合理、无歧视承诺是否本身违反反垄断法存在争论。Bruce H. Kobayashi 和 Joshua D. Wright, 《反托拉斯和专利持有的界限：回应 Cary 等人》（The Limits of Antitrust and Patent Holdup: A Reply to Cary et al），《反垄断法律期刊》第 78 期，（ANTITRUST L.J.），第 505 页，523 页，2012 年（认为“合同法不仅比反垄断法更适于辨别和监管与专利劫持相关的事后机会主义，同时更有可能减少交易成本和社会福利损失”，部分是因为“合同法提供了一些相对于反垄断法的好处”，包括“合同法设计的原则能够比较准确地区分事后机会主义（如专利劫持）和根据市场情况变化修改既存协议的合法尝试”），而 Joseph Farrell, John Hayes, Carl Shapiro 和 Theresa Sullivan 著，《标准制定，专利及专利劫持》（Standard Setting, Patents, and Hold Up），《反垄断法学期刊》第 74 期，（ANTITRUST L.J.），第 603 页，609 页，2007 年版（认为专利劫持“不仅是私人合同问题，也是一个反垄断问题”，因为“它与对损害消费者的市场力量之低效获取有关；更重要的是，欺骗购买者或使其对将出现的技术之条款一无所知会破坏竞争过程。”）

三部门谨此建议，第 13 条第（二）款至少应限定适用于专利权人自愿同意以公平、合理、无歧视原则许可其标准必要专利的情形。这样的修改对确保标准制定组织在未经专利权人同意的情况下不滥用其专利技术，并且避免专利权人的义务在中国和其他司法管辖区产生实质性矛盾是必要的。³⁵例如，欧盟委员会《关于对横向合作协议适用欧盟运行条约第 101 条的指南》（“《第 101 条指南》”）中规定，标准制定组织的知识产权政策应包含公平、合理、无歧视原则，但该指南也强调加入标准制定组织是自愿的，即专利权人可以不就其专利技术参与标准制定程序，因此可免于适用任何有关许可的承诺。³⁶美国反垄断执法机构同样鼓励（但不强制要求）标准制定组织采纳公平、合理、无歧视原则，并将其视为促进使用标准进行后续创新的因素之一。³⁷而相反的政策可能会阻碍中国企业在国际上的投资和创新活动，也可能与中国三中全会最新的指示不一致，即政府政策应“建立在鼓励创新的市场机制基础上”，消除所有针对创新和投资的“各种形式的不合理规定（和）隐形障碍”。³⁸

很多标准制定组织要求希望参加标准制定过程的经营者将其持有的任何标准必要专利以公平、合理、无歧视的原则许可给标准实施者。在该等情形下，公平、合理、无歧视承诺就是经营者签署的一项协议，以期获得参与标准制定组织标准制定过程的机会。经营者以公平、合理、无歧视条款许可其标准必要专利的该等协议可能对经营者来说是有价值的，原因是，例如，若经营者的专利技术被采纳为标准必要专利且该等标准是成功的，经营者就有机会从更大的销售量中获得更多的许可费。然而，是否做出公平、合理、无歧视承诺以及是否加入标准制定组织应由经营者自主决定，且对一些经营者来说，其选择不加入标准制定组织，从而拒绝做出公平、合理、无歧视承诺的行为并不限制竞争。采用其他策略也可能加强竞争从而有利于消费者。

对选择不加入标准制定组织的经营者要求强制性的公平、合理、无歧视承诺排除了经营者对其知识产权的独占权和排他性权利，从而可能降低其创新动力。强制性要求公平、合理、无歧视承诺的效果与经营者自愿做出该等承诺以期获得参与标准制定权利的效果形成鲜明对比。公平、合理、无歧视承诺的自愿选择权可以

³⁵ 三部门认为，强制性施加公平、合理、无歧视承诺与中国专利法的一般原则是相违背的，即专利所有人有权自行决定如何行使其专利权。《中华人民共和国专利法》第 11 条（2008 年修订）。

³⁶ 参见欧盟委员会《关于对横向合作协议适用欧盟运行条约第 101 条的指南》，2011 年，O. J. (C 11) 1，第 285 段；参见欧盟委员会竞争事务总司，标准必要专利，《竞争政策简述》（COMPETITION POLICY BRIEF），2014 年 6 月，http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf。

³⁷ 参见美国司法部和美国专利和商标办公室，《关于标准必要专利受限于自愿的公平、合理、无歧视承诺的救济措施之政策陈述》（Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary F/Rand Commitments），第 5-6 页，2013 年 1 月 8 日。

³⁸ 中国共产党第十八届中央委员会第三次全体会议，《中共中央关于全面深化改革若干重大问题的决定》。

增加创新的动力。

若工商总局决定不采纳《第6次征求意见稿》第12条的规定，和/或者决定保留第13条第（二）款，三部门谨此建议第13条应修改如下：

经营者不得在行使知识产权的过程中，通过故意违反其自愿向标准制定组织做出的关于其被纳入标准的知识产权的公平、合理、无歧视承诺或披露承诺，故意利用标准制定组织采纳的标准（含国家技术规范的强制性要求，下同）的制定和实施从事排除具有排除、限制竞争效果的行为。

具有（1）因其专利技术被纳入标准而具有市场支配地位的经营者没有正当理由，及（2）根据相关标准制定组织的规则，对相关标准已自愿做出公平、合理、无歧视承诺或同意披露义务的经营者（经营者也是标准制定组织中具有投票权的积极参与者³⁹），没有正当理由，不得在标准的制定和实施过程中实施下列具有排除、限制竞争效果的行为：

（1）在知道其专利可能会被纳入有关标准的情况下，故意不向标准制定组织披露其权利信息，或者明确放弃其权利，故意或者欺骗性地不履行标准制定组织的相关披露要求，而随后在其明知未披露的专利成为某项强制性标准必要专利后，却对该标准的实施者主张其专利权。

（2）在其专利成为标准必要专利后，违背其以公平、合理无歧视原则条款进行许可的自愿承诺，包括（i）拒绝其他经营者以合理的条件以公平、合理、无歧视原则条款许可给标准实施者实施该专利；或者以不公平的条件许可其专利，或者在许可其专利的过程中实施搭售行为；（ii）拒绝许可其标准必要专利，除非实施者同意其限制竞争的条件。⁴⁰

本规定所称标准必要专利，是指实施该项标准所被认定为必不可少的专利。

但是，三部门认为，上述替代建议与三部门的首要建议（即采纳《第6次征求意见稿》第12条的规定并删除第13条第（二）款）相比缺乏一定的实践基础。

第15条

第15条禁止具有市场支配地位的经营者在其知识产权期限已经届满或者无效的情况下，或者在他人已经提供不构成知识产权侵权充分证据的情况下，滥发侵权警告函，以排除、限制相关市场竞争。⁴¹该条从字面来看是针对可能寻求实施无

³⁹ 三部门建议，经营者受限于“有投票权的积极参与者”的规定应限于标准制定组织的参与者可能被要求参与但可能不被允许对标准进行投票的情况。

⁴⁰ 该关于搭售行为的条款不是必要的。《征求意见稿》第9条全面阐释了搭售行为。如果工商总局认为一条特定的禁止搭售条款必须包括在第13条中，三部门谨此建议，该条款应明确限定于禁止具有排除或限制竞争效果的，将非标准必要专利与标准必要专利进行强制搭售的行为。

⁴¹ 他人已经提供不构成知识产权侵权的“充分证据”这一条件很难予以执行，并且会对经营

效专利或主张没有依据的侵权的专利主张实体（“**专利主张实体**”）。与《征求意见稿》第 2 条和《反垄断法》第 55 条一致，三部门赞赏工商总局明确说明该条中规定的行为仅在其排除、限制竞争时才予以禁止。在美国，尽管政府官员已听到过很多滥用知识产权提起侵权诉讼（包括由专利主张实体提起）的事例，但很少有实证证据可以证明专利主张实体行为的竞争成本和收益。为了更好地理解专利主张实体对创新和竞争的影响，2013 年 9 月，美国联邦贸易委员会启动了一项程序，就向大约 25 个专利主张实体收集信息的提案向公众征求意见。⁴²

三部门谨此建议工商总局：（1）就专利侵权诉讼和专利主张实体对竞争的影响进行进一步研究；（2）考虑制定遏制专利主张实体问题行为的措施是否以及如何可能对通过合法努力实施专利的经营者造成影响；以及（3）继上述进一步研究之后，就包括滥发侵权警告函等行为的执法路径给予清晰的指引，包括说明用以确定“他人已经提供不构成知识产权侵权充分证据”的因素。

第 17 条

三部门支持第 17 条最后一段关于除非当事人在订立协议之前已存在竞争关系，否则知识产权许可应被认为是纵向协议的描述。同时三部门建议，一个更好的测试方法可能是“许可是否取代了当事人之间的竞争”。三部门认为，除非许可取代了当事人之间先前存在的竞争，否则知识产权许可应被认为是一种纵向关系。

第 19 条

第 19 条规定经营者滥用知识产权排除、限制竞争的，工商行政管理机关将对其

者遵守法律带来重大的不确定性。经营者没有根据或者恶意地发出知识产权侵权警告函的条件也能达到同样的目的并更易于执行。

⁴² 《征求公众意见的通知和请求函》(Notice and Request for Public Comment), 78 Fed. Reg. 61, 352 (2013 年 10 月 3 日), http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/10/131003paereportsfrn.pdf. 2012 年 12 月，美国司法部和联邦贸易委员会举办了一场研讨会，会议邀请了政府机构官员、经济学家和高科技行业人员进行发言和陈述，会议对专利主张实体的影响，及反垄断法是否应当以及如何对专利主张实体的行为施加影响等问题进行了讨论和辩论。尽管很多与会人员对专利主张实体及其对竞争和创新的影响持批判态度，一些经济学家和这种商业模式的其他支持者仍认为专利主张实体为个体发明家的货币化提供了一个路径，这实际上可以激励创新。此外，很多讨论小组成员表示，任何措施均应针对存在问题的特定行为，而不是仅关注于商业模式。很多与会者同意，基于有关专利主张实体诉讼数量及诉讼结果数据的有限性，对专利主张实体的最终评估存在难度。与会人员似乎一致同意的是，非专门关于反垄断的措施也可能在一定程度上有助于解决专利主张实体的行为。具体来说，与会者主张提升专利质量和透明度，以及涉及费用转移、对禁令和排他性决定予以限制等的司法改革。总结而言，关于专利主张实体行为的最优反垄断路径目前尚未明晰。研讨会的相关记录、视频、书面评论和其他材料请见 <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>. 三部门注意到很少有专利主张实体就其持有的知识产权具有市场支配地位。

处以上一年会计年度销售额百分之一以上百分之十以下的罚款。三部门希望重申我们的以下请求，即工商总局说明“营业额”是指直接从受违法行为影响的中国相关产品市场和地域市场获得的营业额。

总结

三部门赞赏工商总局为完善《关于滥用知识产权排除、限制竞争的规定》所做的大量工作，也希望工商总局能够考虑我们及其他人的评论意见，以继续行使其实施、执行《反垄断法》并就《反垄断法》提供清晰指引的使命。

附录

1. 《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定》（征求意见稿）（“**《征求意见稿》**”）非官方翻译版
2. 关于《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定（征求意见稿）》的起草说明（“**起草说明**”）非官方翻译版
3. 三部门对《关于知识产权领域反垄断执法指南》（草案）第五稿的评论意见（“**2012 年评论意见**”）

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF
ANTITRUST LAW, SECTION OF INTELLECTUAL PROPERTY LAW, AND
SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT RULES ON
THE PROHIBITION OF ABUSES OF INTELLECTUAL PROPERTY RIGHTS
FOR THE PURPOSES OF ELIMINATING OR RESTRICTING COMPETITION**

July 9, 2014

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments on the Draft for Comments (the “Consultation Draft”) of the Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the “Rules”) of China’s State Administration for Industry and Commerce (“SAIC”).¹ The Sections appreciate the substantial thought and effort of the SAIC reflected in the Consultation Draft² and take the opportunity to offer these comments (the “Comments”) in the hope that they might assist in completion of the final Rules. The Sections are available to provide additional comments, or participate in consultations with the SAIC, as the SAIC deems appropriate. The Sections’ Comments reflect the expertise and experience of their members with competition law, its intersection with intellectual property law, and underlying economic principles.

General Comments

The Sections commend the SAIC for making several improvements in the current draft, including eliminating several apparent presumptions that certain forms of conduct involving intellectual property rights (“IPRs”) are anticompetitive, and instead applying a rule-of-reason type approach by prohibiting only conduct that is without legitimate justification and eliminates or unreasonably restricts competition.

The Sections hope that the SAIC will re-consider and again issue guidelines instead of rules regarding IPR abuse under the Anti-Monopoly Law (“AML”). As the SAIC noted, the enforcement

¹ The Consultation Draft was published for comment, together with Explanatory Notes regarding the Drafting of the Rules on the Prohibition of Abuses of IPR for the Purposes of Eliminating or Restricting Competition (Draft for Comments) (“Explanatory Notes”), at <http://www.chinalaw.gov.cn/article/cazjgg/201406/20140600396223.shtml>. These Comments are based on unofficial translations of the Consultation Draft. Unofficial translations of the Consultation Draft and the Explanatory Notes are appended for reference as Appendices 1 and 2, respectively.

² The Sections appreciate the SAIC’s consideration of their comments submitted in 2012 (“2012 Comments”) regarding the Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights (the “Draft Guide”) (attached as Appendix 3).

of competition law in connection with IPR is an important, and complex issue for all jurisdictions.³ Guidelines may provide more flexibility for the SAIC in developing its enforcement regime.

Article 2

The Sections support the recognition in Article 2 of the Consultation Draft, consistent with Article 55 of the AML, that with respect to IPR the AML applies only to conduct that abuses IPR and results in the elimination or restriction of competition. The Sections recommend that this principle be expressly made applicable to all provisions of the Consultation Draft (including Articles 3, 6, 8, 11, 13, and 17). The Sections also commend the express recognition in Article 2 and the incorporation throughout the Consultation Draft of the principle that antitrust and IPR laws share common goals, and of the policies underlying the Rules to facilitate innovation and competition, improve efficiency, and protect consumer welfare. The Sections suggest that where the Consultation Draft prohibits an exercise of IPR as abusive unless the conduct is otherwise justified (e.g., Article 8 on exclusive dealing and Article 11 on discriminatory licensing), it be revised to clarify that the enforcement authority must establish that the IPR holder's conduct has eliminated or restricted competition, through an examination of the competitive effects of that conduct, before it will conclude that the conduct violates the AML.

Article 3

Article 3 defines the “relevant technology market” to be “the market where technologies involved in the exercise of the intellectual property rights compete with the existing substitutable technologies of the same type.” The Sections suggest deleting the word “existing” because it creates ambiguity as to the time at which the relevant market is to be defined and substitutable technologies evaluated. Similarly, it is unclear what the phrase “of the same type” is intended to mean and whether it is intended to limit the scope of actually substitutable technologies that will be considered.

Article 5

Article 5 creates safe harbors where there are “substitutable technologies that can be obtained at reasonable cost.” The Sections recommend that Article 5 be revised to replace “reasonable cost” with “a comparable cost to the user.”⁴ Such a revision would eliminate the ambiguity of determining the “reasonable cost” and serve the goal of identifying true substitute technologies.

Moreover, the Sections suggest clarifying the introductory paragraph by either deleting the phrase at the end of the introductory paragraph or revising it as follows: “except where there is evidence ~~to the contrary~~ proving that such agreement ~~has the effect of eliminating or restricting competition~~ is of the type identified in Article 13(1) through 13(5) of the Anti-Monopoly Law.”

³ Explanatory Notes at II.

⁴ See U.S. DEP'T & U.S. FED. Trade COMM'N ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.2.2 ex. 2 n. 23, § 3.3 ex. 6, § 3.4 ex. 7, § 4.3, § 5.1 ex. 9 (1995) *available at* <http://www.justice.gov/atr/public/guidelines/0558.pdf> [hereinafter U.S. IP GUIDELINES].

Article 7

The Sections are concerned that Article 7 endorses the wide application of the “essential facilities doctrine” to IPR. The essential facilities doctrine has rarely been used in the jurisdictions where it exists, and has never been used in the patent context anywhere in the world.⁵ The Sections respectfully urge the omission of Article 7 and remain concerned⁶ that applying the essential facilities doctrine to IPR would substantially impinge upon IPR holders’ core right to exclude, create disincentives for competitors to develop their own competing IPR, and create long-term disincentives to innovate in general.⁷ Enforced sharing lowers the value of the shared asset and can undermine the incentives for the asset owner to create the next technological breakthrough or for its rivals to develop a superior substitute to an existing industry-leading innovation.⁸

If the SAIC decides to retain the essential facilities doctrine in the Rules, the Sections respectfully urge the SAIC to include the revisions recommended in the 2012 Comments on Article 17(2) of the Draft Guide. At the least, Article 7 should be revised to expressly require proof that all three

⁵ Leading antitrust scholar, Herbert Hovenkamp, has noted that “[r]egardless of the merits of the essential facilities doctrine in general, its application to intellectual property cases is particularly problematic.” Herbert Hovenkamp, et al, *IP AND ANTITRUST* (Ch.13 *Unilateral Refusals to License*), 13-15 (2d ed. 2013). In the IPR context, the European experience offers a sense of the maximum extent of the use of such a doctrine, which has stopped short of patents. In *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*, [2004] All ER (EC) 81 3 (2004), the European Court of Justice limited the doctrine to exceptional circumstances, in particular where access is essential to create a new product or service and alternatives are not feasible. More recently, the European Commission’s Guidance in Its Enforcement Priorities in Applying Art. 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (“Article 102 Guidance”) states that an input is essential in a refusal to deal context when “there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long-term – the negative consequences of the refusal.” Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, para. 83, *available at* <http://ec.europa.eu/competition/antitrust/art82/>. This Article 102 Guidance is consistent with the *IMS* decision.

⁶ Please see the 2012 Comments on Article 17(2) of the Draft Guide for an explanation of the Sections’ rationale for this recommendation. Article 7’s broad compulsory licensing language may also be inconsistent with the rights of patent owners under China’s Patent Law to exclude others from making, using, offering to sell, selling, or importing patented products without authorization from the patentee. China Patent Law, Art. 11 (as amended in 2008).

⁷ The U.S. Supreme Court treats essential facilities claims with great skepticism, observing that enforced sharing of assets is in “some tension with the underlying purpose of the antitrust laws.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004). Broadly applied, the doctrine potentially supplants market economics and “requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited.” *Id.* While forced sharing of IPR may seem to increase competition in the short run, since more suppliers could offer a downstream product, over the long run, the economy and consumer welfare suffer as fewer resources are invested in innovation. *See* Richard J. Gilbert & Carl Shapiro, “An Economic Analysis of Unilateral Refusals to License Intellectual Property,” 93 PROCEEDINGS OF THE NAT’L ACAD. OF SCIENCES OF THE U.S.A. 12749-12755 (1996), *available at* <http://www.pnas.org/content/93/23/12749.full> (showing that compulsory licensing may invite entry of inefficient firms and lower economic efficiency).

⁸ *Trinko*, 540 U.S. at 407-08.

factors listed in the second paragraph are present before it is concluded that an IPR constitutes an essential facility.

In addition, to the extent Article 7 is directed at standard-essential patents (“SEPs”), the Sections respectfully submit that there is no need to employ the essential facilities doctrine specifically to ensure access to SEPs. Standard-setting organizations (“SSOs”) commonly seek commitments from participants to license SEPs on “fair, reasonable and non-discriminatory” (“F/RAND”) terms, often as a quid pro quo for the inclusion of their IPR in the standard.⁹ Article 13 of the Consultation Draft covers SEPs and helps enforce these safeguards.

Article 8

Article 8 prohibits undertakings with dominant market positions from, in the course of exercising their IPR, engaging in various types of exclusive dealing “without justification.” The Sections commend the SAIC for specifying that the prohibited conduct be “without justification,” and recommend that Article 8 be clarified to explicitly state that the SAIC will establish that such prohibited conduct has resulted in the elimination or unreasonable restriction of competition, consistent with Article 55 of the AML and Article 2 of the Consultation Draft, before concluding that an IPR holder has violated the AML.

The inclusion of the language “without justification” in Article 8 appears to recognize that exclusive dealing often has procompetitive effects. “For example, a licensing arrangement that prevents the licensee from dealing in other technologies may encourage the licensee to develop and market the licensed technology or specialized applications of that technology.”¹⁰ Furthermore, “the fact that intellectual property may in some cases be misappropriated more easily than other forms of property may justify the use of some restrictions that might be anticompetitive in other contexts.”¹¹ Clarifying that Article 8 applies only to exclusive dealing arrangements that eliminate or restrict competition would bring Article 8 into conformity with international norms, which focus on the actual practice and its effects, and not on the formal terms of the arrangement.¹²

⁹ See, e.g., *Standard Essential Patent Disputes and Antitrust Law: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of Suzanne Munck, Chief Counsel for Intellectual Property, Federal Trade Commission), available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730standardessentialpatents.pdf.

¹⁰ U.S. IP Guidelines § 4.1.2 (citing Ex. 8 and § 4.2).

¹¹ *Id.*

¹² See, e.g., *id.*; Communication from the Commission - Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements §§ 2.2, 4.2.2, 4.2.2.1 (Mar. 28, 2014), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:089:FULL&from=EN>; Fair Trade Commission of the Republic of Korea Review Guidelines on Unfair Exercise of Intellectual Property Rights §II.2 (Mar. 31, 2010), available at http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Unfair%20Exercise%20of%20Intellectual%20Property%20Rights_mar%2014%202012.pdf; Competition Bureau of CAN. Intellectual Property

Article 11

Article 11 prohibits undertakings with dominant market positions from, in the course of exercising their IPR, treating counterparts of same conditions in a discriminatory manner. The Sections recommend that Article 11 be revised to clarify that it prohibits only such conduct that eliminates or restricts competition (consistent with Article 55 of the AML and Article 2 of the Consultation Draft) and is without justification. Such revisions would recognize that, under some circumstances, conduct such as price discrimination can enhance consumer welfare.¹³ “For example, it can enable price-sensitive consumers to be served when they otherwise would be priced out of the market if uniform pricing were mandated.”¹⁴ Where there are two distinct customer groups, one that is highly price sensitive and another that is not, without allowing for price discrimination, firms will price relatively high for the latter group to maximize their profits. As a result, the first group will be foreclosed from the market.¹⁵ And, “for certain market structures, price discrimination can also lead to lower overall prices for consumers in comparison with uniform prices.”¹⁶

Discriminatory refusals to license or licensing to different parties on different terms may serve legitimate, procompetitive ends. For example, a business may grant licenses to some, but not all, interested potential licensees to ensure that licensees have incentives to promote the licensor’s technology. Alternatively, a business may require higher royalties from a company that has less sales volume in order to maximize its income from the patent, or offer lower royalties to licensees

Enforcement Guidelines § 5.4 and § 7 Ex. 3.1, *available at* [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/\\$FILE/ipege.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/$FILE/ipege.pdf).

¹³ See, e.g., Anne Layne-Farrar, “Non-Discriminatory Pricing: What is Different (and What is Not) About IP Licensing in Standard Setting,” J. OF COMPETITION LAW & ECON. 1, 1, 4-7 (Aug. 5, 2010) (the existing literature on price discrimination in traditional markets for goods and services and on licensing intellectual property establishes that “price discrimination is not necessarily harmful, and in some cases can even increase consumer welfare; most IP licensing is characterized by ‘discrimination’ in that rates and terms tend to differ across licensees; proof of market power must remain the first step in any inquiry on allegations of anticompetitive IP licensing discrimination; and as of yet, no widely applicable benchmarks or rules for distinguishing harmful from beneficial or non-harmful licensing discrimination have emerged, meaning that a careful, quantitative effects-based analysis remains the best approach”) [hereinafter Layne-Farrar, “Non-Discriminatory Pricing”].

¹⁴ *Id.* at 5 (citing Benjamin Klein & John Wiley, Jr., “Competitive Price Discrimination As an Antitrust Justification for Intellectual Property Refusals to Deal,” 70 ANTITRUST L.J. 599 (2003); Lars A. Stole, Price Discrimination and Competition, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2223 (Mark Armstrong & Robert Porter eds., Univ. of Chicago 2007)); Hal R. Varian, “Price Discrimination,” in HANDBOOK OF INDUSTRIAL ORGANIZATION 597 (Richard Schmalensee & Robert D. Willig eds., North-Holland 1989) (surveying price discrimination theory and practices); Richard Schmalensee, “Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination,” 71 AM. ECON. REV. 242 (1981).

¹⁵ While the enforcement authority might conclude that the price must be uniformly lowered to eliminate both discrimination and a price that might foreclose some consumers, that approach would impose price regulation that may depress innovation.

¹⁶ D. Fudenberg & J. Tirole, “Customer Poaching and Brand Switching,” 31 RAND J. ECON. 634 (2000)); Layne-Farrar, “Non-Discriminatory Pricing” at 6 (citing Jacques F. Thisse & Xavier Vives, On the Strategic Choice of Spatial Price Policy, 78 AM. ECON. REV. 122 (1988)).

that can offer valuable consideration in trade, such as cross-licenses for their intellectual property, which may be netted against the price of a license. In general, competition policy should not penalize holders of IPR for maximizing the return on their investment in risky and costly research and development, without which the market would be denied the benefits of innovation and the economic growth that innovation encourages.¹⁷ That is especially so in the case of IPR, the very purpose of which is to induce investment in risky and costly research and development.

Article 12

Commendably, Article 12 of the Consultation Draft appears to remove the apparent presumption in Article 21 of the Draft Guide that certain patent pools are anticompetitive. This change is consistent with the widely-held view that patent pools can create efficiencies by combining complementary technologies, disseminating patents to interested potential licensees, reducing transaction costs, clearing blocking positions of certain technologies, and avoiding expensive infringement litigation.¹⁸ However, the Sections respectfully suggest clarification of paragraph 2 of Article 12, which as drafted appears to classify certain behaviors as *per se* unlawful and to place the burden on members of a patent pool to “prove that the agreements concluded” are in compliance with Article 15 of the AML.

The Sections respectfully recommend that rather than apparently establishing a categorical approach to evaluating patent pools, Article 12 expressly provide instead that patent pools be analyzed under a rule-of-reason analysis, in which the benefits of each pool are weighed against the potential anticompetitive harms. Using the rule of reason would recognize the fact that “by promoting the dissemination of technology . . . pooling arrangements are often procompetitive.”¹⁹

The U.S. antitrust enforcement agencies generally apply a rule-of-reason analysis to patent pools and have offered extensive guidance on their analysis,²⁰ and this experience may be useful for the SAIC to consider. In the Sections’ experience, the business community has treated the U.S. agencies’ guidance as a type of safe harbor outlining likely acceptable conduct, as opposed to a list of strict liability rules.

Specific examples of the U.S. agencies’ guidance include business review letters issued by the U.S. Department of Justice, as well as an enforcement action initiated and settled by the U.S. Federal Trade Commission.²¹ In each of these matters, the U.S. agencies weighed the procompetitive

¹⁷ See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

¹⁸ U.S. IP GUIDELINES § 5.5 (1995).

¹⁹ *Id.*

²⁰ See, e.g., FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 62-85 (2007) (summarizing U.S. agency guidance on pools as of 2007), available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf> [hereinafter “FTC/DOJ 2007 IP REPORT”]; U.S. IP GUIDELINES §§ 3.4, 5.5.

²¹ See, e.g., Letter from Charles A. James, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Ky P. Ewing, Esq. (Nov. 12, 2002), available at <http://www.justice.gov/atr/public/busreview/200455.pdf> [hereinafter “2002 3G Platform

benefits against the potential anticompetitive harms of the pools to arrive at a determination about whether the specific facts of each arrangement could implicate the antitrust laws. In these matters, the U.S. agencies considered many factors, including: (1) whether pool members can license independently outside the pool;²² (2) whether pool members can independently develop competing technologies;²³ (3) whether licensees must provide pool members with exclusive grantbacks;²⁴ and (4) whether licensees are prohibited from challenging the validity of a pooled patent.²⁵ Additionally, the U.S. agencies have observed that the exchange of competitively sensitive information may be required for the administration of the pool.²⁶ To mitigate the possibility of collusion, they have suggested that pool members incorporate mechanisms to limit or constrain dissemination of the competitively sensitive information by, for example, using an independent licensing agent to administer the pool,²⁷ or by creating “firewalls” that limit access to sensitive information.²⁸

U.S. agency guidance on the rule-of-reason analysis of patent pools also contains additional factors that might appropriately be considered for inclusion in the Consultation Draft. First, with respect to the “differential treatment” described in Article 12(5) of the Consultation Draft, the U.S. agencies do not take the position that a pool must offer all potential licensees in a relevant market the same licensing terms or conditions. Instead, the U.S. agencies have stated that they “will not presume that different royalty payments faced by different licensees (e.g., insiders and outsiders) are anticompetitive. Whether such an arrangement could be anticompetitive would depend upon

Letter”]; Decision and Order, *In re Summit Tech., Inc.*, 127 F.T.C. 208, 217 (1999) (No. 9286), *available at* http://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-127/volume127a.pdf; Decision and Order, *In re VISX, Inc.*, 127 F.T.C. 236 (1999) (No. 9286), *available at* http://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-127/volume127a.pdf; Letter from Joel I. Klein, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Carey R. Ramos, Esq. (June 10, 1999), *available at* <http://www.usdoj.gov/atr/public/busreview/2485.pdf> [hereinafter “6C DVD Letter”]; Letter from Joel I. Klein, Ass’t Attorney Gen., U.S. Dep’t of Justice, to Garrard R. Beeney, Esq. (Dec.16, 1998), *available at* <http://www.usdoj.gov/atr/public/busreview/2121.pdf> [hereinafter “3C DVD Letter”]; Letter from Joel I. Klein, Acting Ass’t Attorney Gen., U.S. Dep’t of Justice, to Garrard R. Beeney, Esq. (June 26, 1997), *available at* <http://www.usdoj.gov/atr/public/busreview/215742.pdf> [hereinafter “MPEG-2 Letter”].

²² See, e.g., MPEG-2 Letter, at 11; 6C DVD Letter, at 15.

²³ MPEG-2 Letter, at 12; 3C DVD Letter, at 13-14.

²⁴ MPEG-2 Letter, at 12-13; 3C DVD Letter, at 14.

²⁵ 6C DVD Letter, at 8-9. Note that while the DOJ guidance suggests that licensees should generally remain free to challenge the validity of a pooled patent, the same guidance also suggests that a licensor should remain free to suspend or terminate a license to its own pooled patents if they are challenged by a licensee.

²⁶ FTC/DOJ 2007 IP REPORT at 81.

²⁷ MPEG-2 Letter, at 4, 11.

²⁸ See, e.g., 6C DVD Letter, at 9.

the specific facts of the case.”²⁹ Second, the U.S. agencies have suggested that competition concerns may arise where pools are not limited to technically essential patents, but contain substitute patents.³⁰ Finally, the U.S. guidance indicates that, in analyzing the potential effects of a pool, consideration should be given to how its features may stimulate development and commercialization of the pool technology.³¹

The Sections commend that Article 12 excludes cross-licenses from the definition of “patent pools.” This is an improvement from the Draft Guide, as it recognizes the potential for procompetitive benefits of cross-licensing and the different considerations relevant to cross-licenses as compared to patent pools.³²

Article 13

Article 13(1) prohibits dominant firms that know that their IPR may be incorporated into a standard from intentionally failing to disclose their IPR to the SSO or expressly waiving their rights, but later asserting them against those implementing a standard that incorporates the IPR. The Sections respectfully urge that the SAIC return to the approach adopted in Article 12 of the 2013 Draft for Comments of the Rules on the Prohibition of Abuses of IPR for Purposes of eliminating or Restricting Competition (“6th Draft”). That approach is consistent with international norms.³³

The 6th Draft limited liability for non-disclosure to situations when: (1) a patent holder or applicant is an active voting participant in an SSO; (2) the SSO has a published written policy that creates certain disclosure obligations as a condition of participation; (3) the patent holder or applicant fraudulently or intentionally breaches the SSO’s disclosure obligations; (4) after adoption of the standard, the patent holder or applicant asserts its essential patents against implementers of mandatory portions of the standard; (5) but for the patent holder’s or applicant’s failure to disclose, a different technology would have been incorporated into the standard; and (6) the patent holder’s or applicant’s conduct causes or is likely to cause an adverse effect on competition in the relevant market.

Such limitations are necessary to ensure that Article 13(1) does not apply when someone other than the patent holder offers patents for incorporation into a standard, and applies only to conduct that eliminates or restricts competition, consistent with Article 55 of the AML and Article 2 of the

²⁹ FTC/DOJ 2007 IP REPORT at 81. This reflects the fact that different licensees bring different assets to the negotiating table, and treating dissimilarly-situated licensees differently, including with regard to royalty payments, may promote efficient business outcomes and be procompetitive.

³⁰ MPEG-2 Letter, at 9-10; 3C DVD Letter, at 10-11; 6C DVD Letter, at 11-12.

³¹ MPEG-2 Letter, at 14-15; 6C DVD Letter, at 15; 2002 3G Platform Letter, at 11.

³² *See, e.g.*, FTC/DOJ 2007 IP REPORT at 58 (noting differences in competitive considerations of pools and cross-licenses).

³³ The Sections respectfully refer to our 2012 Comments on Article 22 of the Draft Guide for an explanation of the Sections’ rationale for supporting adoption of Article 12 of the 6th Draft.

Consultation Draft. Article 13(1) of the Consultation Draft can be read to create a disclosure obligation on an undertaking that is not a participating member of the relevant SSO. Moreover, as presently drafted, Article 13(1) could have the effect of imposing disclosure obligations that go beyond the requirements agreed to by members of the relevant SSO. The Sections suggest that each SSO is in the best position to determine the appropriate level of disclosure requirements for its own standard-setting activities.

Article 13(2) prohibits a patent holder from failing to offer F/RAND terms after its patented technology becomes essential to a standard. Article 13(2) would appear to make a F/RAND commitment mandatory for any undertaking that owns an SEP, regardless of (1) whether the undertaking had participated in the SSO and made the associated F/RAND commitment to that SSO with respect to the relevant standard, or (2) whether the SSO in question required a F/RAND commitment. The Sections recommend that Article 13(2) be deleted in its entirety. The Sections are unaware of any court that has imposed antitrust liability for a mere refusal to grant a license for SEPs on which no prior F/RAND commitment has been made.³⁴

The Sections respectfully urge that, at least, Article 13(2) be limited to apply only when a patent holder has voluntarily agreed to license its SEPs on F/RAND terms. Such a revision is necessary to ensure that SSOs do not misappropriate technologies without the patent holder's consent, and to avoid creating a substantial inconsistency between a patent owner's obligations in China and other jurisdictions.³⁵ For example, the European Commission's Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union ("Article 101 Guidelines") to horizontal co-operation agreements state that IPR policies of SSOs should incorporate F/RAND principles, but they also reinforce that participation is voluntary by making it clear that patent owners may exclude technology from the standard-setting process and thus from any commitment to license.³⁶ Antitrust authorities in the United States similarly encourage (but do not compel) the adoption of F/RAND policies by SSOs as contributing to follow-on innovation utilizing

³⁴ There is debate within the U.S. whether breaching a F/RAND commitment in and of itself violates antitrust law. Compare Bruce H. Kobayashi and Joshua D. Wright, "The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.," 78 ANTITRUST L.J. 505, 523 (2012) (arguing that "contract law is both better suited to the identification and regulation of ex post opportunism associated with patent holdup than is antitrust and more likely to reduce transaction costs and welfare losses," in part because "[c]ontract law offers a number of benefits relative to antitrust law," including "doctrines designed to reliably distinguish between ex post opportunism, such as patent holdup, and legitimate attempts to modify existing agreements as market conditions change.") with Joseph Farrell, John Hayes, Carl Shapiro, and Theresa Sullivan, "Standard Setting, Patents, and Hold Up," 74 ANTITRUST L.J. 603, 609 (2007) (contending that hold-up "is not merely a private contracting problem, but an antitrust problem" because "[i]t concerns the inefficient acquisition of market power that harms consumers; more fundamentally, deceiving buyers or keeping them in the dark about the terms on which a technology will be available subverts the competitive process.").

³⁵ The Sections suggest that a mandatory imposition of a F/RAND commitment is inconsistent with the general principle of China's Patent Law, that a patent owner should have discretion as to how to exercise its patent rights. China's Patent Law, Art. 11 (as amended in 2008).

³⁶ See Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 at O.J. (C 11) 1, para. 285; see also Competition Directorate-General, European Commission, Standard-essential patents, COMPETITION POLICY BRIEF (June 2014), available at http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf.

standards.³⁷ A contrary policy could discourage international investment and innovation by entities in China. It might also be inconsistent with the recent directive of the Third People's Plenum that government policy should "be based on a market-based system that encourages innovation," and eliminate all "forms of unreasonable regulations [and] hidden barriers" to innovation and investment.³⁸

Many SSOs require an undertaking wishing to participate in the standard-setting process to make patent licenses available on F/RAND terms to implementers of a standard for any SEPs that it holds. In such situations, the F/RAND commitment is an agreement that an undertaking enters into in return for the opportunity to participate in the SSO's standard-setting. This agreement to license its SEPs on F/RAND terms may be worthwhile for the undertaking because, for example, if its patented technology is adopted and the standard is successful, the undertaking has the potential to earn royalties on a larger volume of sales. However, whether to make a F/RAND commitment and participate in the SSO is a voluntary decision on the part of an undertaking, and it is not anti-competitive for some undertakings to choose not to participate in the SSO and thus refrain from making the F/RAND commitment. Pursuing other strategies may also increase competition and thereby benefit consumers.

A mandatory F/RAND commitment for undertakings that choose not to participate in the SSO eliminates the right to exclusivity and thus decreases the incentives to innovate. The effects of a mandatory F/RAND commitment stand in stark contrast to a voluntary decision by an undertaking that making a F/RAND commitment in return for the right to participate in the standard-setting is worthwhile. The option to make a voluntary F/RAND commitment increases incentives to innovate.

If the SAIC decides not to return to the formulation adopted in Article 12 of the 6th Draft and/or decides to retain Article 13(2), the Sections respectfully submit that Article 13 should be revised as follows:

Undertakings shall not, in the course of exercising intellectual property rights, engage in behaviors ~~to eliminate~~that have the effect of eliminating or restricting competition by willfully taking advantage of the formulation and implementation of standards adopted by SSOs (including mandatory requirements of national technological specifications, the same hereinafter) through a willful breach of F/RAND or disclosure commitments made voluntarily by the undertakings to the SSO regarding the undertaking's IPR that is incorporated into those standards.

Undertakings ~~with that~~ (1) have dominant market positions, without justifications by virtue of their patented technologies being adopted by standards and (2) have voluntarily made a F/RAND commitment or agreed to disclosure obligations under the rules of the relevant

³⁷ See U.S. DEP'T OF JUSTICE & U.S. PATENT AND TRADEMARK OFFICE, *Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary F/RAND Commitments* at 5-6 (Jan. 8, 2013).

³⁸ Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform of the Third Plenary Session of the 18th CPC Central Committee.

standard-setting organization in which they are active, voting participants³⁹ with respect to the relevant standard, shall not, without justification, engage in the following conduct during the process of standard setting and standard implementation, to the extent that such conduct has the effect of eliminating or restricting competition:

(1) ~~Where they are aware their patents may be included in relevant standards, refusing to disclose to standards formulation organization the information on their rights or expressly abandoning their rights and~~ Intentionally or fraudulently failing to comply with the relevant SSO's disclosure requirements and subsequently asserting their patent rights against the party implementing such standards after such knowingly undisclosed patents become some particular mandatory standard-essential.

(2) After their patented technologies become SEPs, violating ~~the a voluntary commitment to license on fair, reasonable and non-discriminatory principle and (F/RAND) terms by (i) refusing other undertakings to implement such patents license implementers of the standard on reasonable F/RAND terms;~~ or engaging in patent licensing with (ii) refusing to license its SEPs unless the implementer agrees to unfair anti-competitive conditions; or engaging in tying activities during its patent licensing process.⁴⁰

For the purpose of these Rules, “standard essential patents” refer to such patents ~~which that~~ are determined to be indispensable for the implementation of the standard.

The Sections note, however, that this alternative recommended approach lacks the tempering of experience reflected in the Sections’ primary recommendations (namely, to return to the formulation of Article 12 of the 6th Draft, and to delete Article 13(2)).

Article 15

Article 15 prohibits undertakings with dominant market positions from abusively issuing infringement warning letters to eliminate or restrict competition where the IPR has expired or been voided or where others have provided sufficient evidence that the IPR is not infringed.⁴¹ It appears to be directed toward patent assertion entities (PAEs) that may have been seeking to enforce invalid patents or assert infringement without basis. The Sections commend the SAIC for specifying,

³⁹ The Sections suggest that undertakings subject to the provision be “active, voting participants,” to the extent that participants in SSOs may be required to participate and yet may not be permitted to vote on standards.

⁴⁰ The tying clause is superfluous. Article 9 of the Consultation Draft fully addresses tying. If the SAIC concludes that a special tying prohibition must be included in Article 13, the Sections respectfully recommend that the clause explicitly be limited to prohibiting the coercive tying of non-essential patents with SEPs that would have the effect of eliminating or lessening competition.

⁴¹ The condition that “sufficient evidence” have been provided of non-infringement is one that would be difficult to administer and will create substantial uncertainty for business operators seeking to comply with the law. A condition that the business operator issued infringement warning letters without basis or in bad faith would achieve the same goal and be easier to administer.

consistent with Article 2 of Consultation Draft and Article 55 of the AML, that such conduct is only prohibited where it “eliminate[s] or restrict[s] competition.” In the United States, while officials have heard many troubling stories about abusive IPR infringement litigation, including by PAEs, there is little empirical evidence about the competitive costs and benefits of PAE activity. In an effort to develop a better understanding of how PAEs impact innovation and competition, in September 2013, the FTC initiated a process to seek public comments on a proposal to gather information from approximately 25 PAEs.⁴²

The Sections recommend that the SAIC: (1) conduct further study on the competitive effect of patent infringement litigation and PAEs; (2) consider whether and how measures designed to curb problematic conduct by PAEs may affect operating companies that make legitimate efforts to enforce their patents; and (3) subsequent to such further study, provide clear guidance on its enforcement approach to conduct involving “abusive” infringement warning letters, including identifying the factors that will be used to determine if others have sufficiently provided evidence that the IPR is not infringed.

Article 17

The Sections support the characterization in the last paragraph of Article 17 of IPR licenses as vertical agreements unless the parties were in a preexisting competitive relationship, and suggest that an even better test may be whether the license displaces any competition between the parties. The Sections believe that an IPR license should be considered a vertical relationship unless it displaces preexisting competition between the parties.

Article 19

Article 19 provides that the SAIC shall impose a fine of 1-10 percent of the “turnover” in the previous fiscal year for abusing intellectual property rights to eliminate or restrict competition. The Sections respectfully reiterate our request that the SAIC specify that “turnover” refers to turnover directly obtained in the relevant product and geographic market in China affected by the violation.

⁴² Notice and Request for Public Comment, 78 Fed. Reg. 61, 352 (Oct. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/10/131003paereportsfrn.pdf. In December 2012, the DOJ and FTC hosted a workshop that included speeches and presentations by regulators, economists, and high-tech industry participants, with discussion and debate about the effect of PAEs and whether and how the antitrust laws should be brought to bear on PAE activity. Although many participants were critical of PAEs and their effect on competition and innovation, some economists and other proponents of the business model contended that PAEs offer a path to monetization for individual inventors, which can actually spur innovation. Furthermore, many panelists stated that any measures should focus on the specific conduct at issue and not simply on the business model. Many workshop participants agreed that a final assessment is difficult given the limited data regarding the amount of PAE litigation, and the outcome of those cases. There seemed to be general agreement that non-antitrust-specific measures might also go some distance towards addressing PAE conduct. Specifically, panelists advocated improvements to patent quality and clarity, and for judicial reforms such as fee-shifting and limitations on injunctions and exclusion orders. In sum, the optimal antitrust approach to PAE conduct is not yet clear. Transcripts, videos, written comments, and other materials from the workshop are available at <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>. The Sections note that few PAEs hold dominant market positions relating to the IPR they hold.

CONCLUSION

The Sections recognize that substantial work went into developing the Rules, and appreciate the SAIC's consideration of our comments and those of others as it continues with its mission to implement, enforce, and provide clear guidance on the AML.

APPENDICES

1. Unofficial Translation of Draft for Comments of the Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition ("Consultation Draft")
2. Unofficial Translation of Explanatory Notes regarding the Drafting of the Rules on the Prohibition of Abuses of IPR for the Purposes of Eliminating or Restricting Competition (Draft for Comments) ("Explanatory Notes")
3. The Sections' Comments regarding the Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights ("2012 Comments")

Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition

工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定

(Draft for Comments (June 11, 2014))

(征求意见稿 (2014 年 6 月 11 日))

<p>第一条</p> <p>为了保护竞争和激励创新，制止经营者滥用知识产权排除、限制竞争的行为，根据《中华人民共和国反垄断法》（以下简称《反垄断法》），制定本规定。</p>	<p>ARTICLE 1</p> <p>These Rules are enacted in accordance with the <i>Anti-Monopoly Law of the People's Republic of China</i> (hereinafter the “AML”) in order to protect competition and encourage innovation as well as to prohibit the abuse of intellectual property rights by undertakings to eliminate or restrict competition.</p>
<p>第二条</p> <p>反垄断法与保护知识产权具有共同的目标，即促进创新和竞争，提高效率，维护消费者利益和社会公共利益。</p> <p>经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用《反垄断法》；但是，经营者滥用知识产权，排除、限制竞争的行为，适用《反垄断法》。</p>	<p>ARTICLE 2</p> <p>The AML shares the same goal with intellectual property protection, which is to promote innovation and competition, improve efficiency and protect consumer welfare and public interest of the society.</p> <p>The AML does not apply to conducts of undertakings in exercising their intellectual property rights in accordance with relevant intellectual property laws and administrative regulations; however, the AML applies to conducts of undertakings that abuse their intellectual property rights in eliminating or restricting competition.</p>
<p>第三条</p> <p>本规定所称经营者，是指从事商品生产、经营或者提供服务的自然人、法人和其他组织。其中，商品、服务包括技术。</p> <p>本规定所称滥用知识产权排除、限制竞争行为，是指经营者违反《反垄断法》和其他有关知识产权的法律、行政法规的规定行使知识产权，实施垄断协议、滥用市场支配地位等垄断行为。</p> <p>本规定所称相关市场，包括相关商品市场和地域市场，依据《反垄断法》和《国务</p>	<p>ARTICLE 3</p> <p>“Undertakings” referred to herein shall mean natural persons, legal persons and other organizations producing or trading products, or providing services. “Products” and “services” here include technologies.</p> <p>“Conducts eliminating and restricting competition by abusing intellectual property rights to restrict or eliminate competition” referred to herein shall mean monopolistic conducts such as implementing monopolistic agreements, abusing dominant market position, etc. by exercising the intellectual property rights in violation of the AML and provisions under applicable laws and administrative</p>

<p>院反垄断委员会关于相关市场界定的指南》进行界定，并考虑知识产权、创新等因素的影响。在涉及知识产权许可等反垄断执法工作中，相关商品市场可以是技术市场，也可以是含有特定知识产权的产品市场。相关技术市场是指由行使知识产权所涉及的技术和可以相互替代的现有同类技术之间相互竞争所构成的市场。</p>	<p>regulations in connection with intellectual property rights.</p> <p>“Relevant market” referred to herein includes both relevant product market and relevant geographic market and shall be defined in accordance with the AML and the <i>Guidelines on the Definition of Relevant Market</i> issued by the Anti-Monopoly Commission under the State Council by taking into account factors such as intellectual property rights, innovation, etc. In the anti-monopoly law enforcement work involving the license of intellectual property rights, relevant product market may either be the technology market or a product market containing specific intellectual property rights. “Relevant technology market” shall mean the market where technologies involved in the exercise of the intellectual property rights compete with the existing substitutable technologies of the same type.</p>
<p>第四条</p> <p>经营者不得在行使知识产权的过程中达成垄断协议。</p> <p>经营者之间不得利用行使知识产权的方式达成《反垄断法》第十三条、第十四条所禁止的垄断协议。但是，经营者能够证明所达成的协议符合《反垄断法》第十五条规定的除外。</p>	<p>ARTICLE 4</p> <p>Undertakings shall not reach monopolistic agreements during the exercise of intellectual property rights.</p> <p>Undertakings shall not, in the form of exercising intellectual property rights, reach monopolistic agreements as prohibited by Articles 13 and 14 of the AML except to the extent that such undertakings can prove the agreements reached are in compliance with provisions under Article 15 of the AML</p>
<p>第五条</p> <p>经营者行使知识产权的行为有下列情形之一的，可以不被认定为《反垄断法》第十三条第一款第（六）项和《反垄断法》第十四条第（三）项所禁止的垄断协议，但是有相反的证据证明该协议具有排除、限制竞争效果的除外：</p>	<p>ARTICLE 5</p> <p>Under any of the following circumstances, the exercise of intellectual property rights by undertakings may not be identified as monopolistic agreements as prohibited by Article 13(6) and Article 14(3) under the AML, except to the extent that evidence to the contrary prove such agreements have the effects to restrict or eliminate competition:</p>

<p>(一) 具有竞争关系的经营者在受其行为影响的相关市场上的市场份额合计不超过百分之二十，或者在相关市场上存在至少四个可以以合理成本得到的其他替代性技术；</p> <p>(二) 经营者与交易相对人在相关市场上的市场份额均不超过百分之三十，或者在相关市场上存在至少两个可以以合理成本得到的其他替代性技术。</p>	<p>(1) the combined market share of the competing undertakings in the market affected by their behavior is no more than 20%; or there are at least four other alternative technologies which are available at reasonable costs;</p> <p>(2) Neither the undertaking nor its counterpart has a market share of more than 30% in the relevant market, or there are at least two other alternative technologies which are available at reasonable costs in the relevant market.</p>
<p>第六条</p> <p>具有市场支配地位的经营者不得在行使知识产权的过程中滥用市场支配地位，排除、限制竞争。</p> <p>市场支配地位根据《反垄断法》第十八条和第十九条的规定进行认定和推定。经营者拥有知识产权可以构成认定其市场支配地位的一个因素，但是经营者不仅仅因为拥有知识产权而直接被推定为在相关市场上具有市场支配地位。</p>	<p>ARTICLE 6</p> <p>Undertakings with dominant market positions shall not, in the exercise of the intellectual property rights, abuse such dominant market positions to restrict or eliminate competition.</p> <p>Dominant market positions shall be identified or presumed in accordance with Article 18 and 19 of the AML. Possession of intellectual property rights may constitute a factor to determine the dominant market position, provided that an undertaking may not be directly presumed to hold a dominant market position in relevant market only as a result of its possession of intellectual property rights.</p>
<p>第七条</p> <p>具有市场支配地位的经营者没有正当理由，不得在其知识产权构成生产经营活动必需设施的情况下，拒绝许可其他经营者以合理条件使用该知识产权。</p> <p>认定知识产权构成生产经营活动必需设施，需要考虑的因素包括：该项知识产权在相关市场上没有合理的替代品，为其他经营者参与相关市场的竞争所必需；拒绝许可该知识产权将会导致相关市场上的竞争或者创新受</p>	<p>ARTICLE 7</p> <p>An undertaking with dominant market position shall not refuse without justifications to license other undertakings to use its intellectual property rights on reasonable terms in the circumstance that such intellectual property rights constitute essential facilities for manufacturing and operating activities.</p> <p>Factors to be considered when determining whether the intellectual property rights constitute essential facilities for manufacturing and operating activities include: whether there are reasonable substitutes to such intellectual</p>

<p>到不利影响；许可该知识产权对该经营者不会造成不合理的损害等。</p>	<p>property rights in the relevant market; whether such intellectual property rights are essential for other undertakings to participate in competition in the relevant market; whether refusal to license such intellectual property rights will bring adverse impact on the competition or innovation in the relevant market; whether the licensing of such intellectual property rights will result in unreasonable damage to such undertaking, etc..</p>
<p>第八条</p> <p>具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施下列限定交易行为：</p> <p>（一）限定交易相对人只能与其进行交易；</p> <p>（二）限定交易相对人只能与其指定的经营者进行交易；</p> <p>（三）限定交易相对人不得与其竞争对手进行交易。</p>	<p>ARTICLE 8</p> <p>Undertakings with dominant market positions shall not, in the course of exercising their intellectual property rights, engage without justifications in the following behaviors to restrict transactions:</p> <ul style="list-style-type: none"> (1) to restrict that the counterpart can only conduct transactions with them; (2) to restrict that the counterpart can only conduct transactions with the undertakings designated by them; (3) to restrict that the counterpart shall not conduct transactions with their competitors.
<p>第九条</p> <p>具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施同时符合下列条件的搭售行为：</p> <p>（一）许可或者转让知识产权时，违背交易相对人的意愿要求其接受其他知识产权或者其他商品、服务；</p> <p>（二）搭售品和被搭售品在性质和交易习惯上属于两个独立的商品；</p> <p>（三）实施搭售行为使该经营者将其在搭售品市场的支配地位延伸到被搭售品市场，排除、限制了其他经营者在搭售品或者被搭售</p>	<p>ARTICLE 9</p> <p>Undertakings with dominant market positions shall not, in the course of exercising their intellectual property rights, engage without justifications in tying behaviors satisfying both of the following conditions:</p> <ul style="list-style-type: none"> (1) To require the counterpart to accept against its wills other intellectual property rights or other products or services when licensing or transferring an intellectual property right; (2) the tying product and the tied product are two separate products in terms of both nature and trade practice; and (3) the tying behavior enables such

<p>品市场上的竞争。</p>	<p>undertakings to extend their dominant positions in the tying product market to the tied product market, thereby restricting or eliminating the abilities of other undertakings to compete in the tying or tied product market.</p>
<p>第十条</p> <p>具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施下列附加不合理限制条件的行为：</p> <p>（一）要求交易相对人将其改进的技术进行独占性的回授；</p> <p>（二）禁止交易相对人对其知识产权的有效性提出质疑；</p> <p>（三）限制交易相对人在许可协议期限届满后，在不侵犯知识产权的情况下制造、使用、销售竞争性商品或者研发、使用竞争性技术；</p> <p>（四）要求交易相对人为保护期已经届满或者被认定无效的知识产权继续支付费用；</p> <p>（五）禁止交易相对人与第三方进行交易；</p> <p>（六）要求交易相对人附加其他不合理的限制条件。</p>	<p>ARTICLE 10</p> <p>Undertakings with dominant market positions shall not, in the course of exercising their intellectual property rights, impose without justifications the following unreasonable restrictive conditions:</p> <ol style="list-style-type: none">(1) to require the counterpart to exclusively license back the technology improved by such counterpart;(2) to prohibit the counterpart from challenging the validity of their intellectual property rights;(3) to restrain the counterpart from, upon the expiration of the license agreement, manufacturing, using or selling competing products, or developing or using competing technologies in a way that will not infringe their intellectual property rights;(4) to require the counterpart to continue to pay royalties for intellectual property rights for which the protection period has expired or which have been determined as invalid;(5) to prohibit the counterpart from engaging in transactions with any third party;(6) to require the counterpart to impose other unreasonable restrictive conditions.

<p>第十一条</p> <p>具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，对条件相同的交易相对人实行差别待遇。</p>	<p>ARTICLE 11</p> <p>Undertakings with dominant market positions shall not, in the course of exercising their intellectual property rights, treat counterparts of same conditions in a discriminating manner.</p>
<p>第十二条</p> <p>经营者不得在行使知识产权的过程中，利用专利联营从事排除、限制竞争的行为。</p> <p>专利联营的成员不得利用专利联营交换价格、产量、市场划分等有关竞争的敏感信息，达成《反垄断法》第十三条、第十四条所禁止的垄断协议。但是，经营者能够证明所达成的协议符合《反垄断法》第十五条规定的除外。</p> <p>具有市场支配地位的经营者或者专利联营管理组织没有正当理由，不得利用专利联营实施下列滥用市场支配地位的行为：</p> <p>（一）限制联营成员在联营之外作为独立许可人许可专利；</p> <p>（二）限制联营成员或者被许可人独立或者与第三方联合研发与联营专利相竞争的技术；</p> <p>（三）强迫被许可人将其改进或者研发的技术独占性地回授给专利联营管理组织或者联营成员；</p> <p>（四）禁止被许可人质疑联营专利的有效性；</p> <p>（五）对条件相同的联营成员或者同一相关市场的被许可人在交易条件上实行差别待遇。</p>	<p>ARTICLE 12</p> <p>Undertakings shall not, in the course of exercising intellectual property rights, engage in behaviors to eliminate or restrict competition by taking advantage of patent pools.</p> <p>Members to the patent pool shall not, by taking advantage of such patent pool, exchange competition-related sensitive information concerning price, output, market division, etc. They may also not conclude monopolistic agreements prohibited by Article 13 and Article 14 of the AML, except to the extent that they can prove the agreements concluded are in compliance with provisions of Article 15 of the AML.</p> <p>Undertakings with dominant market positions or the management organization of the patent pool shall not engage in the following behaviors to abuse dominant market positions by taking advantage of the patent pool:</p> <ol style="list-style-type: none"> (1) to restrain member to the pool from licensing patents beyond the pool as independent licensor; (2) to restrain members to the pool or the licensee from developing independently or jointly with third parties technologies which compete with the pooled patents; (3) to force the licensee to exclusively license back the technologies it has improved or developed to the management body of, or members to

<p>本规定所称专利联营，是指两个或者两个以上的专利权人通过某种形式将各自拥有的专利共同许可给其他第三方的协议安排。其形式可以是为此目的成立的专门合资公司，也可以是委托某一联营成员或者某独立的第三方进行管理。</p>	<p>the patent pool;</p> <p>(4) to prohibit the licensee from challenging the validity of the pooled patents;</p> <p>(5) to provide differential treatment on trading conditions against members with same conditions to the pool or the licensees in the same relevant market.</p> <p>For the purpose of these Rules, “patent pool” refers to a scheme of arrangement whereby two or more than two patent holders jointly license their respective patents to a third party in a form where a joint venture is set up specifically for such purpose or a member to the pool or an independent third party is entrusted with the responsibilities of management.</p>
<p>第十三条</p> <p>经营者不得在行使知识产权的过程中，利用标准（含国家技术规范的强制性要求，下同）的制定和实施从事排除、限制竞争的行为。</p> <p>具有市场支配地位的经营者没有正当理由，不得在标准的制定和实施过程中实施下列行为：</p> <p>（一）在知道其专利可能会被纳入有关标准的情况下，故意不向标准制定组织披露其权利信息，或者明确放弃其权利，但是在其专利成为某项强制性标准后却对该标准的实施者主张其专利权。</p> <p>（二）在其专利成为标准必要专利后，违背公平、合理和无歧视原则，拒绝其他经营者以合理的条件实施该专利，或者以不公平的条件许可其专利，或者在许可其专利的过程中实施搭售行为。</p>	<p>ARTICLE 13</p> <p>Undertakings shall not, in the course of exercising intellectual property rights, engage in behaviors to eliminate or restrict competition by taking advantage of the formulation and implementation of standards (including mandatory requirements of national technological specifications, the same hereinafter) .</p> <p>Undertakings with dominant market positions, without justifications, shall not engage in the following conducts during the process of standard setting and standard implementation:</p> <p>(1) Where they are aware their patents may be included in relevant standards, refusing to disclose to standards formulation organization the information on their rights or expressly abandoning their rights and asserting their patent rights against the party implementing such standards after such patents become some particular mandatory standards.</p> <p>(2) After their patent technology become</p>

<p>本规定所称标准必要专利，是指实施该项标准所必不可少的专利。</p>	<p>standard essential patents, violating the fair, reasonable and non-discriminatory principle and refusing other undertakings to implement such patents on reasonable terms, or engaging in patent licensing with unfair conditions, or engaging in tying activities during its patent licensing process.</p> <p>For the purpose of these Rules, the standard essential patents refer to such patents which are indispensable for the implementation of the standard.</p>
<p>第十四条</p> <p>著作权集体管理组织不得在开展活动的过程中滥用知识产权，排除、限制竞争。</p> <p>著作权集体管理组织在与其他经营者或者其他国家和地区的著作权集体管理组织达成的相关协议中，不得不合理地实施限制会员资格、地域范围等，限制权利人或者使用人的选择自由。</p> <p>具有市场支配地位的著作权集体管理组织没有正当理由，不得实施下列滥用市场支配地位的行为：</p> <p>（一）拒绝对他人发放著作权的使用许可；</p> <p>（二）对条件相同的权利人或者被许可人实行差别待遇；</p> <p>（三）强迫被许可人接受其不需要的著作权许可；</p> <p>（四）限制权利人退出该组织。</p> <p>本规定所称著作权集体管理组织，是指为著作权人和与著作权有关的权利人（简称权利</p>	<p>ARTICLE 14</p> <p>Collective management organizations for copyrights shall not, in the course of their activities, abuse intellectual property rights to eliminate or restrict competition.</p> <p>The relevant agreements reached by collective management organizations for copyrights and other undertakings or collective management organizations for copyrights in other countries and regions shall not unreasonably restrict membership qualifications, geographic scope, etc., or restrict the freedom of choice of copyright holders or copyright users.</p> <p>Collective management organizations for copyrights which have dominant market positions shall not, without justifications, engage in the following behaviors to abuse dominant market positions:</p> <ol style="list-style-type: none"> (1) withholding copyright licenses from others; (2) treating copyright holders or licensees of the same conditions differentially; (3) forcing the licensee to accept the copyright license it does not need. (4) restricting copyright holders' right to

<p>人) 的利益依法设立, 根据权利人授权、对权利人的著作权或者与著作权有关的权利进行集体管理的社会团体。</p>	<p>withdraw from the organization.</p> <p>For the purpose of these Rules, “collective management organizations for copyrights” refer to social organizations which are established in accordance with laws for the benefit of the copyright holders and the copyright-related right holders (“Right Holders”) and manage on a collective basis the copyrights of the Right Holders or the copyright-related rights.</p>
<p>第十五条</p> <p>具有市场支配地位的经营者不得在其知识产权期限已经届满或者无效的情况下, 或者在他人已经提供不构成知识产权侵权充分证据的情况下, 滥发侵权警告函, 以排除、限制相关市场的竞争。</p>	<p>ARTICLE 15</p> <p>Undertakings with dominant market positions shall not, upon the expiration or invalidation of their intellectual property rights or in the circumstance that sufficient evidence has been provided by other party to prove relevant act does not constitute infringement of intellectual property rights, excessively issue infringement warning letters to eliminate or restrict competition.</p>
<p>第十六条</p> <p>经营者涉嫌滥用知识产权排除、限制竞争行为的, 工商行政管理机关依据《反垄断法》和《工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定》进行调查。</p>	<p>ARTICLE 16</p> <p>Where the undertakings are suspected of abusing intellectual property rights to eliminate or restrict competition, the industrial and commercial authorities shall conduct investigations in accordance with the AML and <i>Provisions on the Procedures for the Investigation and Handling by Industrial and Commercial Authorities of Cases Involving Monopolistic Agreements and Abuse of Dominant Market Positions</i>.</p>
<p>第十七条</p> <p>分析认定经营者涉嫌滥用知识产权排除、限制竞争行为, 可以采取以下步骤:</p> <p>(一) 确定经营者行使知识产权行为的性质和表现形式;</p> <p>(二) 确定行使知识产权的经营者之间相互</p>	<p>ARTICLE 17</p> <p>The following measures may be taken for the purpose of analyzing and determining whether the undertakings are suspected of abusing of intellectual property rights to eliminate or restrict competition:</p> <p>(1) to determine the nature and form of the exercise of intellectual property rights</p>

<p>关系的性质；</p> <p>（三）界定行使知识产权所涉及的相关市场；</p> <p>（四）认定行使知识产权的经营者的市场地位；</p> <p>（五）分析经营者行使知识产权的行为对相关市场竞争的影响；</p> <p>分析认定经营者之间关系的性质需要考虑行使知识产权行为本身的特点。在涉及知识产权许可的情况下，原本具有竞争关系的经营者之间在许可合同中是交易关系，而在许可人和被许可人都利用该知识产权生产产品的市场上则又是竞争关系。但是，如果当事人之间在订立许可协议时不是竞争关系，在协议订立之后才产生竞争关系的，则仍然不视为竞争者之间的协议，除非原协议发生实质性的变更。</p>	<p>by the undertakings;</p> <p>(2) to determine the nature of the inter-relationship among the undertakings exercising the intellectual property rights;</p> <p>(3) to define the relevant market involved in the exercise of intellectual property rights;</p> <p>(4) to determine the market position of the undertakings exercising the intellectual property rights;</p> <p>(5) to analyze the impact of the exercise of intellectual property rights by the undertakings on the competition in relevant market;</p> <p>When analyzing and determine the nature of the relationship among undertakings, it shall be taken into account the characteristics of the act of exercising the intellectual property rights. In circumstance concerning the license of intellectual property rights, the undertakings previously competing with each other are parties to the license contract, while in the market where both the licensor and licensee manufacture products utilizing such intellectual property rights, the undertakings are competing against each other. However, if the parties were not competing against each other when they executed the agreement, but only became competitors after the execution of the agreement, the agreement will not be deemed as an agreement between competitors unless there is any substantive change to the original agreement.</p>
<p>第十八条</p> <p>分析认定经营者行使知识产权的行为对竞争的影响，应当考虑下列因素：</p> <p>（一）经营者与交易相对人的市场地位；</p>	<p>ARTICLE 18</p> <p>The following factors shall be taken into consideration when analyzing and determining the impact on competition of the exercise of intellectual property rights by undertakings:</p>

<p>(二) 相关市场的市场集中度;</p> <p>(三) 进入相关市场的难易程度;</p> <p>(四) 产业惯例与产业的发展阶段;</p> <p>(五) 在产量、区域、消费者等方面进行限制的时间和效力范围;</p> <p>(六) 对促进创新和技术推广的影响;</p> <p>(七) 经营者的创新能力和技术变化的速度;</p> <p>(八) 与认定行使知识产权的行为对竞争影响有关的其他因素。</p>	<p>(1) market positions of the undertaking and its counterparts;</p> <p>(2) concentration level of the relevant market;</p> <p>(3) difficulty to enter into the relevant market;</p> <p>(4) industry practice and development stage of the industry;</p> <p>(5) time of restriction in terms of output, geography, consumers, etc. as well as the scope of effectiveness.</p> <p>(6) impact on innovation promotion and technology popularization;</p> <p>(7) The innovation ability of the undertaking and the speed of technology evolution;</p> <p>(8) Other factors relevant to the determination of the impact on competition of the exercise of intellectual property rights.</p>
<p>第十九条</p> <p>经营者滥用知识产权排除、限制竞争的行为构成垄断协议的，由工商行政管理机关责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款；尚未实施所达成的垄断协议的，可以处五十万元以下的罚款。</p> <p>经营者滥用知识产权排除、限制竞争的行为构成滥用市场支配地位的，由工商行政管理机关责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款。</p> <p>工商行政管理机关确定具体罚款数额时，应</p>	<p>ARTICLE 19</p> <p>Where an undertaking abuses its intellectual property rights, eliminating or restricting competition, which constitutes a monopoly agreement, the Administration for Industry and Commerce shall order the undertaking to cease the violation, confiscate the illegal gains, and impose a fine of 1-10 percent of the turnover in the previous fiscal year; where the monopoly agreement has not been implemented, the Administration for Industry and Commerce may impose a fine of no more than RMB 500,000.</p> <p>Where an undertaking abuses its intellectual property rights, eliminating or restricting competition, which constitutes an abuse of a dominant market position, the Administration</p>

<p>当考虑违法行为的性质、情节、程度、持续的时间等因素。</p>	<p>for Industry and Commerce shall order the undertaking to cease the violation, confiscate its illegal gains and impose a fine of 1-10 percent of the turnover in the previous fiscal year.</p> <p>The Administration for Industry and Commerce shall consider the nature, circumstances, seriousness and duration of the violation, and other relevant factors, when determining the specific magnitude of the fine.</p>
<p>第二十条</p> <p>本规定由国家工商行政管理总局负责解释。</p>	<p>ARTICLE 20</p> <p>These Rules shall be interpreted by the State Administration of Industry and Commerce..</p>
<p>第二十一条</p> <p>本规定自 2014 年 月 日起施行。</p>	<p>ARTICLE 21</p> <p>These Rules shall take effect as of [] 2014.</p>

Explanatory Notes for Drafting the Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft for Comments)

The following notes are hereby provided to explain the drafting work of the *Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (Draft for Comments)* (the **Rules** hereinafter).

I. The necessity to enact the Rules

Article 55 of the *Anti-monopoly Law of China* (the **AML**) shows China's basic attitude towards the implementation of the **AML** in the field of intellectual property rights by providing that "[t]his Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law." Specifically, it is justifiable for holders of intellectual property rights to exercise their rights in accordance with intellectual property laws, however, it should also be necessary to regulate the conducts abusing intellectual property rights which have the effects to eliminate or restrict competition. As Article 55 is only a general rule and in light of the necessity to regulate the suspected abuses of intellectual property rights to eliminate or restrict competition which exist in practice, it is imperative to formulate relevant rules or guidelines for the purpose of clearly demarcating between the legitimate exercise of rights and abusive conducts to eliminate or restrict competition, providing better guidance for the antitrust enforcement practice and strengthening the predictability of undertakings' own business activities.

II. The drafting process of the Rules

The State Administration for Industry and Commerce (the **SAIC**) started the drafting process of the Rules at the end of 2012 when it carried out the research and formulation work with regard to the *Guidelines on the Anti-monopoly Law Enforcement in the Field of Intellectual Property Rights (Draft for Comments)* (The **Guidelines (Draft for Comments)**). Before that, a team was already set up in 2009 within SAIC to engage in the research and formulation of the Guidelines (Draft for Comments) and such work had focused on the following three aspects: (1) Collect materials and documents with respect to the law enforcement practices of foreign competition authorities and relevant guidelines and regulations, research in a systematic manner issues such as their basic stance, types of conducts, analytical methods, major targets of law enforcement, etc. in their enforcement of the antitrust laws in the field of intellectual property rights, as well as compare and summarize the consensus reached by the law enforcement agencies in such countries and regions as well as their different views towards some issues. (2) Carry out research in 12 provinces and municipalities including

Beijing, Tianjin, Shanghai, Chongqing, Liaoning, Jiangsu, Zhejiang, Fujian, Hubei, Guangdong, Sichuan, Gansu by paying visits to intellectual property rights-intensive industries and enterprises, distributing questionnaires, holding expert symposia and hearing opinions from administrative and judicial authorities with a view of understanding the current circumstances in China in respect of the abuse of intellectual property rights to eliminate or restrict competition, the form of such abuse and the responses by the enterprises, etc. (3) Propose the Guidelines (Draft for Comments) and hear opinions extensively. In addition to seeking opinions in writing, 6 symposia and workshops were held, on which a number of suggestions were put forward by the industrial and commercial authorities, relevant authorities under the State Council, experts and scholars, various kinds of enterprises and foreign competition authorities. Research was conducted with respect to these suggestions in a systematic manner.

In the course of formulating the Guidelines (Draft for Comments), we gradually understood the current status regarding the general conditions for the abuse of intellectual property rights to eliminate or restrict competition. We hold that the enforcement of the AML in the field of intellectual property rights is not only a heated topic theoretically, but also an important, complex and sensitive issue in the enforcement of the antitrust laws in various countries and regions. As it had not been long for China to implement the AML and practical experiences in enforcing the AML in the area of intellectual property rights were even more limited, it would be too immature to introduce at that time a set of comprehensive and systematically complete guidelines in accordance with China's antitrust enforcement practice in the field of intellectual property rights and the introduction of such guidelines would entail accumulation in practice.

Given that it is necessary to regulate the suspected abuse of intellectual property rights to eliminate or restrict competition which exists in practice, SAIC, on top of formulating the Guidelines, began to formulate the Rules and fulfill its responsibilities for the purpose of regulating the conducts to eliminate or restrict competition by abusing intellectual property rights.

Since March 2013, SAIC has made two rounds of opinion solicitation in writing with regard to the Rules and 5 workshops and symposia have been held, which have involved SAIC branches at provincial and sub-provincial level, 12 departments under the State Council that are related to the antitrust and intellectual property work (including the National People's Congress, the Supreme People's Court, Legislative Affairs Office, NDRC, MOFCOM, Ministry of Industry and Information Technology, State Intellectual Property Office, etc.), 19 foreign and domestic knowledge-intensive enterprises such as China Telecom, Huawei, Qualcomm, Samsung, etc., foreign chambers of commerce and agencies such as American Chamber of Commerce, American Bar Association, foreign competition authorities such as Directorate General of Competition for the EU, U.S. Department of Justice and Federal Trade Commission, Canadian Competition Bureau, etc. as well as domestic experts and scholars on competition laws. More than 300 advice and suggestions have been received since the solicitation of opinion, which were systematically studied by SAIC before it

amended and further improved the contents of the Rules.

III. Main contents of the Rules

(i) The objectives and basis to formulate the Rules are clarified, i.e. the Rules are to be enacted in accordance with the AML in order to protect competition, encourage innovation, and prohibit undertakings from eliminating or restricting competition by abusing intellectual property rights. Furthermore, necessary explanations are also provided for some relevant concepts.

In the first place, the Rules define the relationship between the AML and the protection of intellectual property rights, which is an issue of general concern among undertakings, and provide that the AML and the protection of intellectual property rights share common goals, i.e. to promote innovation and competition, improve efficiency, protect consumer welfare and public interest of the society.

Secondly, by taking into account the anti-monopoly functions assumed by SAIC, it is clearly provided that for the purpose of the Rules, the conduct eliminating or restricting competition by abusing intellectual property rights refers to the monopolistic conducts such as implementing monopolistic agreements, abusing dominant market position, etc. by exercising the intellectual property rights in violation of the AML and provisions under applicable laws and administrative regulations in connection with intellectual property rights..

Thirdly, it is clearly provided that the relevant market referred to in the Rules shall be defined in accordance with the AML and the *Guidelines on the Definition of Relevant Market* issued by the Anti-Monopoly Commission under the State Council by taking into account factors such as intellectual property rights, innovation, etc.

(ii) Undertakings are prohibited from reaching monopolistic agreements in the exercise of intellectual property rights. The Rules provide in general that undertakings are prohibited from reaching monopolistic agreements in the exercise of intellectual property rights. At the same time, however, safe harbor rules are also provided, which would help to crack down on the exercise of intellectual property rights which has significant anti-competitive effects, help the holders of intellectual property rights determine the consequences under the AML arising from relevant conducts by taking into account their market power in relevant market, and help to guide undertakings to avoid such right-exercising conducts as would have significant anti-competitive effects, thereby leading to reasonable market competition on a gradual basis.

(iii) Undertakings with dominant market position are, in the exercise of the intellectual property rights, prohibited from abusing such dominant market position to restrict or eliminate competition.

It is clearly provided that in the course of antitrust enforcement, intellectual property rights shall be treated equally as other property rights and market dominance shall be identified or presumed in accordance with Articles 18 and 19 of the AML. Possession of intellectual property rights by an undertaking may constitute a factor to determine its dominant market position, provided that the undertaking may not be directly presumed to hold a dominant market position in relevant market merely because of its possession of intellectual property rights. The Rules also provide for several specific abusive conducts which are commonly seen in practice, such as refusal to license intellectual property, restricting the transaction counterparts, tying, imposition of unreasonable restrictive conditions, differential treatment, etc. Regarding the provision that undertakings with dominant market position are prohibited from refusing without justifications to license intellectual property (which is quite a sensitive issue), the parties concerned have put forward their advice and suggestions, the majority of which hold that the provision shall be kept on the condition that the constitutive elements shall be clarified. There are also some opinions that the provision shall be deleted. Such provision was finally kept upon careful study and by taking into consideration the AML of China and the actual circumstances of the Chinese market. However, the provision under the AML that undertakings with dominant market position are prohibited from refusing to deal without justifications is limited to only one circumstance where intellectual property rights constitute essential facilities for manufacturing and operating activities, thereby restricting strictly the provision's application conditions for the purpose of striking a balance between the encouragement of innovation and protection of competition.

(iv) The Rules provide whether 4 specific types of conducts (i.e. patent pool, the exercise of patent rights in the course of setting and implementation of standards, collective management organizations for copyrights and excessive issuance of infringement warning letters) to exercise intellectual property rights constitute the relevant monopolistic conducts. Such conducts may constitute monopoly agreements or abuse of dominant market position, or both, but most cases involve the latter.

(v) The Rules provide for the principles and framework of analysis for industrial and commercial authorities to enforce antitrust laws in the field of intellectual property rights. In analyzing and determining abuses of intellectual property rights to eliminate or restrict competition, the industrial and commercial authorities will, in addition to taking into account the particularity of intellectual property rights, follow the general steps to analyze and determine monopolistic conducts. When analyzing and determining whether the undertakings are suspected of exercising intellectual property rights in violation of the AML, the actual or potential restrictive or eliminative effects on competition arising from such conduct shall be analyzed. Such provision sets out clearly to the undertakings and relevant agencies the enforcement methods of the industrial and commercial authorities, which not only improves the operability of enforcement, but also enhances the transparency of enforcement. It therefore provides references for undertakings to conduct self-assessment and helps to encourage undertakings to engage in technology promotion and dissemination.

(vi) Legal liabilities for abusing intellectual property rights to eliminate or restrict

competition.

In accordance with the provisions under the AML, Article 19 of the Rules clarifies the legal liabilities for abusing intellectual property rights to eliminate or restrict competition.

**美国律师协会反托拉斯法部、知识产权部和国际法部共同
对国家工商总局所起草的《关于知识产权领域反垄断执法的指南》（草稿）的共同建议**

十月三十日，二零一二年

本文的陈述只代表了美国律师公会三个部门的共同观点。它并未经美国律师公会会员代表大会或理事会的批准，因此不应被视为代表美国律师公会的政策。

美国律师公会反托拉斯法部，知识产权部和国际法部（以下合称“三部门”）诚恳地对中国国家工商总局（“工商局”）所起草的《关于知识产权领域反垄断执法的指南》（第五稿）（“指南草稿”）提供建议。¹ 三部门钦佩工商局对指南草稿进行的深入思考和所付出的精力，并希望可藉此机会提供有助于完成指南最终版本的建议。在适当的情况下，三部门可以随时继续为工商局提供建议或者咨询意见。三部门的意见反映了他们在美国和国际竞争法律及潜在的经济原则领域的专业知识和专业经验。

内容概要

三部门赞许工商局在指南草稿中引入了现代经济分析与理论，同时提供了具体建议来更进一步明确本指南和执法政策。

第一，三部门诚恳地促请把第十七条中的第二款撤消，因为它是前所未有地把“必要设施原则”扩展到知识产权领域里。此条款与世界贸易组织准则和国际规范存在冲突。三部门建议修改此条款，最起码需要建立“可反驳的推定”以制约在知识产权领域里的“必要设施原则”的应用，并且要求需要使用此知识产权的竞争者证明其在实际操作中不能够（或者有充分的理由证明其不能够）绕过此知识产权，同时还要证明其使用此知识产权将进一步有利于消费者的合法权益。

第二，三部门建议把不必要宽泛的禁令以及繁杂和难以证明的要求更换成更为通用的、其他法律辖区所应用的“合理原则”。例如，第十九条禁止有市场支配地位的经营者进行任何独占性地回授，但没有提供任何例外情况以允许具有有利影响的回授。三部门诚恳的建议修改此条款使它符合国际准则。

最后，三部门提供了一些澄清性的建议。例如，第十二条提供了关于市场占有率水平形成的反垄断安全港的有用的指导。但是，第十二条现在的表述有可能被误解为市场占有率高于阈值就具有市场影响力的认定。三部门诚恳地建议为了明确起见，在第十二条加上一句“市场占有率高于阈值并不一定被认定为具有市场影响力”，相反，“这样的认定将会根据第九条款所述，基于在市场结构的具体情况，竞争情形，以及对竞争有不利影响的证据，而作出。”[修改注解：《反垄断法》下的市场支配地位推定（presumption）就是根据市场份额，但是最终的认定(determination)是需要进行综合判断的。]

¹ 本建议书是基于指南草稿的非正式翻译稿。作为参考，附上指南草稿和指南草稿的非正式翻译稿。

I. 第十七条 拒绝许可知识产权

第十七条一开始就陈述了一个普遍原则，即：“正常情况下”允许进行无条件或非歧视性地单方拒绝许可知识产权。上述表述与美国法律和国际惯例相一致，美国律师公会上述各部对此表示认同和欢迎。²但各部谨建议删除第 17（2）条中所提出的必要设施例外适用（于一般性规定）情形的提议。³中国《反垄断法》（《反垄断法》）并未提及任何必要设施原则，亦未对“滥用”知识产权进行定义。《工商行政管理机关禁止滥用市场支配地位的规定》（《禁止滥用市场支配地位的规定》）第 4(5)条规定：若“产品或服务”为必要设施，则禁止占支配地位的经营者无条件拒绝交易，但并未说明该原则是否适用于知识产权。第 17(2)条是首次明确将必要设施原则延伸至知识产权领域。⁴

美国律师公会上述各部门之前的意见建议《反垄断法》及实施细则中全部删除必要设施原则。各部认为至少应“明确必要设施原则根本不适用于知识产权或仅适用于极个别情况。”⁵自提出上述意见以来，各部门并未注意到有任何实践发展使各部门需要改变该意见。提出该意见是因为知识产权的“本质”即是单方排他性权利。⁶中国知识产权法明确授权知识产权权利人可以单方拒绝向他人提供其

² 如：Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004)；《有关将<欧共体条约>第 82 条适用于占支配地位经营者排他性滥用行为的委员会执法指南》（*Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*），2009 O.J. (C45) ¶ 75 第 7 页；美国律师公会反垄断法部，《国际知识产权许可交易中的反垄断问题》（2012），第 2 页(ANTITRUST ISSUES IN INTERNATIONAL IP LICENSING TRANSACTIONS 第 2 页 (2012))（“多数法域的法律均规定：与知识产权许可（或拒绝许可）相关的多数安排不违反竞争法，因此这些法律在这一点上是一致的。”）。

³ 美国律师公会上述各部门谨建议工商总局亦考虑将第 17（1）条所列例外情形限定为如下情况，即：标准关键专利（“SEPs”）权利人违反了其向标准制定组织（“SSO”）所作的有关以合理和非歧视（“RAND”）条款许可其专利的承诺。

⁴ 美国律师公会上述各部门假定：在第 17 条第一句就提及第 16 条表明了第 17 条暗含的市场支配地位是通过权利人拒绝许可的知识产权而获得的。

⁵ 2005 年对中华人民共和国所拟议的反垄断法的意见，见 18-19、21 页（“2005 年对《反垄断法》的意见”，参 见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf。另请参见 2010 年 7 月 2 日对国家工商行政管理总局《工商行政管理机关禁止垄断协议行为的规定》、《工商行政管理机关禁止滥用市场支配地位行为的规定》以及《工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定》草案的共同意见（“2010 年意见”）第 5 页、第 10-11 页，见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_sil_saic.authcheckdam.pdf；2009 年 5 月 29 日对国家工商行政管理总局《关于禁止垄断协议行为的有关规定》和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）的共同意见（“2009 年 5 月意见”）第 10 页、第 35-36 页，见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_saic_200906.authcheckdam.pdf。为方便起见，特附上述评述意见的复本。

⁶ 比如，可参见 *Dawson Chem. Co. V. Rohm&Haas Co.*, 448 U.S.，第 176、215 页(1980)（“授予专利的实质是有限阻止他方从取得专利的发明中获利。”）；*Stewart v. Abend*, 495 U.S. 第 207 页，第 228-29 页(1990)（“版权所有人享有相关权利，可以任意拒绝向寻求利用成果的一方授予许可。”）。

发明或著作（仅存在有限的例外情况）。⁷将必要设施原则适用于知识产权将极大地影响知识产权权利人的核心权利（单方排他权）、为竞争者开发自主的具竞争性的知识产权设置障碍，而且通常亦会为创新设置长期的障碍。⁸

从美国律师公会上述各部门成员的经验来看，一项设施很少是真正必要的，经常出现的情况是：主张强迫共享“必要”设施的人士低估了意志坚决的竞争者绕开该设施进行竞争亦可使消费者从中获益的能力。对快速发展的技术而言尤其如此，因技术和市场的发展可带来诸多机会，从而使得可以绕开竞争者知识产权开展工作，同时较之实物基础设施，绕开知识产权开展工作相对容易。在认识到上述问题后，美国最高法院明确表示将以怀疑态度对待所谓的“必要设施”主张，美国最高法院认定：法院在认定一般原则（即：即便是垄断者也可选择交易对象）的例外情形时应十分谨慎。⁹审理 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*¹⁰案的法院解释称，法院在 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 一案中所认定的例外情形¹¹“处于或接近（谢尔曼法）第2章节所规定责任的外缘”¹²，法院表示其“从未认可”必要设施原则。¹³

⁷ 《中华人民共和国专利法》第11条。而且，《WTO与贸易有关的知识产权协议》(TRIPS)授予专利和商业秘密所有人独家权利，该等权利仅受制于某些极为有限的例外情形。

⁸ 在制定拒绝交易的标准时，仅关注静态效率是错误的（拒绝许可相关具体知识产权权利人而对竞争产生的影响），因为这会忽视对创新刺激因素的长期影响。J. Thomas Rosch, 《静态及动态分析在制药业反垄断中的作用》（2010年2月18日）（*The Role of Static and Dynamic Analysis in Pharmaceutical Antitrust*）（Feb.18, 2010）（“若某一专利所产生的预期有助于刺激对发明进行投资（或披露）一项发明，则该等静态成本是合理的）。人们普遍认为：由专利激发的发明（或披露）产生的动态效益高于静态成本。”），见 <http://www.ftc.gov/speeches/rosch/100218pharmaantitrust.pdf>；Donald F. Turner, 《设定知识产权利用中的反垄断限制及误用限制的基本原则》（*Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights*），53 *Antitrust L.J.* 485, 485 (1985)（“长期看，技术进步对消费者福利的贡献大于无效率分配因非竞争定价得以消除而产生的贡献”）；*Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1186 (1st Cir. 1994)（“使专利活动接受更广泛的反垄断审查将削弱构成专利制度基础的激励因素”）；同上，第1186-87页（“国会自身作出了经验式假设，即：允许版权所有人收取许可费并排除他人使用其著作产生了一种激励机制，该机制鼓励对创作优良的艺术及功能性著作进行投资，从而长远地推动消费者福利。我们无法要求反垄断诉讼中的被告在每一宗拒绝许可版权著作行为受到攻击的案件中对上述立法假设的合理性进行证明和指责。”）（省略其内引述）；*SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1209 (2d Cir. 1981)（对所谓的不合理地拒绝许可合法获得的专利施加反垄断义务“会严重践踏我们专利法所提供的激励因素，从而影响整个专利制度”）。确实，可能进行该等干预会削弱或抑制前期进行创新及知识产权投资的动力。主要原因是投资动力在很大程度上取决于知识产权的预期价值或经营者预期从投资中获得的租金。新产品的引入（即便受制于庞大的市场势力）代表对社会的贡献，这是美国专利制度的基本理论。由于发明的社会回报大大超过了私人回报，预期从创新中获得的垄断利润刺激经营者从事风险性投资，以此为社会增益。Dennis W. Carlton, 《对排他性行为及拒绝交易的总体分析-Aspen 和柯达缘何被误导》（*A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*），68 *ANTITRUST L.J.* 659, 672-73 (2001)；Charles I. Jones & John C. Williams, 《衡量研发的社会回报》（*Measuring the Social Return to R&D*），113 *Q.J. ECON.* 1119 (1998)。

⁹ 比如，*Trinko*, 540 U.S.第408页。

¹⁰ 同上。

¹¹ 472 U.S. 585 (1985)。

¹² *Trinko*, 540 U.S. 第409-10页。

若保留第 17(2)条，则应对其进行修订，并针对涉及知识产权的必要设施主张纳入强有力的可反驳推定。就此，美国律师公会上述各部门进一步建议对第 17(2)条进行修订，使其要求证明：(1)寻求获得设施的竞争者无法实际地或合理地绕开知识产权开展工作，以及(2)强迫性获得（设施）将促进消费者的合法利益。该等修订将使第 17 条更加符合国际规范，而且也更加符合《工商总局关于市场支配地位的规定》。¹⁴

II. 不必要的过于宽泛的禁止和沉重的证明责任

A. 第十一条 行使知识产权行为对竞争影响的评价

第十一条似乎是对第七条第六款的详细阐述，第七条第六款要求执法机构分析“如果经营者行使知识产权行为排除、限制了相关市场的竞争，则进一步考察该行为的有利影响以及该有利影响是否大于排除、限制相关市场竞争所造成的不利影响。”对于国家工商总局有意仔细考察行使知识产权行为的有利影响是否能抵消任何潜在不利影响，美国律师公会各部门表示十分赞同。

但是，当第十一条详述界定行使知识产权行为是否能提高效率的标准时，对于什么样的做法可视为排除或限制竞争，或者需要什么样的证据证明对竞争有不利影响，其规定又不太明确。由“知识产权的取得或者独占性许可……[以及]交叉许可协议”及“拒绝许可知识产权行为”和“控制关键技术”，第十一条似乎暗示这些常见的知识产权行为是排除或限制竞争的方式。这似乎推定了这些行为的不利影响，除非当事方能提供事实证据证明存在有利于竞争的影响。

¹³ 同上，第 411 页。事实上，专门负责知识产权争端的美国联邦上诉法院已表示“在已报导案件中，法庭并未就单方拒绝出售或许可专利而施加反垄断责任” *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000)。另见 *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 第 215 页（“强制许可在我们的专利制度中非常罕见”（“Compulsory licensing is a rarity in our patent system.”））；另见美国司法部及联邦贸易委员会，《反垄断执法及知识产权：促进创新和竞争》（ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION）（反垄断执法及知识产权）第 32 页(2007)（“对单方无条件拒绝许可专利施加反垄断责任对专利权和反垄断保护的互动中并不发挥重要作用。”）。经济学方面亦警告政府不要进行干预，若干干预会丧失巨大效益，而且理论上确定竞争损害可能存在难度，单这一点即表明在对某一作法提出谴责之前需进行定量分析。比如，参见 *Carlton, supra* n.11, 第 672-73 页。确实，由于单方无条件拒绝许可是设立知识产权的具体法律明确规定的一项核心权利，因此事实上难以想象可根据竞争法将必要设施原则适用于知识产权。

¹⁴ 比如，欧洲法院仅在“极个别情况”下(涉及有关数据的极为广泛的知识产权许可)并达到了严格限制（在进行专利许可时从来不会出现这种情况）的情况下强迫获得知识产权。比如，*IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, All ER (EC) 813 (2004)（只有在如下情况下才强迫获得知识产权，即：知识产权对于在市场上进行竞争是必不可少的，而且没有可行的替代品；存在知识产权供应的上游市场；寻求获得知识产权的一方能够证明，其有意销售存在市场需求的新产品，或有意为不同的市场提供产品；拒绝会排除二级市场上的所有竞争）。美国律师公会上述各部门认为，仅在该等极个别情况下适用必要设施原则保证相关考量的正当性（即：是否应适用于知识产权，以及若适用，是否应使用所有标准）以确保即使是占支配地位的经营者亦不会被随时或不公平地迫使许可其知识产权。

美国律师公会各部门建议，第十一条应得到澄清，并与第七条第六款保持一致，要求调查知识产权行使行为的反垄断执法机构，收集和评估证明知识产权行使行为具有不利于竞争影响的证据，并权衡该知识产权行使行为的不利影响和有利影响，而并非推定这些行为具有不利竞争的影响。一项知识产权许可附加的限制是否在第十一条下合法，应取决于该限制是否阻碍了在不许可该项知识产权的情况下会出现的竞争。¹⁵ 第十一条所列行为类型本身都不是反竞争的；相反，（与任何知识产权行使行为一样）行为存在不利影响的潜在可能取决于各方的市场控制力、许可的性质和范围、所涉及的知识产权，以及第十条所述的其他因素。例如交叉许可，因为允许竞争对手间依赖彼此的创新，而能促进竞争。但如果交叉许可是在拥有显著市场控制力的竞争对手之间达成，而且是排他性的，进而构成各方之间不向任何其他市场参与者授予许可的协议，那么该交叉许可就可能存在不利影响，但还是需要提供这种影响的证据。此外，可将第十一条所规定的行为的具体类型交叉援引至《指南》中，并说明列明这些行为在那些情形下可能对竞争有不利影响，例如第十六条和第十七条关于拒绝许可的内容。

美国律师公会各部门还认为，可能很难适用两套复杂的标准来界定所主张效率的有利影响是否能抵消任何不利影响。首先，第十一条第二款要求相关行为是“效率产生所必不可少的”，这一项就是个过高的标准。实践中，要界定某知识产权行使的限制性行为是否“必不可少”极为困难。界定特定行为是否“必不可少”将要求国家工商总局进行推测性调查，以得出理论上限制性程度更低的替代行为。但这些理论上限制性程度更低的替代行为，在实际商业情形中对知识产权所有人来说可能不现实。美国律师公会各部门同意，如果知识产权所有人能通过限制性程度明显更低的方式来明确实现所主张的效率，那么国家工商总局就不必考虑该效率主张。但另一方面，在某些案件中具有有利竞争影响的行为可能不一定是真的“必不可少”的，例如捆绑许可。在这些情况下，不应“要求知识产权所有人考虑假设和理论上的替代方案”来为其行为提供合理理由。¹⁶ 另外，根据知识产权所有人所处的特定市场情形，其有利竞争的效率的评估，以及实现效率的限制条件的合理必要性评估，可能会有所不同。例如“因满足新的市场进入者的需要而合理的一项限制条件……可能在不同市场情形下就不具有有利竞争效率的合理性”。¹⁷

因此，各部门提议将“必不可少”一词替换为“合理必要”一词。这一标准与“合理原则”标准相符，而“合理原则”标准是其他司法管辖区用以分析商业行为是否反竞争的默认分析方式。美国反垄断执法机构一般只考虑“在协议签订时，可行的、限制性程度明显更低的方式是否合理存在。”¹⁸

¹⁵ 美国司法部及联邦贸易委员会，《知识产权许可反垄断指南》（美国知识产权指南）第 4.1.2 条（1995 年），见 <http://www.justice.gov/atr/public/guidelines/0558.pdf>。

¹⁶ 关于对技术转让协议适用欧共体条约第 81 条的委员会通知，第 149 条（2004 年），见 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF>（“委员会通知”）。又见美国知识产权指南第 4.2 条（“调查机构不会寻求理论上限制性更小、但在各方所处的实际商业情形下不具现实性的替代方案。”）。

¹⁷ 美国知识产权指南第 4.2 条。

¹⁸ 联邦贸易委员会和美国司法部，《竞争对手间合作反垄断指南》第 9 页（2000 年）。又见美国知识产权指南第 4.2 条。另一种选择是设立一种浮动标准，在反竞争影响很明确的情况下，它要求行为和所主张的效率之间具有更密切的联系。这种标准与美国反垄断执法机构评估合并效率的方式类似。参见美国司法部和联邦贸易委员会《横向兼并指南》第 10 条（2010 年）。

第二，第十一条第三款中要求“产生的效率必须能够为消费者所分享”也可能较难执行。某些效率可能对生产成本有直接影响，而其他效率产生的影响可能是间接的，如使创新更加容易或更有可能。在多数情况下，对生产成本有直接影响的效率会将影响“传导”到消费价格，但是“传导”效果通常难以准确衡量。有间接影响的效率对消费者的价值，例如使创新更加容易或更有可能的那些效率，则更难以衡量。

尽管如此，降低边缘成本的效率一般会传导给消费者，即使是由拥有市场控制力的公司产生的效率。¹⁹这是因为当公司面临向下倾斜的需求曲线时，新的利润最大化的价格就会降低。因此，美国律师公会各部门提议删除第十一条第三款，或者予以说明确保可能降低成本或刺激创新的所有效率获益都满足该标准。由于这些效率获益非常可能使消费者受益，如果国家工商总局执行更严格的标准，可能造成对总局稀缺资源的非充分利用。

B. 第十八条 涉及知识产权的搭售

指南草案的第十八条正确的指出了搭售有利于竞争的可能性。²⁰ 但是，原文可能被解读为符合最后一段所列的四个条件的搭售行为既不需考虑其有利于竞争的可能性也不需证明其对于竞争的损害而必然被禁止。由于搭售有可能产生有利于竞争的影响，美国反垄断执法机构决定在对涉及知识产权的搭售行为进行处理时，仅当其对被搭售品市场的竞争产生不利影响，并且其有利于竞争的影响不能抵消其不利影响时，才对该搭售行为进行处罚。²¹ 因此，本部建议在本条最后一段提及考虑因素时添加“搭售对竞争产生的有利影响或效率性”这一因素，以及对第三个条件进行进一步修改完善，明确要求“搭售对被搭售品市场有实质性负面影响”。这些修改旨在将第十八条与第七条和第十一条中所规定的程序进行统一。

¹⁹ 造成固定成本降低的效率也可能对价格产生直接影响。例如，固定价格的减少可以降低公司长期边缘成本，使公司能长期在盈利的情况下维持低价格。另外“固定成本”节省是经济的资源节省并能使社会受益。在研发程度较高且创新竞争激烈的行业里，例如计算机和电信行业，研发费用的固定成本降低可能带来“为了降低公司实现盈利机会必须克服的‘障碍’而增加投资研发的刺激。”Dennis W. Carlton 著，《修订横向兼并指南》(*Revising the Horizontal Merger Guidelines*)，JOURNAL OF COMPETITION LAW & ECON. 2010 年第 6 期第 619，629-630，639 页。这些增加的激励反过来可能会带来造福消费者的新的或更高品质的产品和服务。同上。

²⁰ 参见 Dennis W. Carlton 与 Michael Waldman 著 *Tying*，发表于 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008); Phillip E. Areeda 与 Herbert Hovenkamp 著 ANTITRUST LAW ¶1717b2, 第 185 页(2d ed. 2004) (文中提到搭售有可能导致“消费者……比无搭售时以同样的花费得到更大的价值”); Marius Schwartz 与 Gregory J. Werden 著 *A Quality-Signaling Rationale for Aftermarket Tying*, 64 ANTITRUST L.J. 387, 388 (1996) (“如果当耐用产品的质量被证明为优秀时其配套产品的需求也有足够的提高，则搭售可以使提供质优的耐用品有利可图。”)。

²¹ 参见美国知识产权指南§ 5.3。有些情况下，搭售可能阻抑搭售品市场的市场进入，从而损害竞争。参见 *United States v. Microsoft Corp.*, 253 F.3d 34, 92-95 (D.C. Cir. 2001)。

C. 第十九条 涉及知识产权的不合理的交易条件

第十九条对第十六条第四项所指的“涉及知识产权的不合理交易条件”做出具体界定。第十九条第一项列出一类“不合理”交易条件为“要求交易相对人将其改进的技术进行独占性地回授”。²²对于第十九条是否旨在对于“排他性授权”的回授作出规定有一定的模糊性。回授只有当被许可人使用许可人的知识产权而创造出的新的知识产权只能为许可人与被许可人所使用的情况下，才是排他性的。²³本部建议对这点作出更明晰的界定。指南草案实质上禁止了由知识产权形成市场支配地位的经营者在其许可协议中加入此类回授条款。如果旨在对于“排他性授权”的回授作出规定，本部认为第十九条第一项的规定过于严苛，有可能限制一些原本有利于竞争的授权协议。因此，本部建议删除第十九条第一项，或阐明并非所有的排他性授权都被反垄断法禁止，或阐明排他性授权要经过如第七条和第十一条所规定的审查后才能确定是否应被反垄断法禁止。²⁴

回授在很多情况下都是明显有利于竞争的。回授“提供途径使得被许可人和许可人共担风险，并对许可人因为在其授权技术的基础上所产生的进一步创新予以回报，从而促进了创新和对创新产物的进一步许可。”²⁵另一方面，回授在有些情况下可能产生不利于竞争的影响，例如（1）当回授的范畴超出该专利之外；（2）回授是用来掩盖或促使交易各方的卡特尔行为；（3）回授可能大大降低被许可人进行研发的动力从而限制创新市场的竞争。

通常认为，非排他性回授比排他性回授更有可能有利于竞争，因为后者有可能降低创新的动力。²⁶然而，排他性回授并非一定排除、限制竞争。²⁷排他性回授有可能有利于竞争，包括它可能“保证许可人不会因为被在他所拥有的技术的协助下而产生的改进技术排除在外而不能有效竞争”。²⁸例如，含“畅通”条款的排他性回授使被许可人可以充分利用改进技术知识产权，从而比不含此条款的回授更有可能有利于竞争。²⁹本部认为工商总局应将现实情况与假设情况进行对比来衡量排他性回授

²² 第二十一条第二项是一项相似的对于专利联营中排他性回授的禁止条款。同样，本部也建议删除或修改该条款。

²³ 在有些情况下，排他性回授可能欠缺一项“畅通”条款，从而限制了被许可人对于该改进技术的充分应用。

²⁴ 本部认识到除反垄断法之外的规章政策也可能对排他性回授有一定的限制，此处不对这些其他因素发表意见。

²⁵ 美国知识产权指南§ 5.6。

²⁶ 参见 Hovenkamp et al., IP AND ANTITRUST §25.3, 第 25-6 至 25-7 页等文献。

²⁷ 参见 *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947) (排他性回授本身并不必然违法)等文献。

²⁸ 见 *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043, 2007 U.S. Dist. LEXIS 89947, at *7 n.18 (C.D. Cal. Oct. 29, 2007) (援引美国知识产权指南§ 5.6 第 30 页)。另见 *Santa Fe-Pomeroy, Inc. v. P&Z Co.*, 569 F.2d 1084, 1102 n.34 (9th Cir. 1978) (“在与被许可人之间的关系上，许可人有权要求对其研发投入给予一定的保护……回授是一种寻求这类保护的合理手段”)。

对于创新可能具有的削弱性效应，即考虑如果该项交易条件不存在时创新情况会如何。对于排他性回授一概禁止将会在不增加消费者福利的前提下对创新产生不必要的削弱效应。³⁰

第十九条第三项禁止协议附加“限制交易相对人在许可协议期限届满后，制造、使用、销售竞争性商品或者采用竞争性技术”的条件。虽然广泛性的对交易相对人在许可协议期限届满后制造、使用、销售竞争性商品或者采用竞争性技术进行限制有可能排除、限制竞争，局限性的对交易相对人就这些行为在其构成侵权时进行限制是不损害竞争的。实际上，这也正是许可协议设立期限（先于知识产权过期前）的初衷：协议过期后，被许可人无权再使用此知识产权。本部建议对第十九条第三项进行完善，以阐明并非禁止许可协议设立期限。并且，如果在许可协议期限届满后交易相对人在制造、使用、销售竞争性商品或者采用竞争性技术的过程中构成侵权，许可人对此类侵权的捍卫行为不构成损害竞争行为

D. 第二十三条 著作权保护中的技术措施行为

我方对国家工商总局确认了一项长期原则表示赞赏，即著作权人不会仅仅因为拥有专有权或行使其专有权而被推定具有市场支配地位，且著作权人行使这些权利本身并不会招致政府干预。在最终版的指南中清楚反映这一原则，并不再对使用技术措施创设任何强制性要求或限制对于在数字环境下著作权的行使是十分必要的。同时，保证最终版的指南不会导致中国违反其国际义务（比如，世界知识产权组织的版权条约以及组织表演和录音制品条约）也十分关键。关于第二十三条的最后一款，我方建议，合适的标准应该是看该特定的技术措施是否对竞争有不合理的负面作用。如果该技术措施对竞争没有不合理的负面作用，则其他对竞争影响较小的替代方法存在与否无关紧要。此外，如果该技术措施的主要作用是保护著作权，则我方认为其效果对于竞争的影响不应该被认为是不合理的。³¹最后，作为善意提醒，指南草案可能会将国家工商总局至于对技术措施实施普遍管理的地位，我方反对这一作法。³²

III. 澄清

A. 兜底条款

指南草案创设了几个兜底条款，根据这些条款执行机关可以禁止某些“其他行为”。比如，第十三条第6款和第十四条第3款禁止“（执法机构）认定的滥用知识产权的其他垄断协议”（知识产权）；第十六条禁止“（执法机构）认定的其他滥用主要由知识产权形成的市场支配地位的行为”；

²⁹ 参见 *Hull v. Brunswick Corp.*, 704 F.2d 1195, 1201-02 (10th Cir. 1983) (主张含畅通条款而不以此附加费用的排他性回授不应判为本身违法) 等文献。

³⁰ 在美国，法院要求证明排他性回授产生排除、限制竞争的效果。见 *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*; *Hull v. Brunswick Corp.* 等。

³¹ 一个更可取的方式可能是整个删去第二十三条最后一款，并将第二十三条第二款并入第十八条。

³² 我方还建议国家工商总局考虑一下国家版权局正在考虑的著作权法修改提案，里面专辟一章规定了对技术保护措施的保护。

及第十九条禁止实施“（执法机构）认定的其他不合理的交易条件。”我方郑重请求国家工商总局为何种特别因素在适用这些兜底条款时会被考虑提供指引。

B. 具有市场支配地位的经营者在相关市场中滥用知识产权的行为

值得肯定的是，第九条和第十六条释明了经营者不会因为仅仅拥有知识产权而被推定其具有市场支配地位，执法机构只会对知识产权已构成“经营者获得市场支配地位的一个重要甚至是关键因素”的情况启动调查。我方郑重请求进一步在指南中明确：与知识产权有关的行为如果构成对市场支配地位的滥用则必须是该行为既滥用了知识产权，且在其所处的市场中，该行为取得市场支配地位是源于知识产权。比如，如果经营者在一个给定产品的市场中取得了支配地位，知识产权是获得市场地位的如第九条所言的“重要因素”，但经营者并未在相关技术市场中获得支配地位，则仍应允许该经营者根据第十七条拒绝许可其知识产权。

C. 与知识产权有关的明显垄断行为的构成要件

指南草案第三条似乎明确了经营者只有在滥用知识产权，且同时排除，限制了竞争的情形下，才会触犯《反垄断法》。我方完全支持上述做法。要构成《反垄断法》下的明显垄断行为需要同时满足两个要件：第一，该行为是一种滥用知识产权的行为（仅认定具有市场支配地位是不够的）；第二，行为必须达到排除或限制竞争的效果。占支配地位的经营实体仅仅实施了与知识产权有关的行为不足以认定其限制了竞争，因为行使知识产权的当然结果就是限制竞争。知识产权的基本要素就是排除他人使用的能力。因此，经营者的行为还必须以某种方式构成滥用。但是，指南草案似乎也在不同的条款中（以第2条为例）建议：对与知识产权有关的滥用知识产权行为或排除、限制竞争的行为需要进行分析认定。本草案因此建议在指南的定稿中进一步明确：与知识产权相关的违反《反垄断法》的行为必须是既滥用了知识产权且达到了排除或限制竞争效果的行为。

D. 第七条 知识产权领域反垄断执法的一般分析步骤

《指南草案》第6条确认了，知识产权及其本身，属于反垄断执法机构之外的其他行政机关的管辖范围。第七条的子条款中将反垄断执法限定在评价行使知识产权的行为，而非其效力，这是很适当的。与之相似，在美国（除了一些有限的情况，比如通过欺骗专利局获得了专利权）³³，知识产权的有效性不属于反垄断执法机构的管辖范围，而是由美国专利与商标局和法院决定。反垄断执法机构仅评价行使知识产权的行为对于竞争的效果。³⁴此外，美国的专利权、商标及著作权在法律上都是明确地被推定为有效了。³⁵

³³ 请见 *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979).

³⁴ 请见 U.S. IP GUIDELINES §§ 1.0, 2.0; ANTITRUST ENFORCEMENT AND IPR at 1-13.

³⁵ 请见 35 U.S.C. §282; *Microsoft Corp. v. i4i LP*, 564 U.S. ___, 131 S. Ct. 2238, 2245 (2011) (presumption of validity of patents); 15 U.S.C. §§1057(b), 1115(a); *ZobmondoEnt. v. Falls Media*, 602 F.3d 1108, 1113-14 (9th Cir. 2010) (presumption of validity of trademarks); 17 U.S.C. §410(c) (presumption of validity of copyrights).

为了同第七条子条款中“行使”这一措辞相一致，本指南建议修订第七条的序文，阐明反垄断执法机构“将推定任何潜在的知识产权为有效，除非有证据证明该权利是权利人通过欺诈手段从管理知识产权的有关部门获得的，或者该权利人明知该权利无效，一般采取以下步骤。”但是，对于那些可能并未经过特定的有效性审查即从知识产权管理部门取得授权的知识产权，本指南可规定有效性推定不对其适用。对于知识产权效力推定的阐释也有助于厘清反垄断执法机构同与其相对应的其他行政机关及法院的管辖界限。³⁶

E. 第 12 条 经营者相互关系及其市场地位对竞争分析的影响

第 12 条针对在市场份额达到何种水平时经营者可以免于接受反垄断审查提供了实用的指导。但从字面看，可将第 12 条解释为：市场份额超过该条所列标准的经营者将被推定具有市场势力。该等解释与《国际竞争网络建议规范》不符，³⁷ 美国律师协会上述各部认为其并未体现工商总局的意图。因此，上述各部谨建议在 12 条中再加入一句，明确说明“若（经营者）市场份额超过上述标准，则并不必然被推定具有市场势力”，而是“根据市场结构、竞争形势以及反竞争效果的证据等具体情况（如第 9 条规定）作出决定。”

此外，第 12(2)条提及“在相关市场上存在至少其他两家拥有可替代知识产权的经营者。”鉴于该等“可替代知识产权”可能包括质量不高的 IPR、功能低下的可替代知识产权，并/或可能导致高昂的转换成本，工商总局可考虑将该术语改为“具有密切替代关系的知识产权。”

最后，第 12 条第三段未明确说明据以断定安全港的市场类型，而美国和其他法域的指南主要着重于商品市场。³⁸ 鉴于第 8 条规定相关市场可以是技术市场，也可以是含有特定知识产权的产品市场，因此建议工商总局最好能明确：在计算第 12 条中规定的安全港限制时是仅参照商品市场、还是会考虑技术市场。³⁹

³⁶ 事实是反垄断执法机关一般将知识产权推断为有效，除非在其他法庭根据其他法律不排斥以欺诈方式获取的知识产权的效力。

³⁷ 见国际竞争网络单方行为工作小组(ICN Unilateral Conduct Working Group)，根据单方行为法而进行的支配地位/实质市场势力分析（DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS），第五部分（“一般而言，拥有超出安全港之外的市场份额是认定支配地位/实质市场势力份额的必要但不充分条件”（Possession of a market share outside the safe harbor is generally necessary but insufficient for finding dominance/substantial market power”）），见 <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>

³⁸ 见《美国知识产权指南》§4.3；新加坡竞争委员会（Competition Commission Singapore），《关于处理知识产权的指南》（Guidelines on the Treatment of Intellectual Property Rights），2007 年，¶3.17；日本公平贸易委员会，《在反垄断法案规定下使用知识产权的指南》（Guidelines for the Use of Intellectual Property under the Antimonopoly Act），第 2(5)部分。

³⁹ 在涉及知识产权时，欧盟界定“安全港（safe harbor）”可能也考虑技术市场。见《欧盟有关将〈欧共体条约〉第 81 条适用于技术转让协议的指南》（EU Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements），2004（C101/02），¶9。此外，工商总局可能希望仅在无法计算商品市场份额时考虑技术市场（见《美国知识产权指南》§4.3），或单对产品市场分析不足以说明对技术间竞争或研发竞争影响的情况下考虑技术市场（见新加坡竞争委员会，《关于处理知识产权的指南》，2007 年，¶¶ 3.18-3.20）。

F. 第十六条 滥用主要由知识产权形成的市场支配地位

指南第十六条第一款禁止“以不公平的高价许可知识产权”。正如前几章的意见所指出,要求以“公平”或“合理”的价格,及禁止“高价”或“低价”,是“不符合竞争政策的公认准则及现代经济理论,并有增加以法律惩处积极竞争的趋势,也直接违反了公认的竞争法的宗旨”。⁴⁰大体言之,我们认为竞争法不应禁止有独占权的经营者对其商品和知识产权进行最高定价。原则上讲,经营者“收取垄断价格不仅没有违法,而且是有利于吸引商业才能,促进创新及经济成长的风险承担”。⁴¹由于知识产权本身目的是鼓励对于高风险高成本研发的投资,此效应在知识产权领域尤其深切。为了达成研发及保护竞争之间的平衡,垄断价格只有在源于其他非法行为时才属违法。在此处缺乏明确性会导致许多在知识产权领域的重要问题。

首先,知识产权不同于一般的商品化产品。对于商品化产品,用经营者的成本价格的比率来决定其要价是否高于竞争价格是有一定的可能。此方法在欧盟对于过高订价申诉案中用过有限的几次。⁴²但是,由于知识产权通常是高差异商品,比较不同的产权许可的价格极为困难,甚至不可能。况且知识产权的递增成本几乎是零,使得成本价格比率失去意义。即使能分析研发知识产权的成本,也没有架构可以对知识产权的价格是否“不公平”提供适当的定义。因此,经营者在判断其知识产权许可是否违反指南时,将面临极大的不确定性。

第二,禁止“以不公平的高价许可知识产权”有可能最终导致未曾预料到的在不适当的情况下强制许可知识产权的后果。⁴³《反垄断法》第五十五条表示经营者依照有关知识产权的法律行使知识产权的行为不受《反垄断法》干涉;通常只有经营者使用知识产权“排除、限制竞争的行为”才会被禁止。依本文第一章所提,拥有排除的权利是知识产权的核心要素之一。“不公平的高价”的标准可能会阻止经营者取得对于创新的投资及承担风险的补偿。进一步而言,价格不高并不表示市场具有健康的竞争。最后,由于增加更多一单位的知识产权许可的边际成本通常为零或近于零,以边际成本为基础来决定知识产权的价格是否过高或过低是非常不准确的。

G. 第 21 条 专利联营

第 21 条正确地指出,专利池在“促进互补性技术的一体化、降低交易成本……等方面具有一定的积极作用”。就允许对专利池中的专利单独授予许可的专利池而言,不太可能会产生反竞争效

⁴⁰ 2005 Comments on the AML at 2, 17-18.

⁴¹ *Trinko*, 540 U.S. at 407.

⁴² See, e.g., *United Brands Company and United Brands Continental B.V. v. Commission of the European Communities*, Case 17/76 E.C.R. 207 (1978).

⁴³ 竞争法有可能在监管知识产权的价格方面起到有限的作用,比如对于知识产权权利人的欺诈行为的救济。但这不等同于对知识产权许可进行价格管制,也就是第十六条第一款的实际效果。

果。但同时，第 21 条还提到，“专利联营也可能具有排除、限制竞争的效果，因此需要对其进行反垄断分析认定”。各部门希望能够澄清在何种情况下需要对专利池进行反垄断分析认定。⁴⁴

H. 第 22 条 标准制定和实施中的行使专利权行为

第 22 条规定了在判断标准的制定和实施行为是否构成对《反垄断法》的违反时所应适用的四要素检验标准。各部门建议进行以下三点澄清：

第一，建议澄清第 22 条(1)-(4)项中所列出的四要素之间是相互关联的。为澄清该问题，可以在第三和第四项要素中插入“以及”一词，并在第四项要素后添加以下句子：“只有在四要素均具备的情况下，一行为才会构成对反垄断法的违反。”

第二，我们建议澄清，就标准的制定而言不存在一般性的披露义务。按照草案的内容，相关规定可以被解释为施加了默示的披露义务，而美国法下或相关国际规则并未规定这种义务。⁴⁵因此各部门建议增加以下表述以便澄清：

第 22 条 然而，符合以下条件的行为可能会构成对反垄断法的违反…(2)
(a) 专利持有人或专利申请人是标准制定组织（SSO）中有投票权的积极参与者；专利权人或者专利申请人不按标准制定组织的有关知识产权政策披露其可能会被纳入标准的专利信息或者已经公开的专利申请信息；(b) SSO 发布的书面政策所规定的相关披露义务是参与的条件之一；(c) 专利持有人或申请人欺诈性地或故意地违反了 SSO 的披露义务；(d) 标准通过之后，专利持有者以其必要专利对抗标准强制性规定的实施人；(e) 如果专利持有者或专利申请人当时履行了其披露义务，标准就会纳入另一种不同的技术；以及(f) 专利持有者的行为对相关市场的竞争造成了或可能会造成不利影响。

第三，本部门强烈建议对第 22 部分最后一段进行如下修改：

⁴⁴ 例如，可参见美国知识产权指南§5.5。

⁴⁵ 例如，可参见 Rambus Inc. v. FTC, 522 F.3d 456, 464-67 (D.C. Cir. 2008)；Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1013 (Fed. Cir. 2008) (认定在判断专利持有人是否有进行披露的义务从而导致其默示地放弃了主张专利的权利时，其依据应是专利持有人是否参加了标准制定组织，标准制定组织的书面政策是否提出了该种披露义务，以及如果提出了，披露的范围如何)；Dell Computer Corp., 121 F.T.C. 616 (1996) (起诉状及经同意的裁定)；欧盟委员会，关于横向合作协议适用欧洲联盟运行条约第 101 条的指南(2011/C 11/01) ¶¶268, 299 [欧 盟 委 员 会 第 101 条 指 南] ， 见 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>。

当经营者的某项专利技术纳入国家或者行业强制标准时，应当在相关协议中明确许可费的上限。该许可费上限不应明显超过专利纳入相关标准前的许可费水平。标准制定机构可能希望在标准发布之前，鼓励参与的专利持有人在自愿的基础上明确其按照互惠原则，同意对标准采纳的必要专利授予许可的主要条件（包括最高价格、期限以及使用领域）。⁴⁶

I. 第 24 条 著作权集体管理组织的行为

第 24 条明显具有确保著作权集体管理组织（CMOs）合理运行的目的，尤其是在确保透明性、可归责性和良好管理方面，对此，各部门表示赞赏。然而，各部门注意到指南草案允许对 CMOs “（一）没有正当理由，收取过高的代理费或许可费” 进行干预，此条款类似于第 16 条禁止 “以不公平的高价许可知识产权” 的规定。各部门在第 16 条中对于该方面的意见同样适用于第 24 条。而且，在 CMO 所代表的著作权人个体仅拥有很小的市场力量的情况下，国家工商总局也会考虑 CMO 的费用是否存在不合理。各部门担心 CMOs 在其收费合理性问题上可能会受到过多审查，这可能带来处理结果相互冲突的问题。

结论

各部门认可在制定指南过程中已经进行的大量工作，同时也感谢在继续执行、实施反垄断法并就反垄断法问题提供明确指引的过程中，国家工商总局对于我们以及其他相关方意见的考虑。

附录

对国家工商总局关于《禁止垄断协议行为的规定》，《禁止滥用市场支配地位行为的规定》，以及《禁止滥用行政权力排除、限制竞争的规定》的意见的联合评论，2010 年 7 月 2 日

美国律师协会反垄断法部及国际法律部关于国家工商总局《禁止垄断协议和滥用市场支配地位行为的规定》草案的联合评论，2009 年 5 月 29 日

美国律师协会反垄断法部、知识产权法部和国际法律部关于《中华人民共和国反垄断法》建议稿的联合提案，2005 年 5 月 19 日

⁴⁶ 美国反垄断机构和欧盟委员会均承认了该种事前讨论具有促进竞争的潜力。参见 FTC, “认识标准制定中许可使用费商谈所具有的促进竞争的潜力(Recognizing the ProCompetitive Potential of Royalty Discussions in Standard Setting),” (2005 年 9 月 23 日), 见 <http://ftc.gov/speeches/majoras/050923stanford.pdf>; 欧盟委员会第 101 条指南 257-335。各部门建议，就标准所采纳的必要专利的 RAND 许可使用费问题，一种较为合适的衡量方法是以专利技术对产品的价值为基础，排除任何因专利技术被纳入标准而产生的附加价值。

中华人民共和国工商总局《关于知识产权领域反垄断执法的指南》第五稿
指南草案的非官方译本

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF
ANTITRUST LAW, SECTION OF INTELLECTUAL PROPERTY LAW, AND
SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT GUIDE ON
ANTI-MONOPOLY LAW ENFORCEMENT IN THE FIELD OF INTELLECTUAL
PROPERTY RIGHTS**

October 30, 2012

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments on the Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights (the “Draft Guide”) of China’s State Administration for Industry and Commerce (“SAIC”).¹ The Sections appreciate the substantial thought and effort of the SAIC reflected in the Draft Guide, and take the opportunity to offer these comments (the “Comments”) in the hope that they may further assist in the completion of the final Guide. The Sections are available to provide additional comments, or to participate in consultations with the SAIC, as appropriate. The Sections’ Comments reflect their expertise and experience with both U.S. and international competition law, as well as with the underlying economic principles.

Executive Summary

The Sections commend SAIC’s incorporation in the Draft Guide of economic analysis and current thinking on these issues, and offer specific suggestions to provide even clearer guidance and inform enforcement policy.

First, the Sections respectfully urge the omission of Article 17(2), which would for the first time expressly extend the essential facilities doctrine to intellectual property rights (“IPRs”). This provision is in tension with WTO obligations and international norms. At the very least, the Sections urge that the provision be revised to create a strong rebuttable presumption against an essential facilities claim involving IPRs, and to require a showing that the competitor seeking access cannot practically or reasonably work around the IP, and that access would further the legitimate interests of consumers.

¹ These comments are based on an unofficial translation of the Draft Guide. The Draft Guide and the unofficial translation are appended for reference.

Second, the Sections recommend replacing unnecessarily broad prohibitions and onerous and difficult to prove requirements with standards that comport with the “rule of reason” standard that is the default mode of analysis in other jurisdictions. For example, Article 19 prohibits all exclusive grantbacks by companies with a dominant market position without any exception for potentially procompetitive grantbacks. The Sections respectfully suggest revising this article to bring it into conformity with international norms.

Lastly, the Sections suggest a number of clarifications. For example, Article 12 provides useful guidance on market share levels that create safe harbors from antitrust scrutiny. However, as written, Article 12 could be interpreted as creating a presumption of market power for market shares that exceed the stated thresholds. The Sections respectfully suggest Article 12 be augmented by a sentence clarifying that “market shares above the thresholds will not necessarily be presumed to indicate market power,” and that rather “such determination will be made according to the specific circumstances of the market structure, the competitive situation, and evidence of anticompetitive effects, as stated in Article 9.”

I. Article 17. Refusal to License Intellectual Property Rights

Article 17 begins with the general principle that unconditional or non-discriminatory unilateral refusals to license IPRs are “normally” permissible. The Sections agree with (and welcome) this general statement, which is consistent with both U.S. law and international norms.² The Sections, however, respectfully urge the deletion of the proposed exception to the general rule found in Article 17(2) for essential facilities.³ China’s Anti-Monopoly Law (the “AML”) does not include any reference to the essential facilities doctrine, nor does it define “abuses” of IPRs. Article 4(5) of the SAIC Rules on Prohibition of Abuses of Dominant Market Positions (“Rules on Dominant Market Positions”) prohibits unconditional refusals to deal by dominant firms where “the product or service” is an essential facility, but it does not address whether the doctrine applies to the application of IPRs. Article 17(2) would, for the first time, expressly extend the essential facilities doctrine to IPRs.⁴

The Sections’ prior comments recommended that the essential facilities doctrine be deleted in its entirety from the AML and implementing regulations. At the very least, the Sections urged, it should be “made clear that the Essential Facilities Doctrine does not apply to

² E.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C45) ¶ 75 at 7; ABA SECTION OF ANTITRUST LAW, ANTITRUST ISSUES IN INTERNATIONAL IP LICENSING TRANSACTIONS at 2 (2012) (“The laws of most jurisdictions are consistent in providing that the majority of arrangements relating to the licensing of (or refusal to license) intellectual property do not violate competition laws.”).

³ The Sections respectfully suggest that the SAIC also consider limiting Article 17(1) to situations where a holder of standard-essential patents (“SEPs”) violates a commitment to a standard setting organization (“SSO”) to license those patents under reasonable and nondiscriminatory (“RAND”) terms.

⁴ The Sections assume that the reference to Article 16 in the first sentence of Article 17 means that the dominant market position implicated in Article 17 was achieved through the IPR that the holder has refused to license.

IPR at all or only in extraordinarily limited circumstances.”⁵ The Sections are unaware of any developments since their earlier comments that support a change. This is because the very “essence” of an IPR is the right unilaterally to exclude.⁶ With limited exceptions, China’s intellectual property laws expressly authorize intellectual property holders unilaterally to refuse to provide their inventions and works to others.⁷ Applying the essential facilities doctrine to IPRs would substantially impinge upon IPR holders’ core right (the unilateral right to exclude), create disincentives for competitors to develop their own competing IPR, and create long-term disincentives to innovate in general.⁸

⁵ 2005 Comments on the Proposed Anti-Monopoly Law of the People’s Republic of China, at 18-19, 21 (“2005 Comments on the AML”), available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf; see also July 2, 2010 Joint Comments on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements, of Abuse of Dominant Market Position and of Abuse of Administrative Powers (“2010 Comments”) at 5, 10-11, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_sil_saic.authcheckdam.pdf; May 29, 2009 Joint Comments on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position (“May 2009 Comments”) at 10, 35-36, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_saic_200906.authcheckdam.pdf. Copies of these Comments are appended for convenience of reference.

⁶ See, e.g., *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980) (“[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention.”); *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (“[A] copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.”).

⁷ Patent Law of the PRC Art. 11. Moreover, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) grants owners of patents and trade secrets exclusive rights that are subject only to certain very limited exceptions.

⁸ In formulating a test for refusals to deal, it is a mistake to focus solely on static efficiency (the impact of the refusal to license upon competition with the specific IP owner at issue) because this would ignore the long-term effects upon incentives to innovate. J. Thomas Rosch, *The Role of Static and Dynamic Analysis in Pharmaceutical Antitrust* (Feb.18, 2010) (“These static costs may be justified when the promise of a patent helps motivate the investment in (or disclosure of) an invention. It is generally accepted that patents motivating invention (or disclosure) generate more dynamic efficiencies than static losses.”), at <http://www.ftc.gov/speeches/rosch/100218pharmaantitrust.pdf>; Donald F. Turner, *Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights*, 53 *Antitrust L.J.* 485, 485 (1985) (“[I]n the long run, technological progress contributes far more to consumer welfare than does the elimination of allocative inefficiencies caused by noncompetitive pricing.”); *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1186 (1st Cir. 1994) (“exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system”); *id.* at 1186-87 (“Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression. We cannot require antitrust defendants to prove and reprove the merits of this legislative assumption in every case where a refusal to license a copyrighted work comes under attack.”) (internal citation omitted); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1209 (2d Cir. 1981) (holding that imposition of antitrust liability for an arguably unreasonable refusal to license a lawfully acquired patent “would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system”). Indeed, the possibility of such intervention can weaken or stifle an undertaking’s ex ante incentive to innovate and invest in intellectual property. This is because the incentive to invest is highly dependent on the expected value of the intellectual property, or the rents that the undertaking expects to extract from its investment. The introduction of a novel product, even subject to significant market

In the experience of the Sections' members, a facility is rarely truly essential, and it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to compete around the facility, with resulting benefits to consumers. This is particularly true in fast moving technologies, where technological and market developments can present multiple opportunities to work around a competitor's IP, and it is relative easier to work around an IPR as compared to physical infrastructure. Recognizing these concerns, the United States Supreme Court has made it clear that it will treat so-called "essential facilities" claims with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.⁹ The Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*¹⁰ explained that the exception recognized by the Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*¹¹ was "at or near the outer boundary of Section 2 liability,"¹² and stated that the Court had "never recognized" the doctrine of essential facilities.¹³

If Article 17(2) is retained, it should be revised to include a strong rebuttable presumption against an essential facilities claim involving IPRs. In that case, the Sections further recommend revising Article 17(2) to require proof that (1) the competitor seeking access cannot practically or reasonably work around the IP, and (2) compelled access would further the legitimate interests of consumers. These revisions would bring Article 17 closer to international norms and more clearly consistent with SAIC's Rules on Dominant Market Positions.¹⁴

power, can represent a gain to society, and is the underlying rationale of the U.S. patent system. Since social return to invention significantly exceeds private return, the monopoly profit expected from innovation creates the incentive for firms to undertake risky investments to provide the gain to society. Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 ANTITRUST L.J. 659, 672-73 (2001); Charles I. Jones & John C. Williams, *Measuring the Social Return to R&D*, 113 Q.J. ECON. 1119 (1998).

⁹ *E.g.*, *Trinko*, 540 U.S. at 408.

¹⁰ *Id.*

¹¹ 472 U.S. 585 (1985).

¹² *Trinko*, 540 U.S. at 409-10.

¹³ *Id.* at 411. In fact, the U.S. Court of Appeals for the Federal Circuit, which specializes in intellectual property, has stated that there is "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent." *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000). *See also* Dawson Chem. Co. , 448 U.S. at 215 ("Compulsory licensing is a rarity in our patent system."); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (ANTITRUST ENFORCEMENT AND IPR) at 32 (2007) ("[A]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."). Economics also cautions against government intervention where large efficiencies could be lost, and that the potential difficulty in identifying a competitive harm by theory alone means one must turn to a quantitative analysis before condemning a practice. *See, e.g.*, Carlton, *supra* n.11, at 672-73. Indeed, because a unilateral and unconditional refusal to license is a core right contemplated expressly by the specific statutes creating IPRs, it should be virtually inconceivable that the essential facilities doctrine can be applied to IPR under competition law.

¹⁴ For example, the European Court of Justice has compelled access to IPR only in "exceptional circumstances," involving extremely broad IPR grants over data, and where strict limitations have been met—and never in a

II. Unnecessarily Broad Prohibitions and Onerous or Difficult to Prove Requirements

A. Article 11. Assessment of the impact of exercising intellectual property rights on competition

Article 11 appears to elaborate on Article 7(6), which requires enforcement agencies to analyze whether an “undertaking exercises intellectual property rights in a way which eliminates or restricts competition in the relevant market, conducting further analysis as to the positive effects brought about by the behavior and whether the positive effects outweigh the adverse effects caused by eliminating or restricting competition in the relevant market.” The Sections commend the SAIC for its willingness to carefully weigh procompetitive effects that may offset any possible adverse impact of the exercise of IPRs.

However, while Article 11 details the criteria for establishing whether the exercise of an IPR is efficient, it is less clear regarding the practices that may be viewed as eliminating or restricting competition, or what evidence is necessary to show an adverse effect on competition. By referring to “acquisitions of IPR or exclusive license . . . [and] cross licensing agreements,” as well as to “refusing to license intellectual property” and “controlling key technology,” Article 11 seems to suggest that these common IPR activities are means of eliminating or restricting competition. This appears to presume adverse effects from such activities, unless factual evidence of procompetitive effects can be produced.

The Sections suggest that Article 11 be clarified and aligned with Article 7(6), by requiring the anti-monopoly enforcement authority investigating the practice to collect and evaluate evidence of anticompetitive effects of the conduct being examined that can be weighed against procompetitive effects, without any presumption that the practice is anticompetitive. The legality under Article 11 of a restriction in an IP license should depend on whether the provision restrains competition that would have occurred in the absence of a license.¹⁵ None of the listed types of conduct is anticompetitive in itself; rather, there is a potential for adverse effect (as with any exercise of IPRs) depending upon the market power of the parties, nature and scope of the license, and the IPR involved, as well as other factors described in Article 10. Cross-licensing, for example, can enhance competition by allowing competitors to build upon one another’s

patent licensing context. *E.g.*, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, All ER (EC) 813 (2004) (compelled access may be granted only where: the IPR is indispensable to compete in the market and there are no feasible alternatives; there is an upstream market for the supply of the IPR; the party seeking access proves that it either intends to sell a new product for which demand exists, or to supply a different market; and the refusal would exclude all competition in the secondary market). The application of the doctrine only in such exceptional circumstances warrants, in the view of the Sections, consideration both as to whether it should be applied at all in the context of IPR and as to whether, if it is to be applied, all the criteria should be applied as well to ensure that even dominant market undertakings are not readily and unfairly compelled to license their IPR.

¹⁵ U.S. Dep’t of Justice and Federal Trade Commission, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.1.2 (1995) available at <http://www.justice.gov/atr/public/guidelines/0558.pdf> (U.S. IP GUIDELINES).

innovations. If the cross-license is between competitors with substantial market power and is exclusive such that it amounts to an agreement between the parties not to license any other market participants, it is possible that the cross-license could have an adverse effect, but evidence of such effect should be required. In addition, it may be helpful to cross-reference some of the specific types of conduct set forth in Article 11 to the section of the Guide that elaborates on the circumstances under which such conduct may have an adverse effect on competition, such as those practices listed in Article 16 and Article 17 for refusals to license.

The Sections also believe that, as written, it may be difficult to apply two of the enumerated criteria to determine whether the beneficial effects of the proposed efficiency may be credited against any adverse impact. First, the requirement in Article 11(2) that the conduct at issue must be “indispensable towards producing the efficiency” is too high a standard. It will be extremely difficult in practice to determine whether a given exercise of an IPR is literally “indispensable.” Determining the “indispensability” of a given practice will require the SAIC to engage in the speculative search for a theoretically least restrictive alternative that may not be realistic in the practical business situation faced by the IPR holder. The Sections agree that if the IPR holder could clearly achieve the claimed efficiencies by significantly less restrictive means, then the SAIC should not give weight to the efficiency claim. On the other hand, there are practices that have procompetitive effects in some cases, such as bundled package licenses, that may not be literally “indispensable.” The IPR holder should not be “required to consider hypothetical and theoretical alternatives” to justify its conduct in such cases.¹⁶ Moreover, the evaluation of procompetitive efficiencies, and of the reasonable necessity of a restraint to achieve them, may vary based on the IPR holder’s specific market context. For example, “a restraint that may be justified by the needs of a new entrant . . . may not have a procompetitive efficiency justification in different market circumstances.”¹⁷

Therefore, the Sections propose replacing the term “indispensable” with the phrase “reasonably necessary.” This standard would comport with the “rule of reason” standard that is the default mode of analysis in other jurisdictions to analyze whether a business practice is anticompetitive. The U.S. antitrust enforcement agencies generally consider only whether “practical, significantly less restrictive means were reasonably available when the agreement was entered into.”¹⁸

¹⁶ Commission Notice on Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements ¶ 149 (2004) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF> (“Commission Notice”). See also, U.S. IP Guidelines § 4.2 (“[T]he Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.”).

¹⁷ U.S. IP Guidelines § 4.2.

¹⁸ FTC and U.S. Dep’t of Justice, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS at 9 (2000). See also, U.S. IP Guidelines § 4.2. Another alternative is to create a sliding scale that requires a closer link between the conduct and the purported efficiency in cases where the anticompetitive effect is clear. Such a standard would be analogous to the U.S. antitrust enforcement agencies’ approach to evaluating efficiencies in the merger context. See U.S. Dep’t of Justice and FTC, *Horizontal Merger Guidelines* at § 10 (2010).

Second, the requirement in Article 11(3) that the efficiency “must be capable of being shared by consumers” will also likely be difficult to administer. Some efficiencies may have direct effects on production costs, while others may have indirect effects, like making innovation easier or more likely. In most cases, efficiencies with direct effects on production costs should have “pass-through” effects on consumer prices but the pass-through effects are often challenging to measure with precision. The value to consumers of efficiencies with indirect effects, such as those that may make innovation easier or more likely, are even more difficult to measure.

Nonetheless, efficiencies that create a reduction in marginal cost generally will be passed on to consumers, even by firms in possession of market power.¹⁹ This is because the new profit maximizing price will be lower when firms face a downward sloping demand curve. Therefore, the Sections propose the deletion of Article 11(3) or a clarification to ensure that all efficiency gains that are likely to lower costs or spur innovation satisfy the test. The substantial likelihood that efficiencies will benefit consumers suggests that it may be a suboptimal use of scarce SAIC resources to impose a stricter test.

B. Article 18. Tying sales involving IPRs

Article 18 of the Draft Guide rightfully recognizes the potential procompetitive benefits of tying.²⁰ However, as currently drafted, the Article may be read to impose a per se prohibition on all tying arrangements that meet the four criteria listed in its last paragraph, without considering their procompetitive benefits nor requiring them to have the effect of harming competition. Because of the possibility for efficiencies, the U.S. enforcement agencies have concluded that they would, in the exercise of their prosecutorial discretion, prosecute tying involving IPRs only where the arrangement has an adverse effect on competition in the market for the tied product and the efficiencies of the arrangement do not outweigh its anticompetitive

¹⁹ Efficiencies that result in a reduction in fixed costs may also have a direct effect on prices. For example, a reduction in fixed costs can lower a firm’s long run marginal cost, allowing the firm to profitably maintain low prices in the long run. Moreover, “fixed cost” savings are resource savings to the economy and benefit society. In industries characterized by high levels of R&D and intense competition to innovate, such as computers and telecommunications, fixed cost reductions in R&D expenditure would likely “increase incentives to invest in R&D by lowering the ‘hurdle’ that firms must overcome to realize a profitable opportunity.” Dennis W. Carlton *Revising the Horizontal Merger Guidelines*, 6 JOURNAL OF COMPETITION LAW & ECON. 619, 629-30, 639 (2010). These increased incentives in turn can result in introduction of new or higher quality products and services that can benefit consumer welfare. *Id.*

²⁰ See, e.g., Dennis W. Carlton & Michael Waldman, *Tying*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1717b2, at 185 (2d ed. 2004) (explaining that tying can result in “consumers . . . receiv[ing] greater value for the same expenditure as before the tie”); Marius Schwartz & Gregory J. Werden, *A Quality-Signaling Rationale for Aftermarket Tying*, 64 ANTITRUST L.J. 387, 388 (1996) (“[T]ying can make it profitable to offer high-quality durables if the demand for the complement is sufficiently higher when the durable proves to be of high quality.”).

effects.²¹ The Sections therefore respectfully suggest adding “consideration of the tying’s procompetitive and efficiency effects” to the considerations listed in the last full paragraph of Article 18, and clarifying the third criteria to provide for considering whether “competition in the market of the tied product is adversely affected,” before the four sub-sections that follow. These refinements will confirm that Article 18 is intended to be consistent with the processes set forth in Articles 7 and 11.

C. Article 19. Unreasonable trading conditions involving IPRs

Article 19 defines “unreasonable trading conditions involving intellectual property rights” prohibited by Article 16(4). According to Article 19(1), one such “unreasonable” practice is “to require the counterparty to grant back its improved technology [under sole license] to the IPR holder.”²² There appears to be some ambiguity as to whether the Draft Guide intends to address “exclusive license” grantbacks in Article 19. A grantback is exclusive when it allows only the licensor and the licensee to exercise the IPRs created by the licensee using the licensor’s IPR.²³ The Sections respectfully request clarification on this point. The Draft Guide effectively bans IPR holders with dominant market positions from including such grantback provisions in their license agreements. If the intent is to address exclusive grantbacks, the Sections believe Article 19(1) is an overly restrictive provision that may chill some potentially procompetitive licensing agreements. Therefore the Sections respectfully recommend eliminating Article 19(1) or clarifying that not all exclusive grantbacks are prohibited under the AML or that exclusive grantbacks are prohibited under the AML only after being analyzed in accordance with Articles 7 and 11.²⁴

Grantbacks are clearly procompetitive in many cases. They “provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation.”²⁵ On the other hand, grantbacks can have anticompetitive effects in some cases, e.g., (1) the scope of the grantback extends far beyond the scope of the underlying patent, (2) the grantback is used to conceal or foster a cartel arrangement among the license participants, or (3) the grantback may substantially reduce the licensee’s incentives to engage in research and development and thereby limit competition in innovation markets.

²¹ U.S. IP GUIDELINES § 5.3. In some cases, tying might affect competition in the market for the tying product by discouraging entry. *United States v. Microsoft Corp.*, 253 F.3d 34, 92-95 (D.C. Cir. 2001)

²² Article 21(2) includes a similar prohibition on exclusive grantback provisions in the context of patent pools. The Sections recommend the deletion or modification of that provision in accordance with the discussion in this section.

²³ In some cases, an exclusive grant back requirement may lack a “flow through” provision and therefore also restrict the licensee’s use of the improvement.

²⁴ The Sections understand that laws and provisions other than the AML and other policy considerations may limit the use of exclusive grantbacks, and do not address those factors in these Comments.

²⁵ U.S. IP Guidelines § 5.6.

It is generally accepted that non-exclusive grantbacks are more likely to be procompetitive than exclusive grantbacks because the latter may chill the incentive and the ability to innovate.²⁶ However, exclusive grantbacks are not necessarily anticompetitive.²⁷ They are potentially procompetitive, including because they may “ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology.”²⁸ For example, exclusive grantback provisions that also include a “flow through” provision enabling the licensee to use the improvement IPR are more likely to be procompetitive than grantbacks that lack such a provision.²⁹ The Sections believe the SAIC should measure an exclusive grantback’s potential to chill innovation against the “but for” world; in other words, the SAIC should consider the amount of innovation that would have occurred in the absence of the licensing restraint. A broad *per se* prohibition on exclusive grantbacks will unnecessarily chill innovation without a countervailing increase in consumer welfare.³⁰

Article 19(3) prohibits agreements that “limit the counterparty, after the expiry of the term of the license agreement, from manufacturing, using, or selling competing goods or using competing technologies”. While a general prohibition on manufacturing, using, or selling competing goods and/or technologies following the expiration of a license agreement is potentially anticompetitive, a narrower prohibition on manufacturing, using, or selling competing goods or technologies that infringe licensed IPR is not. Indeed, that is the fundamental effect of a term license (that presumably terminates before the expiration of the IPR): after expiration of the term, the licensee no longer has the right to use (or infringe) the IPR. The Sections suggest that Article 19(3) be amended to make clear that term licenses are not prohibited, and that enforcing IP rights against an undertaking that manufactures, uses, or sells competing goods or technologies that infringe the licensor’s IPR after expiration of the license agreement is not deemed anticompetitive.

D. Article 23. Technical measures for copyright protection

The Sections commend the SAIC for recognizing the longstanding principle that market power cannot be presumed from the mere existence or exercise of exclusive rights by a copyright owner, and that the exercise of such rights alone does not warrant government

²⁶ See, e.g., 1 Hovenkamp et al., IP AND ANTITRUST § 25.3, at 25-6 to 25-7.

²⁷ See, e.g., *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947) (exclusive grantback provision was not *per se* unlawful).

²⁸ *Int’l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043, 2007 U.S. Dist. LEXIS 89947, at *7 n.18 (C.D. Cal. Oct. 29, 2007) (quoting U.S. IP GUIDELINES § 5.6 at 30). See also *Santa Fe-Pomeroy, Inc. v. P&Z Co.*, 569 F.2d 1084, 1102 n.34 (9th Cir. 1978) (“In relation to the licensee the licensor is entitled to some protection for its original investment in research and . . . a grantback is a reasonable device through which to seek such protection”).

²⁹ See, e.g., *Hull v. Brunswick Corp.*, 704 F.2d 1195, 1201-02 (10th Cir. 1983) (refusing to hold exclusive grantback clause with provision for flow-through at no additional royalty illegal *per se*).

³⁰ In the U.S., courts require proof that the effect of an exclusive grant back is anticompetitive. See, e.g., *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*; *Hull v. Brunswick Corp.*

intervention. It is important that the final Guide clearly reflects this principle and does not create mandates, or mandated restrictions, on the use of technical measures that are necessary to enable the exercise of copyright in the digital environment. It is also critical that the final Guide does not result in China breaching its international obligations (e.g., under the WIPO Copyright and Performances and Phonograms Treaties). With respect to the last paragraph of Article 23, the Sections suggest that the appropriate standard is whether the particular technical measure has an unreasonable adverse effect on competition. If the particular technical measure does not have an unreasonable adverse effect on competition, then it is irrelevant whether there are alternative methods that have less impact on competition. Moreover, if the primary effect of the particular technical measure is to protect a copyright, the Sections believe that its effects on competition should not be considered unreasonable.³¹ Lastly, the Sections note that the Draft Guide may place the SAIC in the position of regulating technical measures generally, and recommend against this approach.³²

III. Clarifications

A. Catchall Provisions

The Draft Guide creates several catchall categories under which the enforcement agencies may prohibit “other acts.” For example, Articles 13(6) and 14(3) prohibit “other monopoly agreements confirmed as such by the [enforcement authorities] as abusing intellectual property rights” (“IPRs”); Article 16 prohibits “other acts of abuse of dominant market positions mainly formed by [IPRs] confirmed as such by the [enforcement authorities]”; and Article 19 prohibits imposing “any other unreasonable trading conditions as identified by the [enforcement authorities].” The Sections respectfully request that the SAIC provide guidance as to the specific factors that will be considered under these catchall provisions.

B. Relevant Market in Which There is Dominance and Abusive Conduct Relating to IPRs

Commendably, Articles 9 and 16 clarify that possession of an IPR alone does not create a presumption of dominance, and the enforcement agencies will only investigate where the IPR constitutes “an important and even crucial factor for an undertaking to gain market dominance.” The Sections respectfully request further clarification throughout the Guide that conduct relating to IPRs that constitute an abuse of dominant market position must be conduct that both abuses the IPR and is in a market in which that IPR is the source of the dominant market position. For example, a business that is dominant in a given product market in which IPR is “important” as provided in Article 9 should be permitted to refuse to license its IPR under Article 17 if it is not dominant in the relevant technology market.

³¹ A preferable approach may be to delete entirely the last paragraph of Article 23, and to incorporate the second paragraph of Article 23 into Article 18.

³² The Sections also suggest that the SAIC consider the proposed amendment to the Copyright Law currently under consideration by the National Copyright Administration of China, which includes a chapter dedicated to protecting technical protection measures.

C. Elements of Prima Facie Anticompetitive Conduct Relating to IPRs

The Draft Guide in Article 3 appears to make it clear that abuse of IPR may infringe the AML only if it also eliminates or restricts competition. The Sections fully support that approach. Both elements should be required for a prima facie case of anticompetitive conduct under the AML: the conduct must be abusive (it is insufficient for the undertaking to be dominant) and the effect of the conduct must be to eliminate or restrict competition. It is not enough merely that a dominant entity engage in conduct relating to IPR that restricts competition, as the natural effect of the exercise of intellectual property rights will be to limit competition. The fundamental underpinning of IPR is the ability to exclude others from using them. Rather, the conduct must be abusive of IPR in some fashion. However, the Draft Guide also appear to suggest in several provisions (e.g., Article 2), that analysis is required where the undertaking's conduct relating to IPR *either* abuses intellectual property rights *or* eliminates or restricts competition. The Sections therefore respectfully suggest that the final Guide further clarify that the conduct relating to IPR that infringes the AML must be abusive of IPR and its effect must be to eliminate or restrict competition.

D. Article 7. General Steps of Analysis of IPR AML Enforcement

The Draft Guide in Article 6 recognizes that IPRs, in and of themselves, are under the purview of authorities other than the anti-monopoly enforcement authorities. Article 7's sub-sections appropriately apply only to evaluating the *exercise* of IPRs, not their validity. Similarly, in the U.S. (except in very limited circumstances such as where an IPR may have been obtained through fraud on the Patent Office)³³ the validity of IPRs is not under the purview of the antitrust agencies, but rather determined by the U.S. Patent and Trademark office and the courts. Antitrust agencies evaluate only the effects of exercises of IPRs on competition.³⁴ In addition, U.S. patents, trademarks, and copyrights also enjoy an explicit statutory presumption of validity.³⁵

Consistent with the "exercise" language of Article 7's sub-sections, the Sections therefore suggest that the preamble of Article 7 be revised to clarify that the anti-monopoly enforcement authorities "will presume any underlying IPRs are valid unless there is evidence that the IPRs were obtained from the IPR authorities through fraud or deceit or that the IPR holder has knowledge that the IPR is invalid, and generally take the following steps." However, to the extent that IPRs may have been obtained from IPR authorities without specific examination for validity, the Guide might provide that the presumption of validity may not apply. A clarification of the presumption of validity would also assist in delineating the

³³ *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979)..

³⁴ See U.S. IP GUIDELINES §§ 1.0, 2.0; ANTITRUST ENFORCEMENT AND IPR at 1-13.

³⁵ See 35 U.S.C. § 282; *Microsoft Corp. v. i4i LP*, 564 U.S. ___, 131 S. Ct. 2238, 2245 (2011) (presumption of validity of patents); 15 U.S.C. §§ 1057(b), 1115(a); *Zobmondo Ent. v. Falls Media*, 602 F.3d 1108, 1113-14 (9th Cir. 2010) (presumption of validity of trademarks); 17 U.S.C. § 410(c) (presumption of validity of copyrights).

jurisdictional boundaries of the anti-monopoly enforcement authorities vis-à-vis other authorities and the courts.³⁶

E. Article 12. Impact of the Relationship Between Undertakings and Their Market Positions on Competition Analysis

Article 12 provides useful guidance on market share levels that would afford undertakings safe harbors from antitrust scrutiny. However, taken literally, Article 12 can be interpreted to suggest that undertakings whose market shares exceed the thresholds will be presumed to possess market power. Such an interpretation is inconsistent with the Recommended Practices of the International Competition Network,³⁷ and the Sections assume it does not reflect the SAIC's intention. Hence, the Sections respectfully suggest Article 12 be augmented by a sentence clarifying that "market shares above the thresholds will not necessarily be presumed to indicate market power," and that rather "such determination will be made according to the specific circumstances of the market structure, the competitive situation, and evidence of anticompetitive effects, as stated in Article 9."

Additionally, Article 12(2) refers to "at least two other undertakings in the relevant market possessing alternative intellectual property rights." Since such "alternative intellectual property rights" can include IPRs of poor quality, poor functional alternatives, and/or may entail high switching costs, the SAIC may want to consider replacing that phrase with "closely substitutable intellectual property rights."

Finally, the third paragraph of Article 12 does not clearly identify the type of market upon which the safe harbor will be determined, unlike guidelines in the U.S. and other jurisdictions that focus primarily on goods markets.³⁸ Since under Article 8, the relevant markets can be either technology markets or product markets comprising specific intellectual property rights, it would be helpful to clarify whether Art 12's safe harbor limits will be calculated by reference to goods markets only or potentially also by reference to technology markets.³⁹

³⁶ The fact that the anti-monopoly enforcement authorities may generally presume the validity of IPRs unless they are procured through fraud or deceit does not preclude validity challenges in other fora under other laws.

³⁷ See ICN Unilateral Conduct Working Group, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS, Section V ("Possession of a market share outside the safe harbor is generally necessary but insufficient for finding dominance/substantial market power") available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf>.

³⁸ See U.S. IP GUIDELINES § 4.3; Competition Commission Singapore, Guidelines on the Treatment of Intellectual Property Rights, 2007, ¶ 3.17; Japan Fair Trade Commission, Guidelines for the Use of Intellectual Property under the Antimonopoly Act, part 2(5).

³⁹ The EU potentially calculates safe harbors in the IPR context also by reference to technology markets. See EU Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, 2004 (C101/02), ¶ 9. Furthermore, SAIC may want to refer to technology markets only where market shares for goods cannot be calculated (see U.S. IP GUIDELINES §4.3), or when the analysis of the product market alone would not adequately address the effects on competition among technologies or in R&D (see Competition Commission Singapore, Guidelines on the Treatment of Intellectual Property Rights, 2007, ¶¶ 3.18-3.20).

F. Article 16. Abuse of Dominant Market Position Achieved Largely Through IPRs

Article 16(1) prohibits “licensing intellectual property rights at unfairly high prices.” As the Sections have indicated in previous comments, requiring the use of “fair” or “reasonable” pricing, and prohibiting “high” or “low” pricing, is “inconsistent with accepted norms of competition policy and modern economic theory, and raise the prospect of the use of the law to punish aggressive competition, directly contrary to the accepted purpose of competition laws.”⁴⁰ In general, we believe that competition policy should not prohibit a monopolist from charging the highest prices that it can obtain for its products and its IPRs. It is axiomatic that the “charging of monopoly prices, is not only not unlawful; it is ... what attracts ‘business acumen’ . . . ; induces risk taking that produces innovation and economic growth.”⁴¹ That is especially so in the case of IPR, the very purpose of which is to induce investment in risky and costly R&D. To achieve a balance between innovation and protection of competition, therefore, monopoly prices should only be unlawful if they result from other unlawful conduct. The lack of clarity here raises several important issues in the IPR context.

First, IPRs are unlike commoditized products. It may be possible to determine whether a high price for some commodities is “unfair” by calculating the amount the charged price exceeds the competitive price by analyzing the firm’s cost-price ratio; this method is used in the EU in the very rare cases that its excessive pricing prohibitions is invoked.⁴² In the IPR context, however, it is difficult—and in many cases impossible—to compare prices among different licenses because IPRs are usually highly differentiated products. Moreover, the incremental cost of licensing IPR is almost always close to zero, so that a cost-price ratio may be meaningless. Even if one could analyze the costs of developing an IPR, there is no framework to provide an adequate definition of an “unfair” price in the IPR context. Therefore, IPR holders will face significant uncertainty in determining whether their licensing practices violate the Draft Guide.

Second, prohibiting “licensing intellectual property rights at unfairly high prices” may ultimately have the unintended effect of imposing compulsory licensing in inappropriate situations.⁴³ As AML Article 55 recognizes, the exercise of an IPR that is lawful under China’s IPR laws is not to be interfered with; rather, other IPR-related conduct is typically only prohibited where it “eliminate[s] or restrict[s] market competition.” As noted, in Section I, above, the right to exclude is a core element of an IPR. The “unfairly high prices” standard may effectively bar firms from recouping their investments in innovation and compensation for the

⁴⁰ 2005 Comments on the AML at 2, 17-18.

⁴¹ *Trinko*, 540 U.S. at 407.

⁴² See, e.g., *United Brands Company and United Brands Continental B.V. v. Commission of the European Communities*, Case 17/76 E.C.R. 207 (1978).

⁴³ Competition law may play a limited role in regulating IPR prices insofar as it is necessary to remedy fraudulent or deceptive practices by IPR owners. This is different, however, from imposing price controls on IPR licensing in general, which is the practical effect of Article 16(1).

substantial risks they assumed in making the investment. Furthermore, prices that are *not* high are not necessarily indicative of healthy competition. Finally, determining whether IPR prices are too high or low based on some measure of marginal cost is particularly tenuous, since, as noted above, the marginal cost of licensing an additional unit of intellectual property is zero or very close to zero in many cases.

G. Article 21. Patent Pools

Article 21 rightfully recognizes that patent pools “may have a positive effect on promoting the integration of complementary technologies, reducing transaction costs” and other factors. Patent pools that allow for independent licensing of the patents in the pool are unlikely to be anticompetitive. However, Article 21 also states that “patent pools may eliminate or restrict competition, therefore anti-monopoly analysis is required to determine such effect.” The Sections would welcome clarification on the circumstances in which patent pools will be subject to an anti-monopoly analysis.⁴⁴

H. Article 22. Exercising Patent Rights During Formulation and Implementation of Standards

Article 22 sets forth what appears to be a four-part test for determining when conduct associated with the formulation and implementation of standards may constitute a violation of the AML. The Sections respectfully recommend three clarifications.

First, the Sections recommend clarifying that the four elements listed in Article 22(1)-(4) are presented in the conjunctive. This clarification can be accomplished by inserting the word “and” in between the third and fourth elements and adding the following sentence after the fourth element: “All four elements are required in order to establish a violation of the AML.”

Second, we recommend clarifying that there is no general duty to disclose in the standard setting context. As drafted, the provision could be interpreted as imposing an implied duty to disclose where no such duty exists under U.S. law or international norms.⁴⁵ The Sections therefore recommend adding the following clarification:

Article 22. However, behavior conforming to the following conditions may be a violation of the AML ... (2) (a) the patent holder or patent applicant is an active voting participant in a

⁴⁴ See, e.g., U.S. IP Guidelines §5.5.

⁴⁵ See, e.g., *Rambus Inc. v. FTC*, 522 F.3d 456, 464-67 (D.C. Cir. 2008); *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1013 (Fed. Cir. 2008) (determining whether a patent holder has a duty to disclose such that it has impliedly waived its right to assert its patent, depends on whether the patent holder participated in the SSO, whether the SSO’s written policy imposed any disclosure obligations, and, if so, the scope of such disclosures); *Dell Computer Corp.*, 121 F.T.C. 616 (1996) (complaint and consent order); EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01) at ¶¶ 268, 299 [EC’s Article 101 GUIDELINES], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

~~standard setting organization (“SSO”);—fails to disclose relevant information of its patent or already publicized patent application information in accordance with the policy prescribed by the standard setting organizations or authorities (b) the SSO has a published written policy that creates certain disclosure obligations as a condition of participation; (c) the patent holder or applicant fraudulently or intentionally breaches the SSO’s disclosure obligations; (d) after adoption of the standard, the patent holder asserts its essential patents against implementers of mandatory portions of the standard; (e) but for the patent holder’s or patent applicant’s failure to disclose, a different technology would have been incorporated into the standard; and (f) the patent holder’s conduct causes or is likely to cause an adverse effect on competition in the relevant market.~~

Third, the Sections urge the following revision to the last paragraph of Section 22:

~~When the patent holder’s patented technology is included into national or industrial mandatory standards the patent holder should clearly state the upper limit of the license fee in the relevant agreement, and the license fee caps should not be significantly higher than the fee level before such technology is included in the standard. The standard setting body may wish to consider encouraging, on a voluntary basis and prior to the issuance of a standard, the participating patent holders to state the key terms (including maximum price, duration, and field of use) upon which the patent holders agree to license, subject to reciprocity, their essential patents that are incorporated into a standard.~~⁴⁶

I. Article 24. Acts of Copyright Collective Management Organizations

The Sections commend the apparent intent of Article 24 to ensure the fair operation of copyright collective management organizations (“CMOs”), in particular to ensure transparency, accountability and good governance. The Sections note, however, that the Draft Guide would allow intervention against CMOs for “(1) charging excessively high agency fees or license fees without justification” similar to the prohibition in Article 16 against “licensing IPR at unfairly high prices.” The Sections’ concerns regarding Article 16 in this regard apply equally to Article 24. Moreover, where individual copyright holders represented by a CMO may have

⁴⁶ Both the U.S. antitrust agencies and the EC have recognized the procompetitive potential of such ex ante discussions. See FTC, “Recognizing the ProCompetitive Potential of Royalty Discussions in Standard Setting,” (Sept. 23, 2005), available at <http://ftc.gov/speeches/majoras/050923stanford.pdf>; EC’S ARTICLE 101 GUIDELINES at ¶¶ 257-335. The Sections suggest that one appropriate measure for RAND royalty for essential patents included in a standard may be based on the value of the patented technology to the product apart from any enhanced value resulting from the fact that the patented technology has been included in the standard.

little market power, the SAIC might also consider whether the CMO fees are inadequate. The Sections are also concerned that CMOs may be subject to multiple reviews regarding the reasonableness of its fees, with the attendant risks of conflicting results.

CONCLUSION

The Sections recognize the substantial work accomplished in developing the Guide, and appreciate the SAIC's consideration of our comments and those of others as it continues with its mission to implement, enforce, and provide clear guidance on the AML.

APPENDICES

Joint Comments on the SAIC Comments on the Regulation on the Prohibition of Acts of Monopoly Agreements, the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position, and the Regulation on the Prohibition of Abuse of Administrative Powers to Eliminate or Restrict Competition, July 2, 2010

Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009

Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, May 19, 2005

Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights of China's State Administration for Industry and Commerce

Unofficial Translation of the Draft Guide