

March 24, 2016

Legislative Affairs Office of the State Council
People's Republic of China
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**Re: AIPLA Comments on the 2016-2-25 Draft Anti-Unfair Competition Law
of the People's Republic of China.**

主题：美国知识产权法律协会(AIPLA)对2016年2月25日发布的《中华人民共和国反不正当竞争法》（修订草案送审稿）的意见

Dear State Council members:

尊敬的国务院法制办成员们：

The American Intellectual Property Law Association (“AIPLA”) welcomes this opportunity to submit comments on the draft Anti-Unfair Competition Law of the People's Republic of China (“AUCL”).

美国知识产权法律协会（“AIPLA”）感谢此次国务院法制办给予我们机会就《中华人民共和国反不正当竞争法》（修订草案送审稿）（以下简称为《反不正当竞争法》或“AUCL”）提出我们的意见。

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective global laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

美国知识产权法律协会是一个全国性律师协会，拥有大约14,000名会员，主要由各界律师组成，来自律师事务所、企业团体、政府机构、及学术机构。AIPLA成员广泛代表各界个人、企业及机构，其业务直接或间接涉及专利、商标、版权、商业秘密、及反不正当竞争法，以及影响知识产权的其它法律领域。我们的会员既代表知识产权所有权人，也代表知识产权使用者。我们的使命包括帮助建立和维护公平有效的全球法律政策，以促进奖励发明创造，同时平衡公众利益，达到良性竞争、费用合理、和基本公正。

As AIPLA had only limited time to prepare comments, AIPLA submits the following brief observations on the AUCL. AIPLA would welcome the opportunity to prepare more detailed comments and to discuss with you the AUCL and any of these comments. We are grateful for this opportunity to submit these comments.

由于准备时间有限，AIPLA对《反不正当竞争法》提出以下简短的意见。AIPLA十分期待能有机会准备更详尽的意见，并能与贵方进一步探讨《反不正当竞争法》以及我们的观点。我们很感谢这次有机会提出以下意见。

AIPLA offers the following observations.

AIPLA对《反不正当竞争法》有下面几点看法。

Article 2 第2条

Article 2 defines the term “unfair competition” as conducts of undertakings that infringe upon the legitimate rights and interests of other undertakings or consumers and “disturb market order.” As we understand this reference, AIPLA has some concerns that the definition of “Unfair Competition” may be construed too broadly, and that the concept of “disturb market order” is not defined. For example, the lawful enforcement of legitimate intellectual property rights should not be viewed as unfair competition. To the extent the definition encompasses such legitimate activity, it should be modified. AIPLA is also concerned that the concept of “disturb market order” is not entirely consistent with the fundamental objectives of the Anti-Monopoly Law (“AML”) to safeguard competition and to promote the development of a market economy. Therefore, AIPLA respectfully recommends that the phrase “disturb market order” be deleted, or replaced with “undermining fair market competition”, in the definition of “unfair competition.” In addition, AIPLA respectfully recommends that the definition of “unfair competition” be clarified to explicitly exclude conduct of undertakings to exercise their intellectual property rights in accordance with the intellectual property laws and relevant administrative regulations.

第2条将“不正当竞争”定义为经营者侵害其他经营者或者消费者的合法权益以及“扰乱市场秩序”的行为。按我们对这一概念的理解，AIPLA有些担心“不正当竞争”的定义也许过于宽泛，并且对“扰乱市场秩序”这一概念也未作定义。例如，依法行使知识产权不应当被视为不正当竞争。如果“不正当竞争”的定义包括这些正当行为，那么其定义应加以修改。AIPLA还注意到“扰乱市场秩序”的概念与反垄断法（“AML”）的既保护竞争又促进市场经济发展的根本目的不完全一致。因此，AIPLA建议在“不正当竞争”的定义中删除“扰乱市场秩序”的说法，或者用“损害正当市场竞争”来替代。此外，AIPLA建议在“不正当竞争”的定义中应当明确表明，经营者依据知识产权法和相关管理条例行使其知识产权的行为不属于不正当竞争。

Article 2 also defines the term “undertaking” to include natural persons that engage in or participate in the commodity manufacture, business operation, or the provision of services. This definition is similar (but not identical) to the definition of undertaking in Article 12 of the AML. However, Article 2 currently does not clarify if and when an undertaking is responsible for the conducts of its employees. AIPLA recommends that the AUCL clarify when an undertaking is responsible for the conduct of its employees. For example, when an employee is acting within the scope of its employment, is authorized by the employer, and acts as agent with the knowledge of its employer, the employer may be responsible for the employee's conduct. Without such a clarification, the current language may create a loophole that would allow a business owner to avoid liabilities or evade responsibilities under the AUCL by directing, encouraging or allowing an employee to engage or participate in acts prescribed in Chapter 2 of the AUCL.

第 2 条还定义了“经营者”包括从事或者参与商品生产、经营或者提供服务的自然人。该定义与《反垄断法》第 12 条中对于经营者的定义相似（但不相同）。然而，拟定第 2 条没有阐明经营者是否，且何时，对其雇员的行为负责。AIPLA 建议《反不正当竞争法》阐明经营者何时对其雇员的行为负责。例如，当雇员行为在其雇用范围内、雇员行为由雇主授权、以及雇员在其雇主知晓的情况下作为其代理人行动时，雇主可能要对该雇员的行为负责。如果不这样加以说明，当前的措词可能有漏洞，容忍企业所有者通过引导、鼓励或允许其雇员从事或者参与《反不正当竞争法》第二章中列出的行为，来避免或逃避自己对违反《反不正当竞争法》所应承担的法律责任。

Article 5 第 5 条

AIPLA recommends adding a definition of “famous” and “well-known” to be consistent with the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and applicable Free Trade Agreements with similar protections. “Famous” should be defined in both the context of a “famous commercial mark” and with respect to subsequent reference to “famous commodity”.

AIPLA 建议增加对“知名”和“驰名”的定义，以与《WIPO 关于驰名商标保护规定的联合建议》、《与贸易有关的知识产权协议》（TRIPS）、和做出类似保护的适用的《自由贸易协议》保持一致。“知名商标”和下文提到的“知名商品”这二个概念中的“知名”都应予以定义。

AIPLA also recommends clarifying the thresholds for “misleading” consumers and “causing market confusion.” AIPLA further suggests clarification of the following: whether “confusion” is related to confusion of the source of the commodity or services; the level of confusion required to constitute “market confusion”; and whether there needs to be proof of actual consumers who were confused or misled, or whether a “likelihood” of consumer confusion would be considered.

AIPLA 还建议明确“误导”消费者和“导致市场混淆”的最低标准。AIPLA 进一步建议对以下内容进行澄清：“混淆”是否与商品或服务来源的混淆有关；混淆的程度是否构成“市场混淆”的要素；以及是否需要证明确有消费者被迷惑或误导，或者消费者存在混淆的“可能”是否也被考虑在内。

AIPLA recommends expansion of Subsection (3) to also include use of a mark that is “similar to” another’s registered trademark or unregistered well-known trademark.

AIPLA 建议在该条的第（3）项中增加包括使用与他人注册商标或未注册的驰名商标“相似”的标识。

AIPLA recommends expansion of Subsection (4) to also include use of a character element that is the same as or similar to a famous commercial mark or registered trademark.

To the extent that there is a difference in meaning between use of “commercial mark” in Subsections (1) and (2) and “trademark” used in Subsections (3) and (4), the provisions should be clarified. AIPLA notes that while the term “commercial mark” is defined in this Article 5, the term “trademark” is not defined, and suggests that the AUCL include such a definition or reference to a suitable definition under trademark law.

AIPLA 建议在该条的第（4）项中增加包括使用与知名商业标识或注册商标相同或相似的特征元素。规定应当明确第（1）项和第（2）项中的“商业标识”和第（3）和第（4）项中的“商标”之间在含义上的区别。AIPLA 注意到第 5 条对“商业标识”一词进行了定义，但没有定义“商标”。因此，AIPLA 建议《反不正当竞争法》对“商标”加以定义，或者指明其定义参照商标法中的适当定义。

Article 6 第 6 条

Article 6 prohibits an undertaking from using a “relative dominant position” to engage in certain acts. The proposed law identifies five acts as “unfair trading” but does not fully define the term “relative dominant position.” However, the Explanation accompanying the Notice from the Legislative Affairs Office of the State Council indicates that the intention is to regulate acts of unfair competition by undertakings that do not possess market dominant positions but possess “comparatively dominant positions in trading.” From our perspective, this concept may apply to a party that agrees in contract - whether involving IP or not - to undertake certain conduct, and could include companies who differ in their market capitalization or scope of operations or even in their relative turnover. Accordingly, we are concerned that this Article is too broad as currently written. No indication is provided of the degree of the disparity that makes one enterprise “dominant” relative to another. AIPLA respectfully submits that the use of the term “relative dominant position” can be problematic in practice because it is unclear. It may be interpreted in ways that are harmful to competition. It may be used to prohibit conduct by the more “dominant” market player, even absent any proof of market power in a relevant product market, let alone abuse of market power in any manner that would injure competition.

第 6 条禁止经营者利用“相对优势地位”从事某些行为。草案指定了五种“不公平交易行为”但并没有充分定义“相对优势地位”。国务院法制办的起草说明中指出，这一条的目的是要对不具有市场支配地位但“在交易中具有相对优势地位”经营者的不公平交易行为进行规范。在我们看来，这个概念覆盖面太宽，甚至可以覆盖在合同中同意采取某些行动的一方，无论其是否涉及知识产权，也可能覆盖在市场价值、营业范围、甚至营业额有所不同的公司。因此，我们担心目前的措辞太宽泛。本条也未说明什么程度的差距使一个经营者相对于另一个更有优势地位。AIPLA 谨指出，使用定义不太清晰的“相对优势地位”这一概念在实践中可能会带来一些问题。这一概

念的某种可能诠释有可能不利于竞争。它可能被用来禁止更有“优势”的市场参与者的行为，即使缺少在相关产品市场有市场力的任何证据，更不用说以任何方式滥用市场力对竞争造成损害。

In our view, the five specific activities that are listed as “unfair trading” are also not adequately defined. These include: (1) restricting the transaction partners; (2) tying purchases of other commodities; (3) restricting transaction conditions; (4) overcharging or unreasonably demanding other benefits; or (5) attaching other unreasonable trading conditions. Although these activities are qualified in that they are prohibited only when they are undertaken “without legitimate reasons,” the proposed Article 6 does not adequately define the prohibited activity, or what legitimate reasons would justify taking the otherwise prohibited actions.

在我们看来，五个具体的“不公平交易行为”也没有予以充分定义，这些包括：（1）限制交易对象；（2）限定购买其它商品；（3）限制交易条件；（4）滥收费用或者不合理地要求其他好处；或（5）附加其它不合理的交易条件。虽然这些行为只在“没有正当理由”或“不合理”的前提下才被禁止，但拟议的第 6 条并没有充分定义所禁止的行为，以及什么正当理由可以让原本禁止的行为合理。

Moreover, these five categories of conduct are already addressed under the AML in connection with an abuse of a dominant market position. AIPLA is concerned that the proposed Article 6 appears to provide uncertain or conflicting standards regarding when and what business conduct is prohibited. In contrast to the AML, which includes requirements to establish a claim in connection with these five categories, Article 6 would appear to permit the administrative department for industry and commerce of the State Council to prohibit virtually any activity by a “dominant” market player that is deemed not acceptable. Thus Article 6 might provide an end-around to the requirements to establish a claim under the AML. Moreover, if reasonable advance notice of what activities are prohibited is not provided, this prohibition could be made retroactively, after that party has already engaged in the proscribed behavior.

此外，这五类行为已经在反垄断法滥用市场支配地位的条款里进行了规范。AIPLA 担心拟议的第 6 条给判断什么情况下哪些商业行为是违法的标准带来不确定性和矛盾。与反垄断法相反(反垄断法包括了这五类行为的构成要素)，按本条规定几乎任何不被国务院工商行政管理部门接受的有“优势”的市场参与者的活动都可能被禁止。因此，第 6 条可能提供一个渠道绕过反垄断法对违法行为构成要素的要求。此外，不对什么行为违法给予合理的事先通知，当事者的某些行为可能在事后才被宣布为违法。

AIPLA respectfully submits that the proposed Article 6 could be used to restrain a wide variety of business conduct that is considered appropriate under international norms of business and trading. Specifically, an exclusive licensing arrangement among firms without market power could be challenged because it might restrict transaction partners. Tying purchases of one product to another, without any market power or negative effect on a relevant product market, could also be prohibited. Imposing further conditions, such as auditing, reporting, grant-backs, or a wide variety of commercial terms that are generally accepted under international norms of business behavior could also be prohibited. AIPLA respectfully recommends that Article 6 be revised to more clearly define what appropriate levels of charges would be and what other economic benefits would be reasonable or unreasonable.

AIPLA 谨指出拟议的第 6 条可以被用来禁止多种在国际商业和贸易准则下认为恰当的商业行为。具体而言，没有市场力的企业间的独家许可协议可能受到质疑，因为它可能会限制交易的合作伙伴。一种产品的采购和另一种产品的采购绑在一起，即使卖方没有任何市场力或未造成相关产品市场上的负面影响，也可能被禁止。如果施加进一步条件，如审计、报告、回授、或各种国际准则普遍接受的商业条件，也可能被禁止。AIPLA 谨建议在本条中更清楚地规定什么样的费用、什么其他经济利益是合理的或不合理的。

AIPLA respectfully submits that the proposed Article 6 appears to be inconsistent with the AML and international practice. Moreover, in our view it does not provide adequate notice to persons trading in China of what conduct is prohibited, and in what circumstances such conduct may be prohibited. As such, we are concerned that it appears to present an unreasonable risk of liability under the unfair competition laws that may be imposed arbitrarily and after the fact. This concern is heightened by the potentially high monetary fines provided for by Article 19 of the draft AUCL. Therefore, AIPLA respectfully recommends that this provision be deleted from the draft AUCL.

AIPLA 谨指出拟议的第 6 条和 AML 以及国际惯用法则似乎不一致。此外，在我们看来它好像未能给予在中国进行贸易的人足够的警告指明什么行为是禁止的，以及在什么情况下该行为可能被禁止。因此，我们认为这样的反不正当竞争法会给经营者带来不合理的责任风险，而且本条执法可能有随意性，且允许事后追究。本草案第 19 条规定的可能的高额罚款更加深了我们这一顾虑。因此，AIPLA 谨建议删除第 6 条。

Article 7 第 7 条

AIPLA believes that the AUCL should clarify that an undertaking should not be held responsible for the conduct of its employees in instances when an employee is not acting within the scope of his/her employment, is not authorized by the employer, and is not acting as an agent with the knowledge of its employer.

AIPLA 认为 AUCL 应澄清：如果员工行为不在其受雇范围内，未由经营者授权，且并非在经营者知悉的情况下做为其代理人，经营者不应该为员工行为负责。

Article 8 第 8 条

AIPLA recommends removal or redefining the phrase “biased advertising,” as the meaning of this phrase is unclear. AIPLA further recommends adding a materiality requirement for an act of false or misleading advertising to constitute an act of unfair competition. The prohibited statement should have a material impact on the consumer’s purchasing decision.

AIPLA 建议删除或者重新定义“片面宣传”一词，因为这个词的意思不明确。AIPLA 还建议对虚假或误导性广告的行为构成不正当竞争行为增加一个实质性要求，即：被禁止的宣传内容应该对消费者的购买决策产生实质性影响。

Article 10 第 10 条

AIPLA recommends a definition or further clarification of what constitutes “unreasonable conditions” as referenced in Subsection (3).

AIPLA 建议对第三款中的“不合理条件”给予定义或进一步澄清。

Article 11 第 11 条

AIPLA recommends clarification of "malicious review information," which appears to speak to the motive of the author of the information or the actor rather than the truthfulness of the information. For example, AIPLA is concerned that publication of truthful information may be subjected to investigation and sanction based on an allegation of “malicious” intent under this Article. AIPLA recommends changing "malicious" to "baseless or misleading". AIPLA also recommends clarification of the phrase "harming other parties' business goodwill and product reputation." It is unclear in the draft Article whether the actor's subjective intent to harm is required and whether merely having such intent is sufficient regardless of the impact of the action, or this Article instead intends to prohibit actions which cause quantifiable harm regardless of the intent of the actor.

AIPLA 建议阐明“恶意评价信息”的含义。这个表达似乎是针对信息作者或行为人的动机，而非信息资料的真实性。例如，AIPLA 关注的是，发布真实信息资料也可能因本条规定的“恶意”意图而遭到指控并受到调查和制裁。AIPLA 建议将“恶意”改为“毫无根据的或误导性的”。AIPLA 还建议阐明“损害他人的商业信誉、商品声誉”的含义。在草案中没有明确规定，是否行为人必需有主观上的蓄意伤害，以及是否仅有此意图就已足够了，而无需考虑行为后果。或者，是否本条旨在禁止造成可量化损害的行为，而不论行为人的主观意图。

AIPLA supports the distinction between advertising an undertaking's own products (Article 8) and publishing information on a competitor's products (Article 11). To better distinguish Article 11 from Article 8, AIPLA suggests clarification in Article 11 that the prohibited information under this Article concerns the competitor or the competitor's commodities and not the actor's own products. Further, AIPLA recommends amendment to this Article to provide a defense and exoneration if the information is true.

AIPLA 支持对宣传经营者自己的产品（第 8 条）和发布竞争对手的产品信息（第 11 条）进行区分。为了更好地区分第 8 条和第 11 条，AIPLA 建议在第 11 条中阐明：该条中所禁止的信息指的是涉及到竞争对手或竞争对手的商品信息，而非行为人自己的产品信息。此外，AIPLA 建议修改该条，使行为人能以该信息属实作为抗辩理由而免责。

Article 14 第 14 条

Article 14 of the AUCL prohibits an undertaking from performing other unfair competition acts to damage “other’s legitimate rights and interests” and to “disturb market order.” This Article, however, does not define “unfair competition acts” nor does it identify what “rights and interests” would be considered “legitimate,” nor does it define what conduct would “disturb market order.”

反不正当竞争法草案的第 14 条禁止经营者行使其他不正当竞争行为以损害“他人的合法权益”及“扰乱市场秩序”，然而，该条未定义“不正当竞争行为”，也未确定哪些“权益”会被认为是“合法的”，也未定义什么行为会“扰乱市场秩序”。

Rather, proposed Article 14 specifically provides that “other” unfair competition acts are those proscribed by the administrative department for industry and commerce of the State Council. What behavior constitutes unfair competition acts has not been defined. AIPLA is concerned that this Article may create the uncertainty that proper application of competition law seeks to avoid, because otherwise pro-competitive conduct might be subject to challenge, and competition might, in fact, be lessened by such a law.

虽然拟议中的 14 条特别指出：前款其他不正当竞争行为，由国务院工商行政管理部门认定。但它仍未明确指出什么样的行为构成不正当竞争行为。AIPLA 担心，该条会带来不确定性，而这是竞争法恰当应用中应尽力避免的。如果本来促进竞争的行为也可能会受到质疑，本法的存在也许反而会实际上抑制竞争。

AIPLA respectfully submits that the proposed law is indefinite. Absent greater definition of the proscribed conduct, the law may inhibit parties from engaging in normal business activities under international norms of commerce. Moreover, it would tend to inhibit parties from trading in China out of the fear that liability would be imposed, without advance notice and retroactively.

AIPLA 谨指出拟议中的法律不甚明确。缺乏对所禁行为更严谨的定义，本法可能会抑制各方在国际商务常规下从事正常的业务活动。此外，这可能会降低各方在中国从事贸易的愿望，因为他们会担心，在没有事先通知的情况下被事后追究责任。

Also see comments to Articles 2, 5, and 6, above.

另请参见上面关于第 2、5、6 条的意见。

Article 15 第 15 条

Article 15 of the draft AUCL provides a list of seven functions and powers conferred to supervision and inspection departments in connection with supervising and inspecting potential acts of unfair competition. AIPLA recognizes that determining which functions and powers should be conferred to supervision and inspection departments are strictly a decision for the State Council, but AIPLA suggests that initial critical factual findings should be made before a

supervision and inspection department exercises such authority in order to avoid the potential for abuse or misapplication by state officials. The arbitrary application of the functions and powers listed in Article 15 could chill pro-competitive licensing of IP rights, to say nothing of depriving parties of fundamental due process.

反不正当竞争法草案第 15 条授予监督检查部门七种监督检查潜在不正当竞争行为的职权。 AIPLA 认识到国务院有权决定应将哪些职能和权力赋予监督检查部门，但 AIPLA 建议，监督检查部门在行使其权力前先完成初步关键事实调查，以避免潜在的执法人员滥用或误用权力。恣意滥用第 15 条中所列的职权可能会妨碍有利于竞争的知识产权的许可，且不说剥夺当事人基本的程序公正权。

AIPLA recommends that the AUCL be clarified such that enforcement under Article 15 is triggered only after factual findings have been made that demonstrate likely or actual harm to competition or the competitive process. This would conform more closely with generally-established international standards of unfair competition enforcement. For example, in the United States, the Federal Trade Commission (“FTC”) has enacted a policy that states that the FTC will use “a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.” AIPLA suggests that the State Council consider harmonizing Article 15 more closely with generally-accepted international standards of enforcement such as this.

AIPLA 建议，要在反不正当竞争法中阐明，只有在对竞争或竞争过程显示出有可能的或有实际的损害的事实调查结果已经做出后，才能进行第 15 条的执法程序。这将与不正当竞争执法上普遍建立的国际标准更接近。例如，在美国，联邦贸易委员会（简称“FTC”）颁布了一个政策，指出 FTC 将采用“与合理原则类似的框架，即：被委员会质疑的行为或实践必须造成，或很可能造成，对竞争或竞争过程的损害，考虑到相关的可识别的效率和正当商业理由”。AIPLA 建议国务院考虑让第 15 条与国际普遍接受的执法标准相协调。

CHAPTER IV LEGAL LIABILITY 第四章 法律责任

Article 17 第 17 条

AIPLA recognizes the efforts to hold an infringing party liable to an infringed party in addition to the administrative fines paid to the government. AIPLA recommends clarification as to how the liability to the infringed party is measured. The proposed Article 17 does not indicate whether it is measured in net profits, royalties, or otherwise. AIPLA is of the view that the infringing party should receive notice of the action and be provided with an opportunity to produce evidence of the level of harm suffered.

AIPLA 认识到本款想让侵权方在向政府缴纳行政罚款之外还要承担对被侵权方的损害赔偿，但建议澄清如何衡量对侵权方的赔偿责任。拟议第 17 条并未明确规定赔偿责任是以净利润，特许权费，或其他基础来衡量。我们认为，应该给被侵权方发行动通知，让其有机会提供受损程度的证据。

Article 18 第 18 条

AIPLA recommends clarification of the duty to negotiate to allow an infringed party to immediately request an order of cessation from a People's Court to prevent further market harm.

AIPLA 建议阐明协商职责，允许被侵权方即时要求法院发出禁制令以防止更多的市场损失。

It is not clear whether the settlement negotiations are mandatory or recommended because the parties are not required to participate in good faith. AIPLA recommends clarification of what happens to the confiscated merchandise and recommends that such merchandise be stored during any period in which the undertaking may appeal the confiscation and thereafter be destroyed to prevent re-entry into the market.

由于对当事人是否诚意参与不作要求，和解协商是否属于强制性的还是建议性的就不甚明确。AIPLA 建议对被扣押商品将如何处置作出澄清，并建议在上诉期内封存扣押商品，上诉期后再将其销毁防止其重返市场。

Article 18 should also clarify that the amount of the fine should not impact on the infringed party's ability to recover separately in a separate action in a People's Court. AIPLA also recommends clarification to prohibit any amount of double recovery to the infringed party.

第 18 条也应该澄清罚款的数量不应影响被侵权方要求法院给予别的救济行动的能力。AIPLA 还建议就禁止被侵权方得到双重补偿作出澄清。

Articles 19 and 21 第 19 及 21 条

Articles 19 and 21 proscribe a fine that is based on a multiple of "illegal revenue." This can be a severe penalty for a company, especially when combined with potential civil remedies. A fine of "one to five times the illegal revenue," as in Article 19, can force a company into insolvency and may exceed the harm to competition. It is also unclear what the term "illegal revenues" refers to which makes the penalty uncertain, or how an "illegal" portion of revenues is determined. As noted with regard to Article 6, a number of conditions cited are broad, such as "overcharging."

第 19 和 21 条规定以违法经营额的倍数判以行政罚款。这对经营者可能是很重的惩罚，尤其当与潜在的民事补偿累加在一起时。第 19 条中“违法经营额一倍以上五倍以下的罚款”可能会迫使经营者破产，并超过其行为对竞争造成的实际损害。什么是“违法经营额”，不是很清楚，致使惩罚数量也不确定。如何确定经营额中的“违法”部分，也不清楚。与上面讨论第 6 条时提到相同，某些列出的违法行为，如“滥收费用”，其范围很宽。

It is also not clear whether the imposition of a fine requires a finding of intent. A party may not know what is "unreasonable" or "without justification" until there is dispute resolution. AIPLA recommends that Article 19 should be deleted, or at least reworked to specify the triggers for the fine (e.g. see discussion on Article 6), definitions (e.g. "illegal revenues"), and fine amounts to avoid potential penalties that may be disproportionate to an act and discourage "a market

economy...and fair competition.” AIPLA also recommends reconsideration of the fine structure for Article 21 and clarification of "illegal revenues" as used in that provision.

还有不清楚的地方包括，处以罚款的前提是否需要违法意图。当事人在纠纷解决之前，可能事先并不知道什么是“不合理”或“没有正当理由”。AIPLA 建议删除第 19 条，或者至少修改第 19 条具体规定触发罚款的条件（见关于第 6 条的讨论），定义（比如“违法经营额”），及罚款数额，以避免潜在的不成比例的惩罚，或者避免不鼓励“市场经济...和公平竞争”的惩罚。AIPLA 也建议重新考虑第 21 条的罚款结构，澄清其中“违法经营额”的含意。

Article 22 第 22 条

AIPLA recommends that Article 22 specify the availability of both injunctive relief and damages for trade secret theft. While AIPLA understands that such remedies are available under Chinese law, it would be helpful to confirm the existence of such remedies so as to avoid confusion when dealing with law enforcement personnel in trade secret matters.

AIPLA 建议第 22 条明确规定对侵犯商业秘密的行为可同时处以禁令和赔偿惩罚。尽管 AIPLA 知道中国法律已能提供这样的补救措施，不过，在本法中确认这种补救措施的存在会有助于在侵犯商业秘密执法时避免混乱。

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Again, AIPLA appreciates the opportunity to provide these comments in response to the Anti-Unfair Competition Law of the People’s Republic of China. Please contact us if you would like us to provide additional information on any issues discussed above.

AIPLA 再次感谢这次对《中华人民共和国反不正当竞争法》提供上述意见的机会。如果您希望我们就以上所讨论的问题提供进一步信息和意见，请与我们联系。

Sincerely Yours,
此致



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