美国律师协会反垄断法分会与国际法分会
就中国修订后的《反垄断法》的五部配套法规征求意见稿的意见

COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON FIVE DRAFT PROVISIONS IMPLEMENTING THE ANTI-MONOPOLY LAW OF CHINA

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本文观点系反垄断法分会和国际法分会之意见，并未经过美国律师协会代表机构或理事会的审查或批准。因此，该意见不应视为美国律师协会的立场观点。

The views expressed herein are presented on behalf of the Antitrust Law Section and International Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

美国律师协会（ABA）反垄断法分会与国际法分会（合称“两分会”）谨就中国市场监督管理总局（“市场监管总局”）关于中国修订后的《反垄断法》（“《反垄断法》”）的五部配套法规征求意见稿的公开征求意见，提交本意见。[1]

The Antitrust Law Section and International Law Section (the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments in response to the public consultation by the State Administration for Market Regulation (“SAMR”) on five draft provisions implementing China’s amended Anti-Monopoly Law (“AML”).[2]

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[1] 关于公开征求《经营者集中审查规定（征求意见稿）》意见的公告（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220624_348144.html）；关于公开征求《国务院关于经营者集中申报标准的规定（修订草案征求意见稿）》意见的公告（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348149.html）；关于公开征求《禁止滥用知识产权排除、限制竞争行为规定（征求意见稿）》意见的通知（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348161.html）；关于公开征求《禁止滥用市场支配地位行为规定（征求意见稿）》意见的通知（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348155.html）；关于公开征求《禁止垄断协议规定（征求意见稿）》意见的通知（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348148.html）。两分会依据该等草案的非官方翻译提出意见，并将意见限于该等草案中对现有规定的修订部分。市场监管总局也发布了关于公开征求《制止滥用行政权力排除、限制竞争行为规定 （征求意见稿）》意见的通知（网址：https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348159.html），但两分会没有对该草案提出意见。

[2] Notice of Public Consultation on Provisions on the Review of Concentrations of Business Operators (Draft for Comments), available at https://www.samr.gov.cn/hd/zjdc/202206/t20220624_348144.html; Notice of Public Consultation on Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators (Draft for Comments), available at https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348149.html; Notice of Public Consultation on Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition (Draft for Comments), available at https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348161.html; Notice of Public Consultation on Regulation on Prohibition of Abuse of Dominant Market Position (Draft for Comments), available at https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348155.html; Notice of Public

反垄断法分会（ALS）是世界上最大的反垄断和竞争法、贸易监管、消费者保护、数据隐私以及反垄断经济学方面的专业组织之一。分会成员包括来自世界各地的律师事务所、企业顾问、非营利组织、咨询公司、政府机构等组织的律师和非律师专业人员以及法官、教授和法学院学生等，总人数超过7,600人。ALS出版涉及反垄断以及相关领域的大量出版物并开展相关研究项目。分会许多成员在美国之外司法管辖区的法律咨询方面拥有丰富的经验和专业知识。近三十年来，ALS向世界各地的执法机构提供专业意见，就专业范围内的相关议题进行法律咨询。[3]

The Antitrust Law Section ("ALS") is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The ALS provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the ALS have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the ALS has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[4]

国际法分会（ILS）专注于国际法问题，促进法治发展，并提供与跨境活动相关的法律教育、法律政策、出版和法律援助等服务。分会成员包括来自于100多个国家的法律从业人员、企业法律顾问、政府律师以及法学学者等，总人数约11,000人。分会下设的50多个委员会涵盖了世界范围内的竞争法、贸易法、数据隐私和数据安全法等法律领域，以及与这些领域交叉的法律领域，如并购和企业合资。自成立的一个世纪以来，ILS一直为与国际法律政策有关的法律讨论提供意见，[5] 特别是在竞争法、竞争政策领域，ILS数十年来一直为世界各地的政府部门提供意见。[6]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover

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Consultation on Regulation on Prohibition of Monopoly Agreement (Draft for Comments), available at https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348148.html. The Sections base their comments on unofficial translations of the drafts, and limit their comments to the revisions the drafts make to the existing measures. SAMR also published for public comment Provisions on Prohibition of Abuse of Administrative Power to Exclude and Restrict Competition (Draft for Comments): https://www.samr.gov.cn/hd/zjdc/202206/t20220627_348159.html. The Sections do not comment on this draft.

[3] 过往评论可以在 ALS 的网站上查阅（网址：https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/ ）。

[4] Past comments can be accessed on the ALS's website at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

[5] 关于两分会政策，见 ABA 网站(网址：https://www.americanbar.org/groups/international_law/policy/about/)。

[6] 过往评论可以在 ILS 的网站上查阅（网址：https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/）。

competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[7] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[8]

概述
Executive Summary

经营者集中
Merger Control

针对《国务院关于经营者集中申报标准的规定（修订草案征求意见稿）》（“《申报标准草案》”），两分会赞同第 3 条提高申报标准的做法，这减轻了不太可能具有反竞争效果的交易的申报负担。同时，两分会谨建议对新增的第 4 条进行修订，改为采用基于交易价值的申报标准，而非基于市值的申报标准，因为交易价值可被客观确定，而非上市公司的市值不容易确定。此外，两分会建议，对于上市公司市值如何确定（特别是支付对价为买方股份的情形）提供指引。

With respect to the Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators (Draft for Comments) (“*Draft Merger Notification Thresholds Provisions*”), the Sections commend the increased notification thresholds in Article 3 that will avoid the burden of notifying transactions unlikely to have anticompetitive effect, and respectfully suggest that new Article 4 be revised to adopt transaction size-based notification thresholds, instead of market valuation-based thresholds. This is because transaction size can be objectively determined, whereas market valuation is not readily available to private companies. In addition, there should be guidance as to how market valuation is determined for public companies, especially in acquisitions paid for by the buyer’s shares.

两分会赞同对《经营者集中审查规定（征求意见稿）》（“《审查草案》”）的拟议修订（第 4、6、22-25 条），该等修订将进一步明确经营者集中审查程序、提高经营者集中审查的质量和效率。

As to the Provisions on the Review of Concentrations of Business Operators (Draft for Comments) (“*Draft Merger Review Provisions*”), the Sections commend the proposed amendments (Arts. 4, 6, 22-25) that further clarify and improve the efficiency and effectiveness of the merger review process.

两分会谨建议，在以下方面对《审查草案》进行进一步修订：

The Sections respectfully suggest that the Draft Merger Review Provisions may be improved in the following ways:

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[7] *About Section Policy*, AM. BAR ASS’N, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[8] Past comments can be accessed on the ILS’s website at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

- 建议进一步修订第 4 条，澄清符合特定条件的纯财务性少数股权投资（即被动投资）不会导致控制权的变化，以增加当事方在确定交易是否需要根据《反垄断法》第四章进行申报时的确定性和可预测性。
  To increase certainty and predictability for parties in determining whether transactions are subject to notification under Chapter 4 of the AML, Article 4 should be further revised to clarify that transactions involving purely financial minority investments (i.e., passive investments) do not result in a change of control.

- 为完善第 6 条引入的分类分级审查制度，两分会谨建议，市场监管总局应采取适当措施，以确保各地方市场监管局（“地方市监局”）受市场监管总局委托进行的案件审查具有一致性和严谨性。此外，两分会还谨建议，市场监管总局澄清，其计划采取何种“审查办法”以及哪些领域会被视为“涉及国计民生”的重要领域。
  To strengthen the tiered merger review system introduced in Article 6, SAMR should include appropriate measures to ensure the consistency and rigor of the review carried out by local administrations of market regulation (“local AMRs”) in delegated cases. Further, clarifications should be provided regarding the “review measures” that SAMR plans to formulate and the sectors that are considered “important to people’s livelihood”.

- 为明确起见，第 7 条和第 42 条中有关市场监管总局可以要求未达申报标准交易进行申报的条款应被合并，或至少在第 7 条中提及第 42 条中的相关条款，规定经营者集中未达到申报标准，但有证据证明该经营者集中具有或者可能具有排除、限制竞争效果的，市场监管总局应进行核查。
  For clarity, the relevant paragraphs of Articles 7 and 42 related to requiring filing of below-threshold transactions should be combined. At the least, Article 7 should include a reference to Article 42, providing that SAMR shall investigate where there is evidence that a below-threshold transaction may be anticompetitive.

- 两分会建议，对市场监管总局要求未达到申报标准的交易进行申报的权限（第 7 条）设定明确的时限 — 可以是从交易完成起一年的时限 — 在能够对不必申报交易是否具有实质竞争损害进行审查的司法辖区，这是比较常见的做法。此外，鉴于不遵守申报规定可能导致的法律后果，为确保当事方能够正确和及时地收到通知，两分会建议，市场监管总局具体说明申报要求的送达方式和接收方。
  The Sections recommend an express time limit to SAMR’s ability to require notification of transactions that do not meet the notification threshold (Art. 7) — perhaps a 1-year limit from the consummation of the transaction — as is common among jurisdictions where non-reportable transactions can be reviewed for substantive harm. Further, SAMR should specify how and to whom a requirement for notification will be communicated to ensure the parties are appropriately and promptly put on notice given the legal consequences that can arise from non-compliance.

- 建议仅由申报人而非其代理人对申报文件、资料的真实性负责（第 14 条和 66 条）。或者，仅在代理人故意隐瞒信息或明知或合理应知申报材料中的信息明显虚假的情况下，代理人才需承担责任。此外，两分会谨建议，对代理人实施的首次处罚应为警告。在任何情况下，该责任（如果有的话）应仅与申报人的文件有关，而不应延伸至申报人提交的第三方资料。
  The truthfulness obligation should only be imposed on the notifying party, but not its agent (Arts. 14 and 66). Alternatively, the agent should be liable only when it deliberately conceals information or knew or reasonably should have known that the information in the filing materials is manifestly false. Moreover, a warning should be a sufficient first sanction to be imposed on the agent. In all events, the obligation should exist – if at all – only as to the party's documents, not to third party materials that the party is submitting.

- 建议对新引入的 "停表"机制（第 22 至 25 条）的适用加以限制，例如规定在一个案件中停表的最长期限及可停表的最多次数。
  There should be a limit to the newly introduced "stop-the-clock" mechanism (Arts. 22 to 25), such as the maximum duration and number of times it could be used in a case.

- 建议从第 55 条的"实施集中"的示例中删除"实际参与经营决策和管理"及"与其他经营者交换敏感信息"，或者在这两项示例中增加"无合理理由"或"无适当的防火墙机制"等限定语，以确保正常的交易流程（例如整合计划）不会违反《反垄断法》申报和审查程序。如在不增加该等限定语的情况下保留该等示例，两分会谨建议市场监管总局引入一项制度，允许当事方申请减免《反垄断法》下的等待义务。
  "Actually participating in business decision-making and management" and "exchanging sensitive information with other business operators" should be deleted from the examples in Article 55 of "implementation of concentration", or qualified for example by "without reasonable justification" and "without appropriate firewall mechanisms", so that normal transaction processes (e.g., integration planning) do not create a violation of the AML notification and review process. If these examples are retained without the suggested qualifiers, the Sections respectfully suggest that SAMR introduce a process that allows parties formally to apply for a derogation from the standstill obligation under the AML.

滥用知识产权
Abuse of Intellectual Property Rights

两分会谨建议，在以下方面对《禁止滥用知识产权排除、限制竞争行为规定（征求意见稿）》（"《滥用知产草案》"）进行修订：

The Sections respectfully suggest that the Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition (Draft for Comments) ("*Draft IPR Abuse Provisions*") be revised in the following ways:

- 建议对第 9 条第 2 款进行修订以明确在哪些情形下进行一揽子许可具有正当理由。
  Article 9(2) should be revised to clarify the circumstances under which package licensing may be justified.

- 如保留第 14 条中有关 “以不公平的高价”许可联营专利的条款，则建议对第 14 条进行修订，以明确该条款不适用于存在某些安全港要素的情况。
  If the provision on the licensing of pool patents at “unfairly high prices” in Article 14 is retained, Article 14 should be revised to clarify that this provision would not be applicable where certain safe harbor elements are present.

- 建议明确第 16 条第 2 款，说明只有在极少数情形下才会认定以“不公平的高价”许可标准必要专利（SEP）。
  Article 16(2) should be clarified to indicate that a finding of a standard essential patent (“SEP”) being licensed at “unfairly high prices” will be made only in rare circumstances.

- 两分会赞同第 16 条第 3 款承认了各方之间应进行善意谈判（包括在 SEP 许可过程中）。但建议删除该款中的禁止具有市场支配地位的 SEP 持有人寻求司法或者其他官方救济的内容，因为该规定具有潜在的域外适用，缺乏对 SEP 持有人和标准实施者权益的平衡，并且前所未有地涉及超越禁令以外的救济。因此，两分会谨建议删除第 16 条第 3 款。
  The Sections commend the recognition in Article 16(3) that there should be good faith negotiations by and between parties, including in the licensing of SEPs. However, the prohibition in Article 16(3) against SEP holders with dominant market position seeking judicial or other official relief should be deleted, because it potentially has extra-territorial reach, lacks balance between the SEP holder and the standard implementer, and has unprecedented breadth beyond injunctions. Therefore, the Sections respectfully recommend that Article 16(3) be deleted.

- 建议在新增第 23 条增加示例来说明在何种情况下，滥用知识产权可以实施经营者集中，而该集中并未作为非法的垄断协议被禁止。
  New Article 23 should be clarified by the addition of an example to illustrate when the abuse of IPR could implement a concentration that would not already be prohibited as an unlawful monopoly agreement.

滥用市场支配地位
Abuse of Dominant Market Position

两分会谨建议对《禁止滥用市场支配地位行为规定（征求意见稿）》（“《滥用支配地位草案》”）中的新增的第 20 条进行修订，以明确（1）具有市场支配地位的平台经营者在给予自身优惠待遇以及利用平台内经营者的非公开数据方面可以主张的“正当理由”包括提高效率；以及（2）给予自身优惠待遇以及利用平台内经营者的非公开数据只有在对竞争产生不利影响的情形下才会构成《反垄断法》下的滥用市场支配地位。两分会

赞同第 35 条中的市场监管总局将指导和监督地方市监局的关键决定的规定，因为这会促进统一执法。

The Sections suggest that new Article 20 of the Regulations on Prohibition of Abuse of Dominant Market Position (Draft for Comments) ("*Draft Abuse of Dominant Market Position Regulation*") be revised to clarify that (1) "justifiable reasons" for platform operators with dominant market positions in self-preferencing and use of non-public data include efficiencies, and (2) self-preferencing and use of non-public data of operators on the platform will be abuse of dominant market position under the AML only if there is an adverse effect on competition. The Sections commend the clarification in Article 35 that SAMR will guide and supervise local AMRs in key decisions, which promotes consistent enforcement.

垄断协议
Monopolistic Agreements

《禁止垄断协议规定（征求意见稿）》（"《垄断协议草案》"）第 8 条中引入了"潜在的竞争者"的概念，建议对什么样的实体会构成潜在的竞争者进行详细定义。两分会谨建议，提高新增第 15 条中规定的安全港的市场份额门槛，且仅合并计算受到共同控制的实体的市场份额。两分会赞同在新增第 16 条中规定申请适用安全港规则的程序，并建议进一步明确，可以在协商相关交易安排之后但在签署协议之前提出该申请。

The introduction of the concept of "potential competitor" in Article 8 of the Regulation on Prohibition of Monopoly Agreement (Draft for Comments) ("*Draft Monopoly Agreement Regulation*") would benefit from more detail regarding what would be a potential competitor. The Sections respectfully suggest that the safe harbor provided in new Article 15 should be a greater market share than 15%, and that market shares should be aggregated only across entities under common control. The Sections commend the establishment in new Article 16 of a process for applying for a determination of a safe harbor and suggest adding clarification that such an application may be made after an arrangement is negotiated but before an agreement is executed.

具体意见
COMMENTS

I、 经营者集中审查
Merger Control

A. 《申报标准草案》
Draft Merger Notification Thresholds Provisions

第 3 条：两分会赞同第 3 条提高集中申报标准的做法，这减轻了市场监管总局和经营者对不太可能具有反竞争效果的交易的申报负担。《反垄断法》第 26 条明确授权调查低于申报标准的交易，这确保了较高的申报标准不会阻碍对具有反竞争效果的经营者集中的调查。同时，由于没有为市场监管总局何时可以行使权力调查未达到申报标准的经营者集中提供明确的指导，这可能给经营者带来法律上的不确定性。

Article 3: The Sections commend the increased thresholds in Article 3, relieving SAMR and parties from the burden of notifications of transactions unlikely to have anticompetitive effects. The express authority under Article 26 of the AML to investigate transactions below the thresholds ensures that the higher thresholds should not deter investigation of anticompetitive concentrations. At the same time, there is a risk of creating legal uncertainty for parties absent clear guidance on when SAMR might exercise its power to investigate transactions below the thresholds.

第 4 条：在第 3 条的基础上，新增第 4 条引入了在中国应进行经营者集中申报的新标准。根据第 4 条，经营者集中在下述情况应进行申报：若（1）其中一个参与集中的经营者上一会计年度在中国境内的营业额超过 1,000 亿元人民币；且（2）其他参与集中的经营者的市值不低于 8 亿元人民币，并且上一会计年度在中国境内的营业额占其全球范围内营业额比例超过三分之一。两分会理解新申报标准的目的是为了捕捉那些价值高、在中国营业额相对较低、交易方在中国境内营业额占其总营业额有相当比重的交易。许多司法辖区（如：奥地利、德国、韩国）也出于类似的目的修改了它们的经营者集中申报标准。[9]

Article 4: New Article 4 introduces a new threshold for notifiable transactions in China, in addition to those in Article 3. Article 4 provides notification will be required if (1) the turnover in China of one of the parties to the concentration exceeds RMB 100 billion in the previous fiscal year, and (2) other parties to the transaction have market valuation equal to or exceeding RMB 800 million and their turnover in China accounted for more than one-third of global turnover. The Sections understand that the purpose of the new threshold is to catch high value but relatively low China turnover transactions involving parties with a substantial share of their turnover in China. Several jurisdictions (e.g., Austria, Germany, South Korea) have revised their merger control thresholds for similar reasons.[10]

确定经营者的市值可能存在困难，特别是对于非上市公司来说。考虑到非上市公司的股份没有“市场”，所以没有现成的 “市值”。股东的估值可能没有参考意义，因为不同的股东的看法可能不同，特别是当股东本身也是非上市公司的时候。非上市公司可以聘请第三方准备一份评估报告，但这可能是一项昂贵且带有主观性的工作。在技术等领域尤其如此，估值取决于未来的收入、利率和未来市场条件这些高度不确定的因素。两分会建议，即使是对于上市公司，也应该对于如何确定市值提供指导，特别是在并购中买方以其股份支付的情形。[11]

Determining the market value of the parties may be difficult, especially for privately held companies. Given that there is no “market” for the securities of privately held companies, there is

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[9] 德国和奥地利的竞争执法机构已经就其新的集中申报标准发布了有帮助的指引。请见（英文）：https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.html?nn=3590380。

[10] The German and Austrian competition authorities have published useful guidance on their new thresholds. They are available (in English) *available at* https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.html?nn=3590380.

[11] 参见，例如《联邦法规汇编》第 16 篇第 801.10 节（网址：https://www.ecfr.gov/current/title-16/chapter-I/subchapter-H/part-801/section-801.10），其中对于如何为美国 1976 年《哈特–斯科特–罗迪诺反垄断改进法案》（“HSR 法案”）（《美国法典》第 15 编第 18a 节）的目的计算有表决权的股份、非公司权益和拟收购资产的价值提供了详细指导。

no readily available "market value." The value ascribed by shareholders may not be useful because different shareholders may have different views on valuation, especially where the shareholders are themselves privately held. A privately held company may retain a third party to prepare a valuation report but that may be a costly and subjective exercise. This is particularly the case, for example, in the technology sector where valuations depend on future revenues, interest rates and future market conditions, which are often highly uncertain. Even in the case of publicly traded companies, the Sections suggest that there be guidance as to how market valuation is determined, especially in acquisitions paid for by the buyer's shares.[12]

另外，以经营者的市值作为申报标准没有考虑到交易的规模，这将使大型企业之间非常小规模的交易也需要进行申报，给市场监管总局带来沉重的负担。

In addition, a threshold based on the market value of the parties does not take into account the size of the transaction and therefore very small transactions between large players would be reportable, which will put a heavy burden on SAMR.

因此，两分会建议市场监管总局考虑将一个经营者集中的"交易价值"而非参与集中的经营者的市值作为申报标准，因为它代表了卖方从买方获得的交易相关的所有股份或其他所有者权益、资产和货币权益。交易价值可能还包括或有付款，如取决于实现某些目标的盈利能力支付计划安排或奖金。[13]

The Sections therefore recommend that SAMR consider using the "transaction value" of a merger, rather than the parties' market value, as the threshold, as it represents the value of all shares or other ownership interests, assets and monetary benefits that the seller obtains from the buyer in connection with the transaction. The transaction value may also include contingent payments such as earn out provisions or bonuses dependent on the achievement of certain targets.[14]

若以交易价值而非市值作为申报标准，未满足第 3 条申报标准的交易在如下情况仍应基于第 4 条申报：

With a transaction value-based threshold instead of a market valuation threshold, transactions that do not meet the thresholds in Article 3 would still be notifiable under Article 4 where:

(1) 交易一方的中国营业额超过 1,000 亿元人民币（第 4 条第（2）款）；
the China turnover of one of the parties to the transaction exceed RMB 100 billion (Article 4(2)),

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12 See, e.g., 16 C.F.R. §801.10, *available at* https://www.ecfr.gov/current/title-16/chapter-I/subchapter-H/part-801/section-801.10 , which set forth detailed guidance on how the value of voting securities, non-corporate interests and assets to be acquired are to be calculated for purposes of the U.S. Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. §18a.

13 一项交易的价值（以及交易各方的市值）在交易宣布到交易交割之间可能会出现波动，例如由于货币波动，或者当交易价格包括公开交易的股票时，股价的波动。因此，两分会建议将交易宣布时或者其他交易时点的交易价值作为申报标准。

14 The value of a transaction (as well as the market value of the parties to the transaction) may fluctuate between the announcement of the transaction and its closing, for example as the result of currency fluctuation or, where the transaction price includes publicly traded securities, share price fluctuations. The Sections therefore suggest that the transaction value at the time the transaction is announced, or during some specified time period, be used as the threshold.

(2) 交易额超过一定的申报标准；
the transaction value exceeds a certain threshold,

(3) 目标公司至少有三分之二的营业额是在中国实现的。
the target achieves at least 2/3 of its turnover in China.

B. 《审查草案》
Draft Merger Review Provisions

第 4 条：经修订的第 4 条增加了确定存在控制或决定性影响的因素，并明确了两个或多个经营者可以对其他经营者实施共同控制。

Article 4: Article 4 is revised to add the factors determining the existence of control or decisive influence and clarify that two or more undertakings may exercise joint control over other undertakings.

两分会赞同市场监管总局对《反垄断法》下确定存在控制以及决定性影响的补充说明，这有助于对交易是否在中国申报进行自我评估。但是，两分会谨建议进一步修订第 4 条，以澄清在涉及符合以下两种情况的纯金融的少数股权投资（即被动投资）的交易中，不被认定为取得控制权：（1）投资者只享有传统的少数股东保护权利（如对破产和解散的否决权）；和（2）拥有股份的百分比不超过一定的标准，如有表决权的流通股的 10%。[15] 此种修改将提高确定交易是否需要根据《反垄断法》第四章进行申报时的确定性和可预测性。

The Sections commend SAMR for the added clarifications on the determination of control and decisive influence under the AML, which will facilitate the self-assessment of reportable transactions in China. The Sections respectfully suggest, however, that Article 4 be further revised to clarify that no control is obtained in a transaction that involves pure financial minority investments in shares (i.e., passive investments) where: (1) the investor enjoys only traditional minority shareholder protections rights (such as veto rights over bankruptcy and dissolution); and (2) the percentage ownership does not exceed a threshold such as 10% of outstanding voting shares.[16] Such a clarification will increase certainty and predictability for parties in determining whether transactions are subject to notification under Chapter 4 of the AML.

第 6 条：根据新增第 6 条，市场监管总局将建立经营者集中分类分级审查制度。另外，2022 年 7 月 15 日，市场监管总局宣布了一项从 2022 年 8 月 1 日开始、为期三年的试点计划，将部分经营者集中简易案件委托给地方市场监督管理局（“地方市监局”）进行审查。

Article 6: New Article 6 provides that SAMR will establish a classified and tiered merger review system. In addition, on July 15, 2022, SAMR announced a three-year pilot program

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15 HSR 法案规定，持有发行人 10%或以下有表决权的流通股的被动投资交易免于申报，无论其价值如何。《美国法典》第 15 编第 18a(c)(9)节；《联邦法规汇编》第 16 篇第 802.09 节。

16 The HSR Act exempts from notification passive investment transactions resulting in holdings of 10% or less of the outstanding voting securities of the issuer, regardless of the value of the holding. 15 U.S.C. §18a(c)(9); 16 C.F.R. §802.9.

beginning August 1, 2022 to delegate the review of certain simple merger cases to local administrations of market regulation ("local AMRs").

两分会赞同市场监管总局为提高经营者集中审查效率所做的持续努力，并希望将审查工作向下委托的分类分级审查制度能够分散市场监管总局的工作量，从而使其能够专注于对重大交易的审查。两分会理解，虽然市场监管总局将对于这些被委托的申报案件作出最终审查决定，地方市监局将负责审查申请材料并形成意见，市场监管总局将基于此作出最终的审查决定。两分会谨建议市场监管总局采取适当的措施（例如提供明确的审查标准和调查的指示性时间表、有效的监督和公众监督），以确保各地方市监局在审查委托案件时的一致性和严谨性。这将有助于确保市场监管总局和申报人不会因向市场监管总局提出复议而负担过重，并且，在市场监管总局没有具体将某些个案委托给地方市监局的情况下，申报人将不能因此获得在各个地方市监局中进行辖区挑选的机会。

The Sections commend SAMR's continued efforts to improve merger review efficiency and hope that the classified and tiered review system allowing delegation will spread the review workload so that SAMR may focus on the review of major transactions. While the Sections understand that SAMR will make the final review decisions in such delegated cases, the local AMRs will be responsible for reviewing filing materials and forming opinions upon which SAMR will issue final review decisions. The Sections respectfully suggest that SAMR take appropriate measures (such as provide clear review standards and indicative timelines for investigations, effective supervision, and public monitoring) to ensure consistency and rigor of the review carried out by local AMRs in delegated cases. This will help ensure that SAMR and notifying parties are not overburdened by appeals to SAMR and that, in the event SAMR does not specifically delegate individual cases to local AMRs, parties will not seek opportunities to forum shop amongst local AMRs.

根据新增第 6 条，市场监管总局可以针对涉及国计民生等重要领域的经营者集中制定具体的"审查办法"。两分会谨建议市场监管总局对可以采取何种"审查办法"以及哪些领域是"涉及国计民生等重要领域"进行澄清。

New Article 6 also notes that SAMR may formulate specific "review measures" for transactions involving sectors that are important to the national economy and people's livelihood. The Sections respectfully suggest that SAMR clarify what the "review measures" may entail and what sectors are considered "important to the national economy and people's livelihood".

第 7 条和第 42 条：根据第 7 条第 2 款，经营者集中未达到申报标准，但有证据证明该经营者集中具有或者可能具有排除、限制竞争效果的，市场监管总局可以要求经营者申报。第 42 条第 1 款规定，对有证据表明未达申报标准的经营者集中涉嫌具有或者可能具有排除、限制竞争效果的，市场监管总局应当进行核查，包括要求相关经营者提供文件、资料，以确定是否需要进行申报。第 42 条规定的程序显然需要在第 7 条第 2 款规定的程序之前进行。因此，为了增加条款的明确性，两分会建议重新安排第 7 条和第 42 条相关段落的顺序，或者至少在第 7 条中提及第 42 条。

Articles 7 and 42: The second paragraph of Article 7 provides that SAMR may require undertakings to notify transactions falling below the notification thresholds when there is evidence that the transactions have or may have anticompetitive effects. The first paragraph of Article 42 provides that, if a transaction falls below the notification thresholds but is suspected of having

anticompetitive effects, SAMR shall seek confirmation, including by requesting documents and materials from relevant undertakings to determine whether to require a notification. The procedure provided in Article 42 would apparently need to take place prior to that described in the second paragraph of Article 7. Therefore, to increase clarity, the Sections suggest re-ordering the relevant paragraphs of Articles 7 and 42, or at least including a reference to Article 42 in Article 7.

此外，根据第 7 条，市场监管总局可以要求低于申报标准的交易进行申报，无论该交易是否已经完成。正如两分会之前所建议的，[17] 市场监管总局对已完成交易进行申报的要求的提出应该有一个明确的时间限制，从而让已完成的交易不会无限期地受到《反垄断法》第四章的潜在挑战。根据经济合作与发展组织的一项调查，[18]在大多数司法管辖区，竞争执法机构可以对不满足申报标准的交易进行审查，但这种权力的行使限于交易完成后一年或更短时间内。[19] 两分会建议采用类似的一年期限，以便为交易各方和市场参与者提供可预测性。[20]

Further, Article 7 provides that SAMR can require a notification of transactions below the notification thresholds whether the transaction has been closed or not. As the Sections have previously commented,[21] the Sections recommend that there be an express time limit to SAMR's ability to require notification of a consummated transaction, so that a consummated transaction will not be subject to potential challenge under Chapter 4 of the AML indefinitely. According to a

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17 参见《美国律师协会反垄断法部以及国际法部 有关 <国务院关于经营者集中申报的规定（征求意见稿）>的意见》，第 9-10 页（2008 年 4 月 11 日）（网址：https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v12/comments_undertakingdraft.pdf）；《美国律师协会反垄断法部、国际法部关于 商务部<经营者集中审查办法（修订草案征求意见稿）>的意见 》，第 2、10-11 页（2017 年 10 月 6 日）（网址：https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v10/at_comments_salsil_20171006_cn_en.pdf）；《美国律师协会反托拉斯法部门和国际法部门 关于中华人民共和国<反垄断法>修订草案的联合意见》（“2020 年反垄断法修正案意见”），第 4、19-20 页（2020 年 2 月 14 日）（网址：https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-21420-china.pdf）。

18 经济合作与发展组织金融与企业事务司竞争处，关于合作和执法的第三工作组，《经营者集中审查中的当地连接和管辖标准》，第 64 段（2016 年 6 月 14-15 日）（网址：https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf ）。例如，加拿大对此类审查的时效规定为交易交割后一年。

19 虽然美国的执法部门可以根据《克莱顿法》第七条随时对已完成的交易提出质疑，但他们很少行使这一权力，且行使该种权力并非没有争议，特别对于那些交易完成多年后才提出质疑的案件。

20 可以说，要求对任何已完成的交易进行申报或提出质疑，都要遵守中国《行政处罚法》规定的两年法定时效（从交易完成起算）。见《行政处罚法》第 36 条。然而，该时效规定仅适用于对违法行为的处罚。目前尚不清楚因没有达到申报标准交易而未进行申报是否构成《行政处罚法》所定义的违法行为。

21 *See* Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings, 9-10 (April 11, 2008), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v12/comments_undertakingdraft.pdf; Comments of the American Bar Association's Sections of Antitrust Law and International Law Regarding the Draft Measures for the Review of Undertaking Concentrations, 2, 10-11 (October 6, 2017), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v10/at_comments_salsil_20171006_cn_en.pdf; Comments of the ABA Antitrust Law and International Law Sections on Draft Amendments to China's Anti-Monopoly Law ("2020 AML Amendment Comments") at 4, 19-20 (February 14, 2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-21420-china.pdf.

survey by the OECD,[22] in most jurisdictions where the competition law authorities may initiate review of a transaction not meeting the notification threshold, such authority is limited to within one year or less of closing.[23] The Sections suggest a similar one-year limitation, to provide predictability for parties and market participants.[24]

最后，第 7 条规定，经营者必须在市场监管总局要求申报后的 180 天内提交申报。为了确保经营者能够正确和及时地收到通知，两分会建议向经营者明确如何以及向谁传达这种申报要求。

Finally, Article 7 provides that parties must submit a notification within 180 days of SAMR's notice of the requirement. To ensure that parties receive notice properly and promptly, the Sections suggest specifying how and to whom such a notification requirement will be communicated to the parties.

第 14 条和第 66 条：第 14 条列出了向市场监管总局提交申报时应准备的文件和资料。第 14 条最后一段指出申报人（即，交易方）及“申报代理人”应当对所提交文件和资料的真实性负责。

Articles 14 and 66: Article 14 lists the documents and materials which need to be prepared in the notification submitted to SAMR. The concluding paragraph of Article 14 states that both the notifying party (*i.e.*, the transaction party) and the "notifying agent" are responsible for the authenticity of the submitted documents and materials.

两分会谨建议将该责任仅延伸至申报人编制的文件和资料，不包括引自第三方的资料和数据，或者至少局限于申报人就第三方资料与数据的真实性合理可知的部分。[25]

The Sections respectfully suggest that this responsibility extend only to documents and materials created by the notifying party, and not to materials and data from third-party sources, or at the least be limited to the notifying party's reasonable knowledge as to third party materials and data.[26]

另外，两分会建议在判定应予以处罚的隐瞒有关情况及提供虚假材料情形时依照如下两个标准，以避免处罚过重的情形。第一，所隐瞒或虚报的信息的重要程度足以对市场监管总局的审查造成实质性影响。第二，隐瞒有关情况或提供虚假材料应为故意行为。因此，两分会谨认为应在第 66 条的两款内容中加入“故意”一词，从而使相关方不会因无

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[22] OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement, Local Nexus and Jurisdictional Thresholds in Merger Control at para. 64 (June 14-15, 2016), *available at* https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf. For example, Canada has a statute of limitations for such reviews of one year after closing.

[23] While the U.S. enforcement authorities uniquely may challenge consummated transactions under Section 7 of the Clayton Act at any time, they have rarely exercised that authority and the exercise is not without controversy, especially in cases brought years after the transaction was completed.

[24] Arguably, requiring notifications from or challenges to any consummated transactions would be subject to the 2-year statutory limitation period (starting from the consummation of transactions) under China's Administrative Penalty Law. *See* Article 36, Administrative Penalty Law. However, that statute of limitations applies to penalties for violations of law. It is unclear that the failure to notify a transaction that does not meet the notification thresholds constitutes a violation as defined by the Administrative Penalty Law.

[25] 2020 年对反垄断法修订草案的意见，第 4、20 页。

[26] 2020 AML Amendment Comments, 4, 20.

意的疏忽行为而遭受处罚。而且，任何再次调查及新的限制性条件应局限于受不实或不准确信息影响的交易的特定方面，且应旨在基于正确信息解决所提出的竞争损害问题。[27]

In addition, the Sections suggest two standards for the concealment of information and provision of false information that may be subject to penalty, to avoid disproportionate consequences. First, the information that was concealed or false should be sufficiently significant as to materially affect SAMR's review. Second, the concealment of information or provision of false information should be a deliberate act. Therefore, the Sections respectfully submit that the word "deliberately" should be added to both paragraphs of Article 66, so that an unintended oversight does not result in sanctions. Moreover, any re-investigation and new restrictive conditions should be limited to the specific aspects of the transaction affected by the untruthful or inaccurate information and designed to address the alleged competition harm based on the correct information.[28]

第 66 条第 2 款规定，如"申报代理人"在申报过程中隐瞒有关情况或提供虚假材料的，市场监管总局可依照其处罚申报人的相同方式对申报代理人予以处罚。第 66 条第 1 款参照《反垄断法》第 62 条中对申报人的潜在处罚规定，即最高处以相当于申报人年营业额 1%的罚款（或在无营业额的情况下，处以最高 500 万人民币的罚款）以及对个人处以最高 50 万人民币的罚款。第 66 条第 2 款同时还增加了新的内容，强调情节严重的，市场监管总局可以决定不受理申报代理人代理的申报。

The second paragraph 2 of Article 66 states that if the "notifying agent" conceals relevant circumstances or submits misleading materials in the notification, SAMR can impose a sanction on the agent in the same way as it can fine the notifying party. The first paragraph 1 of Article 66 refers to Article 62 of the AML for the potential sanction on the notifying party – *i.e.*, a fine of up to 1% of the annual turnover of the notifying party (or RMB 5 million if there is no turnover) and RMB 500,000 on individuals. The second paragraph of Article 66 adds that, in especially serious circumstances, SAMR can decide not to accept notifications prepared by the agent.

两分会同意申报中所提供内容的真实可靠性是任何并购反垄断审查制度的重要基础。市场监管总局要求各申报人在其申报中提交一份由其正式授权代表签署的"真实准确性声明"正是为了这一目的。

The Sections appreciate that the reliability of the content provided in the notification is a cornerstone of any merger control regime. Thus, SAMR requires every notifying party to submit a specific "statement of truthfulness and accuracy" in its notification, which must be signed by a duly authorized representative of the party.

但是，两分会认为不必要且不适合要求"申报代理人"承担相同的义务和责任，申报代理人通常是外聘法律顾问，来自独立于申报人且与其无任何关联的律师事务所。[29] 首

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27 同上。

28 *Id.*

29 两分会指出，《禁止垄断协议规定（征求意见稿）》第 16 条规定，仅委托人对申请《反垄断法》第 18 条项下的安全港的材料的真实性负责。

先，《反垄断法》和《审查草案》均聚焦于申报人及集中的其他参与方，而非代理人等第三方。[30]

However, the Sections believe that it is unnecessary and inappropriate to impose the same obligations and liability on the "notifying agent" – which is usually the outside counsel in a law firm unaffiliated with, and independent of the notifying party.[31] First, both the AML and the Draft Merger Review Provisions are focused on the notifying party and other parties to the concentration, not on third parties such as agents.[32]

其次，再次核查并确认申报中所提交全部信息的准确性对申报代理人而言负担过于繁重。诸多文件和资料的基础信息源通常由申报人提供或基于申报人所提供的信息编制而成。申报代理人通常无法核实其准确性或真实性，除非其开展深度核查，但这一要求明显过当。

Second, it is overly burdensome for the agent to double-check and confirm the accuracy of all information submitted in the notification. The underlying sources for many of the documents and materials are normally provided by, or prepared based on the information of, the notifying party. The agent is generally not in a position to verify the authenticity or truthfulness unless it engages in an in-depth verification process, which is disproportionate.

再次，两分会理解中国各律所的律师须遵守《律师执业行为规范（试行）》和《律师协会会员违规行为处分规则（试行）》，这两项规则均对律师的行为规定了较高的职业道德要求。[33]

Third, the Sections understand that attorneys at law firms in China are subject to the Code of Practice for Lawyers (Trial) and the Rules on Punishment of Violations by Members of the Bar Association (Trial), which impose high ethical requirements on lawyers in all of their actions.[34]

因此，两分会建议仅要求申报人，而非其代理人承担真实性义务。或者，仅在代理人故意隐瞒信息或明知或合理应知申报材料中的信息明显虚假的情况下，代理人才需承担

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30 这一主体的侧重与行政处罚应有相应法律依据的原则相符，而《反垄断法》第 62 条中提及的个人并未明确涵盖无关联的个人。

31 The Sections note that Article 16 of the Draft Monopoly Agreement Regulation provides that only principals are responsible for the authenticity of the materials in applications for the availability of the safe harbor under Article 18 of the AML.

32 This focus is consistent with the principle that an administrative penalty must have a basis in law, and the AML's reference to individuals in Article 62 does not explicitly refer to unaffiliated persons.

33 根据《律师执业行为规范（试行）》第 15 条规定，律师不得妨碍国家司法和行政机关依法行使其职权。否则，律师协会将依据《律师协会会员违规行为处分规则（试行）》或其他相关规则对违规律师予以处分（第 106 条），严重的可取消律师资格。《律师执业行为规范（试行）》，中华全国律师协会，律发通【2018】第 58 号，2018 年 12 月 13 日；《律师协会会员违规行为处分规则（试行）》，中华全国律师协会，律发通【2017】第 14 号，2017 年 1 月 8 日。

34 According to Article 15 of Code of Practice for Lawyers (Trial), lawyers shall not obstruct the legal exercise by state judicial and administrative organs of their powers. Otherwise, they will be penalized by the bar association according to Rules on Punishment of Violations by Members of the Bar Association (Trial) or other relevant rules (article 106), which can be as serious as being disbarred. Code of Practice for Lawyers (Trial), All China Lawyers Association, Lv Fa Tong [2018] No. 58, December 13, 2018; Rules on Punishment of Violations by Members of the Bar Association (Trial), All China Lawyers Association, Lv Fa Tong [2017] No. 14, January 8, 2017.

责任。在所有情况下，任何义务应仅与该方的文件相关，而不应延伸至其提供的第三方资料。[35]

Therefore, the Sections recommend that the authenticity obligation be imposed only on the notifying party, but not its agent. Alternatively, the agent should be liable only when it deliberately concealed information or knew, or reasonably should have known, that the information in the filing materials is manifestly false. In all events, any obligation should exist only as to the party's documents, not to third-party materials that the party is submitting.[36]

两分会谨建议，至少修改第 14 条最后一款，使代理人的义务与其在第 66 条第 2 款中的责任相匹配。第 66 条第 2 款应规定不得隐瞒情况及不得提供虚假信息的义务，而非对申报文件和资料的真实性承担法律责任。

At a minimum, the Sections respectfully suggest that the closing paragraph of Article 14 be revised so that the obligation on the agent matches its liability under the second paragraph of Article 66. Instead of imposing responsibility for the truthfulness of the documents and materials in the notification, the second paragraph of Article 66 should impose an obligation not to conceal information and not to provide false information.

如一定要保留代理人对文件和资料的真实性以及隐瞒情况和/或提供虚假信息的责任，则两分会谨建议对代理人实施的首次处罚应为警告。[37]

If the liability of agents is retained for the truthfulness of documents and materials and for concealment of information and/or provision of false information, then the Sections respectfully recommend that the first sanction to be imposed on the agent be a warning.[38]

第 22-25 条：第 22 条至第 25 条主要实施《反垄断法》第 32 条中确立的新“停表”机制。第 23 条至第 25 条规定了市场监管总局在《反垄断法》所列的三种停表（中止计算审查期限）情形下行使其职权的具体方式。该三种情形包括：（1）当事方未按照市场监管总局的要求提交相关信息；（2）出现对市场监管总局的审查具有重大影响的新情况或新事实；和（3）根据当事方的要求，市场监管总局和当事方之间需要更多时间对附加的限制性条件进行进一步评估和讨论。

Articles 22-25: Articles 22 to 25 implement the new “stop-the-clock” mechanism established in Article 32 of the AML. Articles 23 to 25 provide details on how SAMR will exercise the three grounds for stopping the clock listed in the AML – i.e., (1) the lack of response by the parties to a SAMR request for information; (2) the appearance of new circumstances or new facts with a significant impact on SAMR's review; and (3) upon the parties' request, the need for more time to conduct remedy discussions between SAMR and the parties.

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35 即便对于申报方的资料，代理人有时亦无法核实其真实性。例如，外聘法律顾问通常无法核实申报方财务数据的准确性。

36 Even as to the party's materials, the agent may sometimes be unable to verify truthfulness. For example, outside legal counsel generally will be unable to verify the accuracy of the party's financial data.

37 两分会谨认为，鉴于《反垄断法》并未就该点做出明确规定，警告比繁重的处罚更符合行政处罚须具备法律依据的中国行政法原则。

38 The Sections respectfully suggest that given the AML's silence on this point, a warning is more consistent than more onerous penalties with the Chinese administrative law principle that an administrative sanction must have a basis in law.

两分会大体赞同该等新规定。通过停表，市场监管总局将有更多时间完成其审查，而无需采取以往涉及复杂事项或限制性条件讨论的诸多申报中经常用到的“撤回并重新申报”程序。

The Sections generally commend those new provisions. By stopping the clock, SAMR will have more time to complete its review without resorting to a “pull and refile” process, which has happened in a number of past filings involving complicated matters or remedy discussions.

但是，两分会建议针对停表机制确定若干量化标准。[39] 首先，两分会建议确定停表的最长期限及一个程序中可停表的最多次数标准。尽管上述第（1）和第（3）种情形一定程度上取决于当事方的行为，但市场监管总局对调查节奏仍享有主要控制权。另外，在第（2）种情形下，由于当事方无需采取任何行动，时间上可能完全取决于市场监管总局。

However, the Sections suggest establishing some parameters for the stop-the-clock mechanism.[40] First, the Sections recommend a maximum period for which the clock may be stopped and a maximum number of times that the clock may be stopped in a procedure. While scenarios (1) and (3) depend to some extent on the parties’ actions, SAMR has primary control over the pace of the investigation. In addition, in scenario (2), there may not be any action required by the parties, so that timing may depend entirely on SAMR.

其次，为将停表机制的适用限于复杂的或需要施加限制性条件的交易，两分会建议对《审查草案》予以修改，规定在简易案件审查及第 1 阶段的普通案件审查不采用停表机制。

Second, to focus the stop-the-clock mechanism on those transactions which are complicated or may be subject to remedies, the Sections suggest that the *Draft Merger Review Provisions* be revised to provide that the stop-the-clock mechanism will normally not be invoked in simple case reviews, nor in phase 1 of a standard case review.

再次，第（2）种情形下足以触发停表机制的“新情况”或“新事实”的构成要素的界定并不清晰。两分会谨建议：首先，增加构成“新情况”或“新事实”的要素的示例，比如，交易的某一当事方的控制权发生变更，但未触发向市场监管总局另行申报的义务，或任何重大立法变更导致相关市场的地域范围发生变化；其次，两分会提议增加一定的程序流程，即，市场监管总局通知当事方其停表意图、解释原因并给予当事方做出回应的机会——类似于第 23 条规定的向当事方提供一定的延长期限以便其补交资料。

Third, it is unclear what constitutes a “new circumstance” or a “new fact” in scenario (2), that would support invoking the mechanism. The Sections respectfully suggest, first, adding examples on what can constitute a “new circumstance” or a “new fact” – for example, a change of control in one of the parties to the transaction which was not notifiable to SAMR under a separate

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[39] 参见《美国律师协会反托拉斯部门和国际法部门对中国反垄断法修订草案的意见》，第 2-3、7-8 页，（2021 年 11 月 18 日）（“2021 年对反垄断法修订草案的意见”）（网址：可登录 https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/november-2021/comments-china-111821.pdf）； 2020 年对反垄断法修订草案的意见，第 4、21-22 页。

[40] *See* ABA Antitrust Law Section and International Law Section, Comments on the Draft Amendment to the Anti-Monopoly Act of China at 2-3, 7-8 (Nov. 18, 2021) (“2021 AML Amendment Comments”), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/november-2021/comments-china-111821.pdf; 2020 AML Amendment Comments, 4, 21-22.

notification, or a significant legislative change which leads to a change in the geographic scope of the relevant market. Second, the Sections propose a procedural addition, that SAMR notify the parties of its intent to stop the clock, explain its reasons, and give the parties an opportunity to respond – similar to the procedure under Article 23 under which the parties are given an extension of the time to respond to requests for information.

第 55 条：第 55 条主要关乎违反《反垄断法》第四章规定的申报与审查要求而非法实施的经营者集中，并列举了该不当“实施集中”的非穷尽示例。该新条款对“实施集中”的构成要素进行了一定程度的澄清，两分会基本表示赞同。

Article 55: Article 55 addresses concentrations implemented in violation of the notification and review requirements of Chapter 4 of the AML, and includes a non-exhaustive list of examples of such improper “implementation of concentration.” The Sections generally commend this new provision, which offers some long-waited clarity on what constitutes an “implementation of concentration.”

但是，“实施集中”的示例中包括“实际参与经营决策和管理”，和“与其他经营者交换敏感信息”两点。有些参与经营决策和管理及交换敏感信息的行为实为交割前交易流程必不可少的环节。例如，买方需要确保目标公司在交易过程中能够以合理一致的方式经营业务，因此可能会对目标公司在达成协议后至交易实施前的经营活动施加特定限制。而且，在公布拟议交易前的尽职调查过程中，当事方需要在实施清洁团队及防火墙保护措施的前提下交换部分敏感信息（如，客户清单、销售数据、拥有的知识产权等）以评估交易的价值。签约后，当事方须规划交易交割时的整合。在采取适当的防护措施的情况下，该类活动属于交易的必要部分。因此，两分会谨建议从第 55 条中删除这两个示例，或对其增加“无合理理由”及“无适当防火墙机制”等限定术语。如在不增加该等限定术语的情况下保留该等示例，两分会谨建议市场监管总局引入一项制度，允许当事方申请减免《反垄断法》项下的停滞义务，并规定市场监管总局应在一较短的时间期限（少于 30 天）内对该申请做出回应。两分会进一步建议，若市场监管总局未在规定期限内做出回应，则任何所提议的限制当事方负责业务运营的雇员接触竞争性敏感信息的机制均应被视为已获得总局同意。

However, the examples of “implementation of concentration” include “actually participating in business decision-making and management”, and “exchanging sensitive information with other business operators.” Some involvement in business decision-making and management and exchange of sensitive information can be an integral part of the transaction process leading to implementation. For example, a buyer will need to ensure that the target operates its business in a reasonable and consistent fashion during the course of the transaction, and therefore may seek to impose certain restrictions on the target’s business activities during the period after an agreement is reached but before the transaction is implemented. Moreover, during the pre-announcement due diligence process, the parties need to exchange sensitive information (e.g., customer list, sales data, ownership of IPRs, etc.), subject to clean team and firewall protections, in order to assess and evaluate the value of the deal. After signing, the parties must plan for integration when the transaction closes. These types of activities, subject to appropriate safeguards, are necessary in transactions. Therefore, the Sections respectfully suggest that these two examples be deleted from Article 55, or qualifiers be added to them, such as “without reasonable justifications”, and “without appropriate firewall mechanism”. If these examples are

retained without the suggested qualifiers, the Sections respectfully suggest that SAMR introduce a process that allows parties to apply for a derogation from the standstill obligation under the AML, and set forth a short time period (under 30 days) in which SAMR will respond to the application. The Sections further suggest that, absent a response within the allotted time, any proposed mechanism that restricts party employees in operational roles from accessing competitively sensitive information is deemed to be approved.

II、 《滥用知产草案》 Draft IPR Abuse Provisions

第 9 条第 2 款：《滥用知产草案》的第 9 条第 2 款禁止具有市场支配地位的经营者在没有正当理由的情况下，通过“在知识产权许可时强制被许可人接受一揽子许可”来实施搭售行为。

Article 9(2): Article 9(2) of the *Draft IPR Abuse Provisions* prohibits dominant market participants from, without justification, implementing bundled sales by “forc[ing] the licensee to accept a package license when licensing intellectual property rights”.

一揽子许可有许多公认的促进竞争的好处，这些好处使得在某些情况下仅提供一揽子许可的做法具有正当理由。美国反垄断执法机构已经认识到，将知识产权进行打包许可“可以提高效率”。[41]在组合许可中，许可人通常会对其拥有的或在许可期限内开始拥有的所有相关专利授予许可。被许可人可以获得非独占权利，在许可期限内实施许可人拥有的任何专利，即达成协议时许可人拥有的以及在许可期限内可能拥有的任何其他专利。这种广泛的许可授予得以形成所谓的“专利和平”及确定性，最大限度地降低了交易成本和未来因许可而产生争议的风险。专利组合通常包括到期日不同的多个专利。组合中的一些专利可能在组合许可的期限内到期。在许可期限内，组合中的一些专利也有可能被宣告无效，但这并不会使整个许可变得不公平或不正当。将在许可确立后的变化作为确定许可是否不当的依据是不公平的。此外，在这种情况下施加竞争法层面的责任，实质上是要求对专利逐一进行识别、分析、评估和实施，进而会阻碍组合许可。这将会给许可人和被许可人都带来巨大的交易成本和不确定性。

There are many recognized procompetitive benefits of package licensing that may justify offering only a package license under some circumstances. The U.S. antitrust agencies have recognized that package licenses to IPRs “can be efficiency enhancing.”[42] In a portfolio license, a licensor typically licenses all the relevant patents it owns or comes to own during the term of the license. Licensees may obtain the non-exclusive right to practice any of the patents the licensor owns during the term, i.e., both the patents owned on the date of the agreement and any additional patents that the licensor may come to acquire. This broad license grant achieves “patent peace” and certainty and minimizes transaction costs and the risk of future disputes over what had been licensed. Patent portfolios generally include patents with different expiration dates. Some patents

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41 参见美国司法部及联邦贸易委员会（U.S. Dep’t Of Justice & Fed. Trade Comm’n）2017 年 1 月 12 日发布的《知识产权许可的反垄断指引》（Antitrust Guidelines for the Licensing of Intellectual Property）第 5.3 节（“《美国知识产权许可指引》”），英文全文见：https://www.justice.gov/atr/IPguidelines/download。

42 U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY §5.3 (January 12, 2017) (“U.S. IP Licensing Guidelines”), *available at* https://www.justice.gov/atr/IPguidelines/download.

in the portfolio may expire during the term of the portfolio license. It is also possible that, during the term of the license, some patents in the portfolio may be invalidated, without rendering the license as a whole unfair or improper. It would be inequitable to consider developments that took place after the license was concluded in determining whether the license was improper. Moreover, to impose competition law liability in such circumstances would discourage portfolio licensing by essentially requiring patent-by-patent identification, analysis, valuation and enforcement. This would impose substantial transaction costs and uncertainties on both licensors and licensees.

根据美国法律，某些情形下将此类专利组合或“专利包”认定为一个“产品”可能是合适的，在这种情况下，根本不存在“搭售”。美国联邦巡回上诉法院对全国范围内的专利侵权案件的上诉具有管辖权，在标准必要专利的许可方面其曾指出：

Under U.S. law, it may sometimes be appropriate to view the portfolio, or "bundle," as one single "product," in which case there is no "bundling" at all. The U.S. Court of Appeals for the Federal Circuit, which has nationwide appellate jurisdiction over patent infringement cases, noted in the context of standard essential patent licensing, that:

> “如果专利权人拥有一个专利包，且所有专利都是使被许可人能够实施特定技术的必要专利，那么公认的是，[专利权人]可以合法地坚持将所有专利作为一个包整体进行许可，并拒绝单独许可，因为这个包里的不同专利不能被合理地视为不同产品。[43]”
>
> If a patentholder has a package of patents, all of which are necessary to enable a licensee to practice particular technology, it is well established that the [patentholder] may lawfully insist on licensing the patents as a package and may refuse to license them individually, since the group of patents could not reasonably be viewed as distinct products.[44]

其得出的结论是：“实施一项特定技术或标准所必要的一组专利通常可被视作一个统一的产品。”[45]另一方面，如果事实上拟被许可的一组专利既包括“实施特定技术或标准所必要”的专利，也包括非必要的专利，那么强制许可该组专利在某些情况下可能引发反垄断关注。[46]”

It concluded that "the group of patents essential to practice a particular technology or standard generally may be viewed as a unified product."[47] On the other hand, if in fact a group of patents to be licensed includes both patents that are and are not "essential to practice a particular

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43 参见美国菲利普斯国际公司诉国际贸易协会案（U.S. Phillips Corp. Int'l）（案号：424 F.3d 1179，美国联邦上诉法院案，2005 年，第 1196 页）。参见霍温坎普（Hovenkamp），《知识产权与反垄断》（IP and Antitrust），第 22.3b 节，第 22-13-15 页。（“即使是互不阻碍的专利或者版权，如果在一个竞争激烈的市场上，它们从未或很少单独获得许可，那么对捆绑销售而言，它们也可以被认为是一个产品。”）

44 *U.S. Phillips Corp. Int'l*, 424 F.3d 1179, 1196 (Fed. Cir. 2005); *see also* Hovenkamp, *IP and Antitrust*, § 22.3b at 22–13-15 ("Even copyrights or patents that do not necessarily block one another can be thought of as a single product for tying purposes if they are never or only rarely seen licensed individually in what appears to be a competitive market.").

45 同上。参见例如：国际制造株式会社诉兰登案（Int'l Mfg. Co. v. Landon）（案号：336 F.2d 723，1964 年，美国联邦第九巡回上诉法院，第 729-30 页）。

46 参见《美国知识产权许可指引》第 5.3 节，同上文引注 41。

47 *Id*. *See also, e.g., Int'l Mfg. Co. v. Landon*, 336 F.2d 723, 729-30 (9th Cir. 1964).

technology or standard" then a forced license of the group may under some circumstances raise antitrust concerns.[48]

因此，两分会谨建议对第 9 条第 2 款的内容予以扩充，释明一揽子许可具有正当理由的情况。

The Sections therefore respectfully recommend that Article 9(2) be augmented to clarify the circumstances under which package licensing may be justified.

第 14 条：第 14 条将以不公平的高价许可联营专利的行为列入到具有市场支配地位的专利联营实体的禁止行为清单中。两分会此前谨建议市场监管总局在决定是否动用《反垄断法》中规定的权力来对价格实施监管时应保持审慎和克制，特别是在专利许可方面。[49]

Article 14: Article 14 adds the licensing of the patent pool patents at unfairly high prices to the list of prohibited conduct for patent pools with a dominant market position. The Sections have previously respectfully recommended that SAMR exercise caution and restraint in deciding whether to invoke any authority under the AML to regulate prices, particularly in the context of the licensing of patents.[50]

专利联营能提供许多有利于竞争的好处，如通过结合互补技术来创造效率，以较低的交易成本向感兴趣的潜在被许可人传播专利，从而破除某些技术的阻碍地位，并规避昂贵的侵权诉讼。[51]如果专利联营存在"安全港"要素——特别是专利联营只许可互补性而非替代性专利技术，或者存在防止专利池成员之间交换竞争性敏感信息的保障措施，以及对潜在被许可人直接与专利权人谈判获得其专利双边许可而不是通过专利联营获得许可的能力不作限制时，因专利联营本身收取高额许可费而可能产生的潜在的竞争关注就应该得以消解。

Patent pools can offer many procompetitive benefits, creating efficiencies by combining complementary technologies, disseminating patents to interested potential licensees at reduced transaction cost, clearing blocking positions of certain technologies and avoiding expensive infringement litigation.[52] Where the safe harbor elements for patent pools are present – in particular, licensing by the patent pool of patents that have been independently determined to consist only of complementary instead of substitute patented technologies, safeguards to prevent

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48 U.S. IP Licensing Guidelines, *supra*, n.42, §5.3.

49 参见美国律师协会反垄断法分会、知识产权法分会与国际法分会联合发布的《关于滥用知识产权的反垄断指南（征求意见稿）》联合意见，2017 年 4 月 20 日。英文全文见：https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v10/at_comments_salsipsil_20170420.pdf。两分会针对《禁止滥用知识产权排除、限制竞争行为规定》（征求意见稿）中的第 17 条第 1 款有着相似的担忧，该条款禁止具有市场支配地位的集体管理组织向著作权人或使用者以"不公平的高价"收取费用。

50 Comments of the ABA Sections of Antitrust Law, Intellectual Property Law, and International Law on the Draft Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights of the People's Republic of China (April 20, 2017), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v10/at_comments_salsipsil_20170420.pdf. The Sections have similar concerns regarding the prohibition in Article 17(1) against collective management organizations with dominant market positions charging "unfairly high prices" to copyright holders or users.

51 参见《美国知识产权许可指引》第 5.5 节，同上文引注 41。

52 U.S. IP Licensing Guidelines, *supra*, n.42, §5.5.

the exchange of competitively sensitive information among patent pool members, and the absence of any restrictions on the ability of potential licensees to negotiate directly with patent owners for a bilateral license to their patents rather than take a license to all patents offered through the patent pool – any competitive concerns about high royalties charged by the patent pool itself should be ameliorated.

因此，两分会建议，如果保留关于以“不公平的高价”许可联营专利的新增条款，则《滥用知产草案》应澄清该条款不适用于存在上述安全港要素的情况。

Therefore, the Sections recommend that, if the addition of the provision on the licensing of pool patents at “unfairly high prices” is retained, the Draft IPR Abuse Provisions make clear that this provision would not be applicable where the above-discussed safe harbor elements are present.

第 16 条第 2 款：第 16 条第 2 款禁止具有市场支配地位的经营者 “在其专利成为标准必要专利后，违背公平、合理和无歧视许可的承诺，以不公平的高价许可，没有正当理由拒绝许可、搭售商品. . . .”

Article 16(2): Article 16(2) prohibits an undertaking with a dominant market position from “after the patent has become an essential patent of the standards, in violation of the fair, reasonable and non-discriminatory promises, licensing at unfairly high prices, refusing to license without justification, tying and bundling products….”

采用以“不公平的高价”许可专利以排挤某一竞争者的策略可能会引起竞争法层面的问题。然而，当涉及交叉许可时，当一项技术作为专利包的一部分被许可时，或者报价为不含动态许可费率、在销售产生之前作出的固定费用报价时，归属于特定知识产权的许可费收入往往“不易以货币形式量化”。[53]因此，在根据第 16 条第 2 款认定标准必要专利持有人以“不公平的高价”进行许可时，应保持极其审慎的态度。

Strategic use of licensing at “unfairly high prices” to exclude a competitor could raise competition concerns. However, royalty income attributable to a specific IPR is often “not readily quantifiable in monetary terms” when cross licensing is involved, when a technology is licensed as part of a package, or the offer is a fixed fee offer that does not specify a running royalty rate and is made before sales have taken place.[54] Therefore, extreme caution should be exercised before finding an SEP holder has licensed at “unfairly high prices” under Article 16(2).

如果“没有正当理由拒绝许可”涉及到限定专利许可的使用领域时，两分会指出，在美国法律体系下，司法部和上诉法院均认为仅对终端设备授予许可的行业惯例并不违反反垄断法。[55]

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53 参见《美国知识产权许可指引》第 3.2.2 节，同上文引注 41。同见上文引注 49。

54 *See* U.S. IP Licensing Guidelines, *supra*, n.42, §3.2.2. *See also*, *supra*, n.50.

55 参见，例如，大陆汽车系统诉 Avanci 有限责任公司案（Continental Automotive Systems v. Avanci LLC）（案号：20-11032，2022 年 6 月 21 日，美国联邦第五巡回上诉法院）英文全文见：https://s3.documentcloud.org/documents/22065093/22-06-21-fifth-circuit-revised-conti-v-avanci-judgment.pdf（维持原判，驳回仅对终端设备上进行使用领域许可违反反垄断法的指控）；联邦贸易委员会诉高通案（FTC v. Qualcomm）（2020 年，美国联邦第九巡回上诉法院，第 31-32 页），英文全文见：https://law.justia.com/cases/federal/appellate-courts/ca9/19-16122/19-16122-2020-08-11.html（援引 Verizon Commc’ns Inc.诉 Law Offices of Curtis v. Trinko, LLP 案）（Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP）（案号：540 U.S. 398，2004 年，第 408 页）；反垄断助理总检察长 Makan Delrahim 致贝

To the extent "*refusing to license without justification*" refers to field-of-use licensing, the Sections note that under U.S. law, the industry practice of licensing only on the end device has been found by the Department of Justice and Courts of Appeals not to violate antitrust law.[56]

> **第 16 条第 3 款：**第 16 条第 3 款禁止具有市场支配地位的经营者，"在标准必要专利许可过程中，违背公平、合理、无歧视许可的承诺，未经善意谈判程序，不正当地请求法院或者相关部门作出或者颁发禁止使用相关知识产权的判决、裁定或者决定，迫使被许可方接受其不公平的高价或者其他不合理的限制条件。"
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> **Article 16(3)**: Article 16(3) prohibits an undertaking with a dominant market position from: "during the process of licensing standard essential patents, improperly requesting the court or relevant authorities to make or issue judgments, rulings or decisions prohibiting the use of relevant intellectual property rights, forcing the licensee to accept its unfairly high price or other unreasonable restrictions, by violating the fair, reasonable and non-discriminatory promises without good faith negotiation procedures."

两分会赞同第 16 条第 3 款承认了各方之间应进行善意谈判。确实，美国司法部、专利商标局和美国国家标准与技术研究院最近宣布，他们将逐案审查"标准必要专利持有人*或标准实施者*的行为，以确定任一方是否反竞争地使用市场力量或者从事其他损害竞争的滥用程序的做法。"[57]（强调补充）。

The Sections commend the recognition in Article 16(3) that there should be good faith negotiations by and between parties. Indeed, the U.S. Department of Justice, Patent and Trademark Office, and National Institute of Standards & Technology have recently announced that they will examine the conduct of "SEP holders *or standards implementers* on a case-by-case basis to

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克•麦坚时律师事务所 Mark H. Hamer 的信（2020 年 7 月 28 日），第 18-20 页，英文全文见：https://www.justice.gov/atr/page/file/1298626/download（"拟议使用领域带来的效率似乎相当可观，可能超过潜在的竞争危害"；"限制联营许可的使用领域并不罕见"）。

[56] *See, e.g.*, No. 20-11032 *Continental Automotive Systems v. Avanci LLC* (5th Cir. June 21, 2022), *available at* https://s3.documentcloud.org/documents/22065093/22-06-21-fifth-circuit-revised-conti-v-avanci-judgment.pdf (affirming dismissal of allegations that field of use licensing only on the end device violates antitrust law); *FTC v. Qualcomm* (9th Cir. 2020) at 31-32, *available at* https://law.justia.com/cases/federal/appellate-courts/ca9/19-16122/19-16122-2020-08-11.html (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004)); Letter from Makan Delrahim, Ass't Attorney General for Antitrust to Mark H. Hamer, Baker & McKenzie (July 28, 2020) at 18-20, *available at* https://www.justice.gov/atr/page/file/1298626/download ("the efficiencies from the proposed field of use appear to be considerable and are likely to outweigh the potential competitive harm"; "limiting a pool license's field of use is not uncommon").

[57] 参见《撤回<2019 年关于受自愿 F/RAND 承诺约束的标准必要专利补救措施的政策声明>》，2022 年 6 月 8 日。英文全文见：https://www.uspto.gov/sites/default/files/documents/SEP2019-Withdrawal.pdf。原文称："体现在我们的宪法、法规和条例中的美利坚合众国的法律，由法院解释和适用的法律以及由司法部和其他机构执行的法律都可以促进这些目的。司法部在执法时，将逐案审查标准必要专利持有人或标准实施者的行为，以确定任一方是否从事导致反竞争地利用市场力量的行为或者其他损害竞争的滥用程序的做法。"

determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition"[58] (emphasis added).

然而，第 16 条第 3 款似乎缺乏对"个案中的标准必要专利持有人或标准实施者"的权益的平衡。此外，第 16 条第 3 款看起来既指向在全球请求禁令，也指向在全球请求与知识产权相关的其他救济或裁决。

However, Article 16(3) does not appear to apply equally to both "SEP holders or standards implementers on a case-by-case basis." Moreover, Article 16(3) appears to refer to both the seeking of an injunction and the seeking of other remedies or rulings relating to intellectual property anywhere around the world.

两分会谨在此对第 16 条第 3 款的潜在域外适用作出提示。专利具有地域性，全世界的法院都对其主管的领土享有管辖权。第 16 条第 3 款可能会使在中国域外寻求救济的行为成为《反垄断法》违法行为，进而影响域外法院在其司法管辖权内就对侵犯其本国专利的行为确定适当救济的资格。此种结果不符合世界贸易组织《与贸易有关的知识产权协定》[59]的要求，在礼让层面也存在很大问题。

The Sections respectfully caution against potential extra-territorial application of Article 16(3). Patents are territorial, and courts around the world have jurisdiction over the territory in which they preside. By potentially rendering the seeking of any remedies outside China as an anti-monopoly violation, Article 16(3) may impact the ability of courts outside China to determine appropriate remedies for infringement of national patents within their jurisdiction. Such a result would be inconsistent with the WTO TRIPs agreement[60] and problematic from a comity perspective.

最后，就两分会所知，全球的任何反垄断机构从未将向法院寻求非禁令救济作为可能违反反垄断法的行为进行审查。

Finally, to the Sections' knowledge, no antitrust authority around the world has ever examined the seeking of non-injunction remedies from courts as a potential antitrust violation.

鉴于上述保留意见，两分会谨建议删除该条款。

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[58] Withdrawal of 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (June 8, 2022), *available at* https://www.uspto.gov/sites/default/files/documents/SEP2019-Withdrawal.pdf ("The laws of the United States of America, as embodied in our Constitution, statutes and regulations; as interpreted and administered by the courts; and as enforced by DOJ and other agencies, can further these purposes. In exercising its law enforcement role, DOJ will review conduct by SEP holders or standards implementers on a case-by-case basis to determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition.").

[59] 参见世界贸易组织《与贸易有关的知识产权协定》第 41 条第 1 款：各成员应保证其国内法中包括实施程序……以便对任何侵犯本协定所涵盖知识产权的行为采取有效行动，包括防止侵权的迅速救济措施和制止进一步侵权的救济措施。英文全文见 https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art41_jur.pdf。

[60] Article 41 (1) of the WTO TRIPs agreement holds that "Members shall ensure that enforcement procedures … are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements", *available at* https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art41_jur.pdf.

In view of these reservations, the Sections respectfully suggest that Article 16(3) be deleted.

第 23 条：新增的第 23 条规范经营者滥用知识产权违法实施集中的行为，并授权市场监管总局责令其停止实施该等集中，并施以其他补救措施和处罚。然而，在何种情况下可以通过滥用知识产权来实施经营者集中尚不明晰。因此，两分会谨建议增加示例来说明在何种情况下，滥用知识产权可以实施经营者集中，而该集中并未作为非法的垄断协议被禁止。

Article 23: New Article 23 addresses the implementation of a concentration by abuse of intellectual property rights and authorizes SAMR to issue an order to stop implementation of such a concentration and impose other remedies and penalties. However, it is not apparent in what circumstances a concentration could be implemented through the abuse of intellectual property rights. Therefore, the Sections respectfully suggest that an example be added to illustrate when the abuse of IPR could implement a concentration that would not already be prohibited as an unlawful monopoly agreement.

III、 《滥用支配地位草案》
Draft Abuse of Dominant Market Position Regulation

第 20 条：新增的第 20 条规定，平台经营者没有正当理由[61]实施自我优待以及利用平台内经营者的非公开数据，构成反垄断违法行为。[62]

Article 20: New Article 20 identifies self-preferencing and use of non-public data of operators on a platform, by a platform operator without justifiable reasons[63] as AML violations.[64]

与平台内经营者相竞争的平台经营者可能会实施自我优待或利用平台内经营者的非公开数据。供应商与客户存在一定竞争关系的双重分销体系较为常见且可以显著提升效率。[65]在这种体系中，自我优待也是常见行为。拥有自有品牌的零售商通常会将其自有品牌产品放置于货架上较制造商品牌产品更为显眼的位置。同样，零售商也常常会利用其获得的制造商品牌的信息，对其售卖的制造商品牌产品进行“逆向工程”，来完善其自有品牌的竞品。

Platform operators that compete with operators on the platform may engage in self-preferencing and use non-public data of operators on the platform. Dual distribution systems in which a supplier may compete with customers, or a customer competes with suppliers, are

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61 在部分情况下，将“公平、合理、无歧视的平台规则”视作一类正当理由可能是不恰当的。例如，基于客户评论的竞品排序不太可能是“无歧视”的。

62 《反垄断法》没有明文规制自我优待或利用非公开数据的行为。

63 The inclusion of “platform rules that are fair, reasonable, and non-discriminatory treatment” as a type of justifiable reason may be inappropriate in some circumstances. For example, a ranking of competing products based upon customer reviews is unlikely to be “non-discriminatory.”

64 The AML contains no general prohibition on self-preferencing or use of non-public information.

65 例如，可参见“应该允许平台在自己的市场上销售吗？”，作者：Andrei Hagiu、Tat-How Teh 和 Julian Wright，《兰德经济学杂志》（即将出版），第 30 页（网址 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055）。

common and may create significant efficiencies.[66] Self-preferencing in dual distribution systems is also common. A retail store with private label products will often display its own private label items on store shelves more prominently than those of brand name competitors. Similarly, a retailer will often "reverse engineer" brand name products that it sells, using its access to the brand name producer's information to develop its private brand competing item.

这种行为在某些情况下可能是反竞争的，但也可能通过增加产品多样性、提高效率和促进竞争为消费者创造利益，即使在平台的环境下亦如此。[67]因此，两分会谨建议，为认定自我优待和利用非公开数据是否违反《反垄断法》，需要个案分析该等行为是否促进或者损害了竞争，并且，第 20 条应明确规定，除非自我优待和利用非公开数据的行为具有排除和限制竞争的效果，则其不违反《反垄断法》。[68]

Such conduct may, in some circumstances, be anticompetitive, but may also create consumer benefits through increased product diversity, efficiency, and competition, even in a platform setting.[69] Therefore, the Sections respectfully submit that case-by-case factual analysis, focused on determining whether the specific self-preferencing or use of non-public data enhances or harms the competitive process, is necessary for a violation of the AML to be present. The Sections therefore recommend that Article 20 expressly provide that self-preferencing and use of non-public data will not be a violation of the AML unless it has the effect of eliminating or restricting competition.[70]

第 35 条：第 35 条规定，地方市监局"作出撤销案件决定、中止调查决定、恢复调查决定、终止调查决定或者行政处罚告知书"前，应当向市场监管总局报告，接受市场监管总局的指导和监督。两分会赞同市场监管总局澄清其将监督地方市监局的前述行为，而不仅仅是接收相关通知，从而进一步确保反垄断执法的一致性。

Article 35: Article 35 specifies that local AMRs shall report to and accept the guidance and supervision of SAMR before making "a decision to withdraw a case, suspend an investigation, resume an investigation, terminate an investigation, or make an administrative penalty notice". The Sections commend SAMR for clarifying that it will supervise the local AMRs in these actions, beyond receiving notification, and thus further ensure consistent enforcement of the AML.

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66 See, e.g., Andrei Hagiu, Tat-How Teh & Julian Wright, Should Platforms Be Allowed to Sell on Their Own Marketplaces?, RAND J. Econ. (forthcoming), at 30, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055.

67 例如，可参见"'请自便'：走向自我优待的分类法"，作者：Aurelien Portuese，信息技术与创新基金会，第 2 页（2021）（网址 https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf）。

68 这并不意味着不存在对其他法律的违反，例如自我优待可能违反消费者保护法，利用非公开数据则可能违反合同法。

69 See, e.g., Aurelien Portuese, "Please, Help Yourself": Toward a Taxonomy of Self-Preferencing, INFO. TECH. & INNOVATION FOUND., at 2 (2021), *available at* https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf.

70 This does not preclude finding violation of other laws, such as consumer protection law in the case of self-preferencing and contract law in the case of use of non-public data.

IV、 《垄断协议草案》
Draft Monopoly Agreement Regulation

第 8 条：第 8 条的新增内容引入了“潜在竞争者”的概念。两分会谨建议进一步明确这一概念的含义，将之修改为“潜在的竞争者是指有实际证据证明具备在较短时期内进入相关市场竞争的计划和可行性的经营者”。

Article 8: The new language in Article 8 of the *Draft Monopoly Agreement Regulation* introduces the concept of “potential competitor.” The Sections respectfully suggest that it be revised to provide greater specificity, to “Potential competitors refer to undertakings who, as supported by actual evidence, have plans and feasibility to enter the relevant market competition within a short period of time.”

第 15 条：新增的第 15 条依据《反垄断法》第 18 条引入以市场份额为基础的安全港规则。然而，两分会谨建议，15%的市场份额标准过低，可能使大量原本不会损害竞争的协议无法适用安全港。例如，欧盟将纵向垄断协议的豁免份额标准设置为 30%。[71]两分会谨建议，市场份额标准应至少提高至 30%。[72]

Article 15: The Sections respectfully suggest that the 15% market share threshold provided in new Article 15 pursuant to the safe harbor established in Article 18 of the AML is too low, so that many agreements unlikely to generate harm to competition would be ineligible. For example, the European Union provides a 30% market share safe harbor for vertical restraints.[73] The Sections thus respectfully recommend that the market share threshold be increased to at least 30%.[74]

此外，两分会建议第 15 条进一步明确，就安全港的适用而言，虽然交易方市场份额的计算，应包括其控制的上游或下游经营者的市场份额，但对于上游或下游市场中仅作为交易方的交易相对人的市场份额，不应与交易方的市场份额合并计算。

In addition, the Sections suggest that Article 15 be clarified, by specifying that while the market shares of upstream or downstream entities controlled by a party will be aggregated with that party to determine whether the safe harbor applies, but those of upstream and downstream entities that are merely counterparties to a party will not be aggregated with that of the party.

第 16 条：新增的第 16 条规定了申请适用安全港的程序。两分会赞同这一程序设置，以及仅经营者须对提交申请、资料的真实性负责的规定。然而，尚不清楚是否仅能在协议

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[71] 参见《2022 年 5 月 10 日关于对各类纵向协议和协同行为适用欧盟运行条约第 101 条（3）款的欧盟委员会条例（2022/720）》（网址：https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720&qid=1652368074897）；《纵向限制指南》（2022/C 248/01）（网址 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG）。

[72] 30%的市场份额标准与《关于汽车业的反垄断指南》中设置的安全港门槛一致，从而避免了两者间的不一致。

[73] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720&qid=1652368074897; Guidelines on vertical restraints (2022/C 248/01), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG.

[74] A 30% market share safe harbor would be consistent with the safe harbor in the Automobile Anti-Monopoly Guidelines, and avoid any tension between the two sets of rules.

订立完成后向市场监管总局提交申请。两分会建议修改第 16 条，阐明经营者可以在就某项安排开启协商后、协议订立前提出申请。这一事前评估有助于提高法律确定性、促进经营者合规。

Article 16: New Article 16 establishes the procedures to apply for safe harbor. The Sections commend the establishment of such a process and the provision that only the principals are responsible for the authenticity of their materials submitted in the application. However, it is unclear whether such an application can only be submitted to SAMR after an agreement has been finalized. The Sections suggest that Article 16 provide that such an application may be made after an arrangement is negotiated but before an agreement is executed. Such *ex ante* evaluation will create greater legal certainty and compliance with the law.

结论
Conclusion

两分会衷心感谢市场监管总局考虑我们对以上五项规定草案的意见。

The Sections appreciate SAMR's consideration of these Comments on the five draft provisions.