

美国律师协会反托拉斯法部和国际法部

关于《中华人民共和国反不正当竞争法（修订草案送审稿）》的联合意见

2016年3月24日

本呈递意见中所述观点仅代表两部门的观点。该等意见并未经美国律师协会会员代表大会或美国律师协会理事会批准，因此不应被视为代表美国律师协会的政策。

美国律师协会反托拉斯法部和国际法部（“两部门”）谨向中华人民共和国国务院法制办（“法制办”）就公开征求意见的《反不正当竞争法（修订草案送审稿）》（“《反不正当竞争法》（草案）”）提交以下意见¹。两部门希望本意见能够协助法制办进一步完善《反不正当竞争法》（草案）。本意见反映了其全球成员在反垄断法和反不正当竞争法领域的专业知识和经验。两部门希望本意见能协助法制办进一步完善《反不正当竞争法》（草案），如果法制办认为必要，两部门可以就草案提供进一步意见，或者参与和法制办的讨论。

概述

两部门赞同法制办所强调的观点，即《反不正当竞争法》（草案）不能是对《反垄断法》的重复，也不能削弱《反垄断法》的地位，并迫切希望法制办进一步降低《反不正当竞争法》同《反垄断法》相冲突的可能性。同样，两部门建议在《反不正当竞争法》中增加一项条款，以避免产生任何同中国知识产权法律相冲突的解释。同时，我们建议对第二条进行澄清，使其避免同《消费者权益保护法》相冲突，或是取代《消费者权益保护法》。

同时，针对《反不正当竞争法》（草案）的具体规定，两部门提出以下修改建议：

- 应当对第五条关于利用商业标识实施市场混淆行为的规定进一步完善，在认定是否构成违法时应更关注效果分析而不是目的分析。
- 根据拟议第六条，经营者不得利用相对优势地位，此条应当被删除或缩减，以避免削弱《反垄断法》，从而达到促进市场竞争的目标。如果不予删除或缩减，两部门强烈建议第十七条规定的民事诉权应当排除私人基于第六条主张任何权利，同时建议修订第十九条，确保根据违法行为的严重程度施加更相称的处罚。

¹请见“国务院关于公布《中华人民共和国反不正当竞争法（修订草案送审稿）》公开征求意见的通知”（2016年2月25日），见<http://www.chinalaw.gov.cn/article/cazjgg/201602/20160200480277.shtml>，“《中华人民共和国反不正当竞争法（修订草案送审稿）》起草说明（‘《起草说明》’）”，见<http://zqyj.chinalaw.gov.cn/draftExplain?DraftID=987>。评论基于《反不正当竞争法》（草案）和《起草说明》的非官方翻译，翻译版本请分别参见附件1和附件2。

- 建议对第七条进行细化，以明确在商业贿赂案件中，若存在自首情节，或者恶劣的员工无视公司明确禁止商业贿赂的合规政策而导致商业贿赂的情况，是否可以获得宽大或豁免。
- 建议对第八条有关禁止引人误解的商业宣传行为的规定进行扩充，以明确误导性或欺骗性行为的范围，同时应对该条进行修订，保留现行法律所规定的实施这些行为的代理人责任。
- 第九条和第二十二条，加重了对通过不正当手段获取商业秘密行为的处罚，并明显将该条规定的重点从对不正当获取行为的辩护转变为对不正当获取行为的推定，有利于保护创新。
- 对于第十二条和第二十五条有关串通投标的规定，建议在某些方面进行扩充，而在另一些方面进行缩减，从而进一步提高《反垄断法》和《反不正当竞争法》的互补性。
- 根据拟议第十三条，经营者利用网络应用服务实施“影响用户选择、干扰其他经营者正常经营”的行为将会根据第二十六条受到严厉处罚，但本条并未界定“网络应用服务”，应当进一步明确其范围。至少应对第二十六条进行修订，在对违反拟议第十三条的行为进行处罚时应允许更大的灵活性。
- 第十四条兜底条款也应被修订，其他不正当竞争行为应仅指第二条所定义的不正当竞争行为，以避免对该条款的适用范围的混淆。

总体评价

两部门赞赏法制办通过《反不正当竞争法》（草案）彻底审视和更新现行法律的努力，法制办尤其考虑到了《反不正当竞争法》与《反垄断法》相互关系中的复杂因素。两部门也赞赏《反不正当竞争法》（草案）中对有关调查权、禁止行为和处罚条款的完善，这有利于促进创新、市场竞争和消费者福利。

两部门赞同法制办在草案中所强调的要避免《反不正当竞争法》对《反垄断法》的重复或冲突²。《反垄断法》反映了一整套反垄断原则，以遏制竞争者们一致行动或者个体经营者滥用市场支配地位的限制竞争的行为，并避免遏制促进竞争的行为。两部门强烈希望法制办进一步降低《反不正当竞争法》同《反垄断法》相冲突的可能性。《反不正当竞争法》（草案）中包含与《反垄断法》的目的和适用相冲突的条款，应当运用《反垄断法》中蕴含的促进竞争原则解决冲突。例如，正如以下对草案新增的第六条的意见中指出那样，只有当能够证明经营者具有市场支配地位时，《反垄断法》才禁止滥用市场支配地位³。然而，《反不正当竞争法》拟议的第六条规制了类似行为却没有要求证明支配地位。进一步完善《反不正当竞争法》（草案）的适用范围以避免削弱《反垄断法》中谨慎的平衡是与国际实践相一致的⁴。

²请见《起草说明》第三条第二款第三项。

³请见《反垄断法》（全国人大常委会 2007 年 8 月 30 日通过，2008 年 8 月 1 日生效），第十七条，见 http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm

⁴请见，例如，美国联邦贸易委员会，联邦贸易委员会法第五条关于“不正当竞争执法原则声明”（2015 年 8 月 13 日）（“FTC 对不正当竞争执法原则的声明”），见 https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf（在处罚不正当竞争行为

法制办也应进一步考虑有关不正当获取知识产权的条款是否应当包含在《反不正当竞争法》中，因为此种行为已经在其他法律如商标法、著作权法和刑法中被规制⁵。两部门敬请法制办考虑在《反不正当竞争法》中增加与《反垄断法》第五十五条前半部分规定相似的条款，声明经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用本法，以避免《反不正当竞争法》与其他法律的冲突。考虑到《反垄断法》第五十五条后半部分已经规定了滥用知识产权的行为，《反不正当竞争法》没有必要就此种滥用行为制定类似的条款。

第二条

《反不正当竞争法》（草案）第二条将“不正当竞争”界定为“损害其他经营者或者消费者的合法权益”的行为，而现行法律第二条仅将“不正当竞争”界定为“损害其他经营者合法权益”的行为，而没有提“消费者”。尽管两部门赞赏对“不正当竞争”进行扩大解释使之接近于其他司法辖区的相关规定，但是两部门担心，这种扩大解释可能会导致《反不正当竞争法》同《消费者权益保护法》产生冲突，或是取代《消费者权益保护法》。因此，两部门建议在“不正当竞争”修订后的定义中增加描述，声明《反不正当竞争法》的任何规定都不会取代《消费者权益保护法》⁶。

另外，修订后的“经营者”主要是指从事或者参与商品生产、经营或者提供服务的自然人、法人和其他组织。两部门不知道修订的定义为什么略去了现行法律中包含的“代理人”。基于第八条的讨论中所解释的原因，两部门建议应当修正定义以包含自然人、法人和其他组织的代理人。

第五条

《反不正当竞争法》（草案）对第五条修订的目的似乎是将现行法律第五条规定的假冒行为（在其他法律中有特别强调）扩充到消费者就特定商品的来源被误导的其他情形。两部门支持对该条扩充，包括对未登记的商标的保护，并提出以下建议进一步完善该修订条款。

第一，对于第五条是否要求误导的主观故意及实际的市场混淆证据并不明确，例如，第五条第二项关于使用与他人知名的商业标识近似的商业标识的规定。两部门建议，这些条款应关注实际的欺骗效果或者至少是消费者被误导的显著可能性。第五条不应要求欺骗意图作为单独证据。此外，两部门建议删除对其他商业标识“知名”的要求。

第二，虽然修订了的第五条似乎用更宽泛的条款涵盖了假冒行为，但却省去了禁止假冒这样的表述，这会引人质疑修订的《反不正当竞争法》（草案）

时，委员会应当根据保护消费者福利和合理原则标准评估行为，如果根据《反垄断法》足以救济行为导致的损失，则不根据本法进行处罚）

⁵请见《起草说明》第一条（指出《反不正当竞争法》的目标之一是消除对其他知识产权法律的重复）。

⁶美国《联邦贸易委员会法》将保护消费者不受“不公平和欺骗性行为”的损害作为美国反不正当竞争法的一部分，但是美国并没有关于消费者权利的特别联邦法律。

是否涵盖假冒行为。如果假冒行为在其他法律中有明确且完备的规定，两部门同意没有必要在《反不正当竞争法》中规定假冒行为。否则，如果有其他法律没有规定的假冒行为类型，两部门建议《反不正当竞争法》保留禁止这些假冒行为类型的表述。

第六、第十七和第十九条

根据拟议的《反不正当竞争法》（草案）第六条，禁止经营者利用相对优势地位，通过几种特定的行为方式实施不公平交易。除了拟议第六条第四款可能属于例外⁷，其他几种禁止的行为与《反垄断法》第十七条禁止的集中行为均重合⁸。

然而，《反垄断法》第十七条中所禁止行为的适用情形与《反不正当竞争法》（草案）第六条所禁止行为的适用情形存在实质不同。《反垄断法》仅在能够证明经营者具有市场支配地位时禁止上述特定行为。市场支配地位被定义为“在相关市场内控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场的能力”⁹。《反垄断法》第十八条明确列举了五个认定市场支配地位的因素，并通过《工商行政管理机关禁止滥用市场支配地位行为的规定》进一步做出解释¹⁰。与之不同，《反不正当竞争法》（草案）拟议第六条仅需存在“相对优势地位”时即禁止上述行为。相对优势地位被定义为“在具体交易过程中，交易一方在资金、技术、市场准入、销售渠道、原材料采购等方面处于优势地位，交易相对方对该经营者具有依赖性，难以转向其他经营者”的情形。而对此的认定是相对于每个个案交易而言的，因此对于一个既定经营者的认定会因不同交易相对方而异。这一因素将使得法律义务存在不确定性。

《起草说明》表明拟议第六条的立法意图在于规制“虽不具有市场支配地位，但在交易中具有相对优势地位”¹¹的经营者的行为，因此在经营者不具有实质市场影响力的情况下，即便其所实施的行为基本不可能危害市场竞争，仍然会受到此条款的制约¹²。实际上，仅仅构成正常的积极的商业谈判的行为就可能违反拟议的第六条。积极的谈判能够促进激烈的市场竞争，应当受到鼓励

⁷ “经营者不得利用相对优势地位，实施下列不公平交易行为：……滥收费用或者不合理地要求交易相对方提供其他经济利益。”《反不正当竞争法》（草案）第六条第四款。

⁸ 请见《反垄断法》第十七条。

⁹ 同上。

¹⁰ 《禁止滥用市场支配地位行为的规定》（由国家工商行政管理总局于 2011.02.01 发布，2011.02.01 起实施），第 10 条，见 <http://www.linklaters.com/pdfs/mkt/london/1b.pdf> (China)。

¹¹ 请见《起草说明》第三条第二款第二项。

¹² 3B Phillip E. Areeda & Herbert Hovenkamp, 反垄断法：对反垄断原则以及其适用的分析（Antitrust Law: An Analysis of Antitrust Principles and Their Application），第 802 页 d。（第 4 版，2015 年）（“Areeda & Hovenkamp”）；另请参见伊士曼柯达公司诉图像技术服务公司（Eastman Kodak Co. v. Image Technical Serv. Inc., 504 U.S. 451, 488 (1992)）（大法官斯卡利亚的反对意见）（“当被告保有实质的垄断权力，其活动将被以特别的眼光看待检查：原本不会为《反垄断法》所考虑的或被认为是促进竞争的行为，一旦由垄断者实施，就可能带上排斥性的内涵。”）。

而非处罚。此外，不同于市场支配地位，相对优势这一焦点关注的是相对议价能力而非市场支配力，可能使得执法者介入不适于政府参与的商业谈判活动以及正常的市场操作，并可能妨碍市场的正常运行。拟议第六条的禁止性规定将会最直接地影响中国最有效率、最具竞争力的企业，从而最终损害中国消费者的利益和健康的市场经济发展。

此外，拟议《反不正当竞争法》（草案）第六条与《反垄断法》第十七条禁止实质上相同的行为，但前者不要求经营者具备市场支配力，这将会破坏《反垄断法》滥用市场支配地位条款的实用性和有效性，并潜在地使得它们在《反不正当竞争法》更低的标准面前无所作为。竞争法宏观目的在于通过竞争的过程提升消费者福利¹³。一个能够利用其地位以从供应方获得更优条件的买方能够转而将此中节约的成本转化为消费者利益¹⁴。但是禁止缺乏市场支配力的买方或其它主体实施此种单方行为的法律将不仅导致政府对常规商业决策和协议的不恰当干预¹⁵，还会增加对促进竞争的行为产生冷却效应的风险¹⁶。事实上，此种针对相对于交易对方具有仅是相对的而非市场支配性优势的经营者的禁止性规定，带有例如“正当理由”此类模糊和未经定义的词语，可能使公司不愿与明显是法律意在保护的中小规模交易对象或供应商进行交易，反而损害经济效率和消费者福利，以及拟议新条款可能想要保护的小型企业¹⁷。

相较于《反垄断法》，依据《反不正当竞争法》（草案）所处的罚金可能会将这一“不公平的交易优势”条款所产生的冷却效应放大。尽管《反垄断法》禁止具有市场支配地位的公司所实施的产生反竞争效果的更严重的行为，但依据《反不正当竞争法》（草案）第十九条因违反第六条而处以的罚金数额却可

¹³ 这一方法所得到的国际认可体现在美国和欧盟对其接受。请见，例如，尼莉·克鲁斯（Neelie Kroes），欧盟竞争政策委员，欧洲消费者和竞争日的演讲，SPEECH/05/512（2005年9月15日），见http://europa.eu/rapid/press-release_SPEECH-05-512_en.html（“消费者福利是业已建立完善的供委员会在评估并购以及对关于卡特尔和垄断组织的条约规则的违反时适用的标准。”）。

¹⁴ 雅子涌井和托马斯·程，《根据日本竞争法规制滥用优越议价地位：异常还是必要？》《反垄断执法期刊》（Masako Wakui & Thomas Cheng, *Regulating abuse of superior bargaining position under the Japanese Competition Law: An Anomaly or a Necessity?*, *J. of Antitrust Enforcement* 1, 16 (2015)）（“Wakui & Cheng”）

¹⁵ 日本公平贸易委员会（“日平贸”）在其指南的序言中就适用日本反垄断法案的滥用优越议价地位条款的问题做出如下认定：当协商是基于行使独立的商业判断和交易各方之间的自由谈判时，此种法规不应被适用。JFTC，关于在反垄断法案框架下可能的滥用优越议价地位的指南（2010年11月30日）第三段（“反垄断法滥用优越议价地位指南”），见http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/101130GL.pdf。

¹⁶ 请见，例如，*美国制针公司诉国家橄榄球联盟案*（*American Needle, Inc. v. National Football League*, 560 U.S. 183, 190 (2010)）；另请参见 3B Areeda & Hovenkamp, 第 802 页 d（“第三，由此产生的诉讼和不确定性将会抑制很多合法的行为。如果每个不具有实质市场支配力的企业每当做出其竞争者不同意的行为时，都面临费用高昂且结果不确定的反垄断诉讼，企业将会不愿意进行为反垄断政策所鼓励的积极竞争行为。”）

¹⁷ 这里亦存在这样的危险：同时是竞争对手的交易对方会歪曲表面上与拟议第六条所认定的行为相似的良性行为，来攻击他们的对手或交易伙伴并寻求政府干涉，以增强他们的议价地位。

能比因违反《反垄断法》第十七条而处以的罚金高得多¹⁸。由于第十九条所规定的因违反第六条而产生的处罚可能并不成比例，其可能与反垄断法的处罚结构和目标不一致之外还产生冷却效应。相比之下，在日本依据《禁止私人企业垄断和维护公平交易法案》所处的对滥用优越议价地位的行政罚款低于对其他违反该法案的行为的处罚，且普遍显著少于《反不正当竞争法》（草案）所规定的处罚¹⁹。

尽管其他国家也有类似的规制“滥用优越议价地位”或“不公平交易优势”的法律，这些法律并未如其具体语言一样，被扩大化地适用。在美国，在商业行为可能被《联邦不正当竞争法》广义的不正当标准所禁止的情形下，此种标准与该行为对消费者而非对竞争者的影响相关联²⁰。在日本，“滥用优越议价地位”最常被适用于实力强大的零售商和他们的供货商之间可能催生垄断的，且涉及难以通过其它方式在日本民事法院系统起诉的合同争议的行为²¹。实际上，自2010年起，日本公平贸易委员会仅针对六起案件基于滥用优越议价地位提起正式诉讼。关于具有垄断力量的大零售商对供应商进行胁迫，从而长期来看会损害消费者利益的相同担忧似乎也在法国引发了对“滥用依赖性”的争论²²。

因此，两部门建议删除拟议第六条。不过，即便拟议第六条被保留，两部门亦建议通过增加类似于美国或其他国家的包含与拟议第六条更为相似的禁止性规定的法律中的限定，对其适用范围进行缩减，以反映在这些法律框架下的

¹⁸ 比较，例如《反不正当竞争法》（草案）第十九条（如违法金额可以计算，可处违法金额一倍以上五倍以下的罚款；如果违法金额无法计算，则处以人民币10万元以上300万元以下的罚款）；对比《反垄断法》第四十七条（“经营者违反本法规定滥用市场支配地位的，应被责令停止违法行为，反垄断机构应没收其违法所得，并处以上一年度销售额百分之一以上百分之十以下的罚款。”）。

¹⁹ 《禁止私人企业垄断和维护公平交易法案》[反垄断法案]，1947年4月14日第54号法案，第五章，第20-26条，见http://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_05.html（“如果一个企业实施了构成违反第十九条规定的行为（限于在第二条第九款第五项下的，企业持续从事的基础上），则公平贸易委员会应当依据第8章第2节的程序，责令该企业向国库支付金额上相当于该企业在该项违法行为中向交易相对方的销售额百分之一的追加罚款……”）。

²⁰ 请见，例如，15 U.S.C. §45n（不正当行为或做法仅会在“该行为或做法引发或可能引发对消费者的实质损害，且此种实质损害须是消费者自身无法通过合理方式避免的，且该行为或做法不对消费者或竞争产生能够弥补此种损失的利益”的情况下，被美国联邦贸易委员会（“FTC”）认定为非法。不正当的行为或做法也与违反联邦贸易委员会法案（15 U.S.C. §41）的不正当竞争手段不同。FTC也限缩了其依据不正当竞争法进行的不正当竞争执法，以避免损害反垄断法。FTC关于不正当竞争手段的执法原则声明，见前注4。

²¹ 请见，例如，Wakui & Cheng，第16-18，20，27-31段；弗雷德里克·詹尼（Frederic Jenny），关于竞争法与政策在促进增长与发展，以及滥用支配地位中的作用的临时专家组（2008年7月15日），第10-15段（“Jenny”），见http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf。垄断涉及一个具有市场支配力的购买者强迫供应商收取低于竞争市场中的价格，从而造成无谓损失并且因造成产品供应比在应有状态下更短缺，使得分配低效化。请见，例如，Wakui & Cheng，第18段，日本将对竞争的更大层面的影响也纳入考虑范围，即便（经营者的）市场份额以及市场支配力的缺乏可能并不掌控结果。请见，例如，JFTC 滥用优越议价地位指南第3段（通过考虑不利影响的程度和行为的影响范围评估妨碍正当竞争的风险）；Wakui & Cheng，第5，20段。

²² 请见，Jenny，第10-12段

执法实践²³。两部门建议《反垄断法》所采用的经济原则和分析框架应同样被适用于拟议第六条的实施。在此框架下，当被拟议第六条认定的行为不具有反竞争效果而能起到提高效率和增加消费者福利的作用的话，该行为不应被认定为不正当²⁴。如果如同拟议第六条这样的法律规定在《反垄断法》之外对具有相对优势地位的经营者的行为还有多余的作用，其也应被限定于多个上游供应商与国有公司或国家批准的垄断经营者进行交易的情形²⁵。此外，两部门促请在《反不正当竞争法》（草案）第十七条项下的私人诉权中，排除私人主体以违反拟议第六条为由提起诉讼的权利²⁶。

第七条

两部门认同商业贿赂是不受欢迎的，并且对于此种禁止是否更适宜纳入《反不正当竞争法》而非如《刑法》的其他法律不持意见。如果保留第七条，两部门建议，若能围绕经营者是否存在自我检举义务以及通过自我检举能否得到从宽处理的问题在第七条做出解释，将可能对经营者有所帮助。而纳入可能的免责或者从宽标准可能也是有益的，例如当经营者对于不良雇员的行为不知情并且具备全面的合规政策时。要求经营者在任何情况下都对不良雇员的行为负责可能是有失公正的。

第八条

两部门赞同第八条解决与新广告法之间的重合，以及通过禁止包括欺骗性的营销形式在内的引人误解的商业宣传行为对现行第九条针对虚假广告做出的禁止性规定进行扩充的明显意图。对保护中国消费者而言，这是一个受欢迎的法律扩充。美国联邦贸易委员会法案也相似地禁止“不正当或欺骗性的行为或做法”²⁷，而这种表述提供给联邦贸易委员会空间和灵活性以应对新的广告、推广和营销形式，从而经受住了时间的考验。

然而，尚不明确的是究竟第八条是否穷尽了《反不正当竞争法》（草案）所禁止的全部行为。因此，两部门建议对第八条进行以下解释：其规定并未列举所有欺骗性和误导性的行为，而仅对会被认定为具有误导性或欺骗性的行为

²³ 请见，Jenny，第 17-18 段。

²⁴ 至少，应有更多的关于如何认定行为的哪些方面构成不正当交易惯例的指南，为企业在其商业交易安排中提供亟需的明确性和可预见性。

²⁵ 请见 OECD，全球竞争论坛。竞争和减少贫困，来自日本的供稿。DAF/COMP/GF/WD(2013)7（2013 年 1 月 18 日），第三段（JFTC 宣布增加不正当贸易优势法规，因为在日本政府已批准卡特尔组织形式的背景下，存在此类政府批准的卡特尔滥用其市场地位并对中小企业施加压力的风险）。

²⁶ 在考虑进一步排除或限缩拟议第六条时，法制办不妨明确考虑这一问题：即在中国，针对不平等关系或交易的民事契约诉讼在何种程度上能够满足保护企业免受滥用优越议价地位之损害的需要。可对比例如，Wakui & Cheng，第 31-32 段（在日本，民事诉讼可能对于实现这一功能而言不够强有力）又例如，针对滥用优越议价地位的特别工作组，《关于滥用优越议价地位的报告》，国际竞争网络东京会议特别程序，国际竞争网络第七次年度会议（2008 年 4 月 14 日至 4 月 16 日）。第 35-36 段，见 <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>（数个司法辖区报告认为私人依据合同或其它法律的诉权足以救济任何滥用行为之损害）。

²⁷ 15 U.S.C. § 15 U.

类型提供示例。比如，可以加入下文斜体的文字以减小潜在的不明确性：“经营者在对产品、商品和服务的广告以及任何商业推广中，不得实施下列引人误解或具有欺骗性的行为，*包括但不限于……*”。

此外，指定在《反不正当竞争法》框架下各个市场领域中的良好实践的指南可能会有所帮助。在全球各国的保护消费者权益工作中，这样的指南构成了适用不正当竞争原则的重要组成部分²⁸。将有关《反不正当竞争法》的判决与和解协议经过保密处理后汇集出版，也能就不正当竞争法中常常显得宽泛的概念在实际中如何运用这一问题提供商业指导方针，从而起到类似的益处²⁹。

最后，两部门注意到针对虚假广告问题的现行第九条禁止广告商在明知或者应知的情况下代理虚假广告。出于两部门未知的原因，拟议第八条并不包含这一关于广告代理商的条款。此外，虽然代理商在现行《反不正当竞争法》中有提及，拟议第二条中将“经营者”定义为从事或参与商品或者服务的生产和经营的个人或营业实体，而并未提及代理商。这一情况进一步提升了根据修订后的《反不正当竞争法》代理人将不对虚假推广承担责任的可能性。规定广告代理商在参与了被审查的行为并且“明知或应知”其欺骗性质时承担违反第八条的责任是有益的。“明知或应知”作为认定代理人对欺骗性行为的责任的标准数十年来在美国行之有效³⁰。两部门建议就这一点做出解释，且建议保留广告代理人的责任，以充分保护消费者利益，并在不良代理从事此种活动时保护经营者的利益。

第九条和第二十二条

两部门认为继续由第九条来规制侵犯商业秘密的行为是合理的。商业秘密指的是基于商业秘密的保密性而具有价值的商业资产，包括客户名单、软件、生产工艺或者数据库等³¹。商业秘密的开发耗费巨大，并可能历时数年研究³²。

²⁸ 请见加拿大竞争局关于市场透明度行动计划，见 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03568.html;

美国联邦贸易委员会组织，程序和实务规则，工业指南，16 C.F.R. § § 1.5-1.6，见 http://www.ecfr.gov/cgi-bin/text-idx?SID=30da0f5ac979e28986a1ce6b9bc514f0&mc=true&tpl=/ecfrbrowse/Title16/16cfr1_main_02.tpl。

²⁹ 请见美国联邦贸易委员会，2014 公开政府计划（2014 年 6 月 2 日）

<https://www.ftc.gov/system/files/attachments/open-government/.opengovplan.pdf>。

³⁰ 请见，例如，多赫蒂，克利福德，施蒂尔斯和谢菲尔德公司诉联邦贸易委员会，（*Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968)）（判处广告代理商有责，因其明知或应知争议中的广告宣传内容具有欺骗性）；美国联邦贸易委员会，关于特定进口纺织、羊毛、皮毛制品的执法政策声明，见 https://www.ftc.gov/system/files/documents/public_statements/299821/guaranty_policy_statement.pdf（规定服装零售商仅在“明知或应知”服装生产商提供的标志为虚假商标时承担商标违规责任）

³¹ 请见，例如 *Altavion v. Konica Minolta Systems Laboratory, Inc.*, 171 Cal.Rptr.3d 第 714, 719 页 (Cal. App. Cal. App. 1st Dist. 2014) (允许文档完成自身鉴定的数码冲压技术应作为商业秘密加以保护)。

³² 美国众议院司法委员会，众议院报告第 113-657 号，2014 年商业秘密保护法案，第五页，见 <https://www.congress.gov/congressional-report/113th-congress/house-report/657/1>。

因此，商业秘密的保护对于在中国经营的公司至关重要³³。两部门很高兴的注意到，法制办在修订草案中不仅继续将侵犯商业秘密的行为作为反不正当竞争法下的一项违法行为，而且澄清许可从他人处窃取的商业秘密亦构成不当使用，并在第二十二条中加大处罚该等行为的相应力度。

两部门同样支持对第二十二条的修订。本条的修订形成了一种推定，即在具有获取他人商业秘密的途径并且使用了与商业秘密类似信息的条件下，可以推定为侵犯了商业秘密。在过去，中国允许将商业秘密已发生实质性改变作为窃取商业秘密的抗辩，这是一种类似商业秘密同等（保护）原则的抗辩³⁴。两部门同意对第二十二条的修改，即可能将商业秘密实质性改变从抗辩理由转变为对侵权行为的推定。同时，希望法制办能对第二十二条进行更明确的修改来体现这种转变。如果原告能够证明其商业秘密与被告使用的信息实质相同，并且被告有获取该等商业秘密的条件，那么被告负有证明其信息使用合法的举证责任。

两部门谨建议法制办考虑，是否在《反不正当竞争法》中明确商业秘密持有者拥有如美国一样进行即时临时救济的渠道，例如有关适当展示的禁令救济³⁵。

第十二条和第二十五条

尽管《起草说明》表示现行《反不正当竞争法》中与《反垄断法》重复的条款会在修订草案中被删除³⁶，修订草案第十二条第一款仍保留了现行《反不正当竞争法》中可能与《反垄断法》第十三条重复的关于禁止共谋串通招投标的规定，而共谋串通招投标通常由反垄断法而非反不正当竞争法规制。另一方面，《反不正当竞争法》（草案）似乎缺少禁止非公开邀请共谋的条款，该行为不受反垄断法管辖，而且适合在反不正当竞争原则下进行规制³⁷。非公开、秘密的邀请共谋不具有促进竞争的效果，反而具有产生共谋或其他反竞争行为

³³ 见 Mark Cohen, 《由懒散迈向创新—关于中国知识产权环境的调查》，中国知识产权 (2016 年 1 月 1 日), 见 <http://chinaipr.com/>。

³⁴ 请见 Mark Cohen, Of NDAs and Smoking Guns: China's Evolving Landscape of Trade Secret Protection, 中国知识产权 (2016 年 2 月 2 日), <http://chinaipr.com/>。在包括美国在内的其他法域，对商业秘密实质性的改变并不能作为窃取商业秘密责任的抗辩理由。

³⁵ 见上。

³⁶ 请见《起草说明》，第三条第二款第三项。

³⁷ 请见, 为支持公共评论对包含同意令的合同的解析 (Analysis of Agreement Containing Consent Order to Aid Public Comment), 有关 Valassis Commc'ns 公司, 联邦贸易委员会文件第 051 0008 号 (2006 年 3 月 14 日) 第 2-3 页; 为支持公众评论对包含同意令的合同的解析 (Analysis of Agreement Containing Consent Order to Aid Public Comment), 有关 U-Haul 国际公司, 联邦贸易委员会文件第 081 0157 号 (2010 年 6 月 21 日) 第 2-3 页。在 U-Haul 案中, U-Haul 国际与联邦贸易委员达成和解, 其因通过邀请最密切竞争者 Avis Budget Group 共谋卡车租赁价格违反联邦贸易委员会法案第五部分而被指控。当时 U-Haul 和 Budget 控制着美国“制着美国 t 价格违反联邦贸易委员单程卡车租赁超过 70% 的业务。联邦贸易委员会的控告声称, 从 2006 到 2008 年 U-Haul 数次试图通过私下或公开与美国第二大卡车租赁公司 Budget 交流而对单程卡车租赁涨价。

的重大风险³⁸。因此，两部门建议，如果第十二条第一款被保留，应避免与反垄断法重叠，仅限制非公开邀请共谋的行为。

第十二条第二款禁止未被《反垄断法》规制的一种串通招投标类型，即投标人和招标人间的共谋。两部门认为该等商业行为是有害的，尽管该等行为可能尚未受到《反垄断法》规制（譬如发生在唯一一个投标人和招标人或其代理、雇员之间的共谋，将导致招投标程序变成虚假的表面形式）。然而，两部门不确定该等行为是否会在反不正当竞争法或者另外的法律，如合同或者反欺诈法律中，获得有效规制。而且，如果第十二条的第二款被保留，第二十五条则因为针对第十二条违法行为的罚则未包括招标人而值得商榷。为增加威慑力，两部门谨建议将第二十五条针对第十二条违法行为的处罚规定延伸至招标人和投标人³⁹。

此外，两部门建议第二十五条增加类似于《反垄断法》第四十六条的宽大政策，对自愿举报其行为并配合有关调查的串通招投标参与者减轻处罚或者适用宽大政策。

第十三条和第二十六条

《反不正当竞争法》（草案）拟议第十三条禁止四种利用网络技术或者应用服务实施影响用户选择、干扰其他经营者“网络应用服务”的行为。《反不正当竞争法》（草案）没有界定“网络应用服务”的概念，据两部门了解，其他任何法律法规也没有对该概念加以界定，因此拟议第十三条规制的范围并不明确。例如，拟议第十三条是否仅适用于互联网应用服务提供者，还是也可适用于基础设施网络、电信网络，甚至其他虚拟或实体网络运营商⁴⁰？《起草说明》提到，拟议第十三条旨在规范利用软件等技术手段在互联网领域干扰、限制、影响其他经营者及用户的行为⁴¹。因此，两部门提议厘清“网络应用服务”的概念或以其他术语代替，比如在拟议第十三条中采用“互联网软件应用服务”。

此外，某些情形下的“干扰”行为可能是合理或者正常的。例如，网络设施的常规升级可能干扰甚至中断其他网络应用服务经营者的正常经营⁴²。基于拟议第十三条，则因技术革新、升级和其他日常运营开发导致的损害也可以依拟议第十七条提出索赔诉求。

³⁸ 该等教唆将会向竞争者发出涨价不会遭到质疑的信号。并且，允许这样的行为持续而不加制裁“必然在某种未知的程度上增加价格固定协议的盛行率，因为它增加了教唆的数量…如果更多教唆发生，将会导致更多的价格固定协议。”果更多教唆发生，将会导致更多的价格固定协议。因为它增加了教唆的数量续而不加制裁 AMP, 反垄断法(ANTITRUST LAW)的价格固定协议。因为第 131 页 (第二版, 2003)。

³⁹ 两部门认为该等投标人和招标人之间的共谋可能涉及一个公共主体，而可能适用《反垄断法》第五章和第五十一条关于该章违法行为的规定。

⁴⁰ 两部门也欢迎就拟议第十三条意图对知识产权法或电子商务法产生的影响或者与之的关系予以澄清。

⁴¹ 见《起草说明》第三条第二款第二项。

⁴² 类似地，为保护用户，反恶意软件服务可能“干扰”被感染的或恶意的代码或软件。

因此，两部门建议修改拟议第十三条，使其仅适用于故意对“其他经营者正常商业运营”造成的实质干扰，同时仅禁止“无正当理由”故意对“用户选择”造成实质损害的行为。由此，经营者可以对其无意导致的干扰行为提出正当理由。例如，为履行网络供应商与网络经营者的合同而对网络设备及软件进行的常规升级、换代或其他改进，反恶意软件和安全服务的常规运营也应当被认定为对其他经营者服务非故意干扰的正当理由。

第十三条第二项和第四项禁止未经其他经营者明确许可或授权而实施的影响其他经营者的行为。但是，某些情况下获得其他经营者的“许可或授权”是不切实际的。例如，当运营系统升级后，操作系统中运行的应用服务可能被中断，然而在升级前向所有应用服务提供者获取许可或授权并不可行。另一方面，在一些情形中，即便存在拟议第十三条第一项规定的“用户同意”，对其他经营者服务的妨碍也不合理。因此，两部门建议删除拟议第十三条中的“许可或授权”和“用户同意”，而如前所述直接禁止不具有正当理由的行为。

第十三条第三项在有关升级与保护系统方面存在类似问题。该项可以适用于因正常升级而“使得用户无法正常使用”某些不兼容应用程序的情况，或者适用于第一方或第三方安全软件阻止涉及不安全行为的应用程序进行加载或保持已加载状态的情况。因此，两部门建议在第十三条第三项中也加入“故意”和“无正当理由”。

第十三条第四项禁止“未经许可或授权，干扰或破坏他人合法提供的网络应用服务的正常运行”。该概括性的禁止条款能够包含修订草案第十三条规定的其他禁止行为。例如，第十三条第二项禁止的“未经许可或授权，在其他经营者提供的网络应用服务中插入链接，强制进行目标跳转”也可以被认为是“干扰或破坏网络应用服务的正常运行”。如果保留第十三条第四项，两部门建议将其修改为禁止“无正当理由，未经许可或授权，故意干扰或破坏他人合法提供的网络应用服务的正常运行的其他行为”，以涵盖在快速变革的互联网产业可能产生的其他不良行为类型。

最后，除了第十三条第三项外，拟议第十三条似乎对列出的其他行为类型确立了“严格责任制”。第二十六条规定违反第十三条将被处以人民币十万元以上的罚款。在某些情形下，第二十六条的规定可能导致对疏忽大意行为或只有微不足道的后果行为的严厉惩罚。另外，考虑到禁止规定中存在不明确的地方、部分“干扰”行为可能正常且合理，明确规定的严格责任制不尽合理。建议第二十六条至少应当有所调整，使其在适用处罚时允许有更大弹性。

第十四条

第十四条是一个兜底条款，其授权国家工商总局认定违反本法的其他不正当竞争行为。两部门理解法律无法预先认定不正当竞争的所有形式，因此建议修改第十四条为“如果行为给消费者带来的利益可能无法抵消其造成的实质损害，国家工商总局应当依据第二条有关不正当竞争行为的定义，界定该行为为违反本法的其他不正当竞争行为。为增强透明性，国家工商总局应在有关认定其他不正当竞争行为的特定案件中解释该行为对消费者造成损害的依据，并且

需定期公布有关其他行为被认定为违反本法的指南（如有）”。这样的修改可以避免因现有第十四条中“不正当竞争行为”的不同描述而导致的混淆。

第十五条

第十五条规定了监督检查部门的调查职权。两部门谨建议在第十五条中加入类似《反垄断法》第三十九条中规定的要求，即在采取任何规定措施前，调查人员应当向主要负责人书面报告并取得批准。

第二十八条

第二十八条规定了“经营者明知或者应知第三方有违反本法规定的不正当竞争行为”，仍然以提供便利的方式与该第三方进行交易的法律 responsibility。虽然第二十八条明确说明经营者需要意识到“行为”本身，但并未明确说明该经营者是否必须知道该行为是违法的。实际上从事违反反不正当竞争法的交易方往往积极掩饰其违法行为，经营者很难知道该交易方的行为是否合法。因此两部门谨建议第二十八条修改并说明，“经营者明知或应知第三方从事的行为，并且明知或应知该行为为违反本法规定的不正当竞争行为...”。以上修改能避免经营者在不符合反不正当竞争法目的的情况下仍被追究法律责任。

结论

两部门感谢法制办对以上《反不正当竞争法》（草案）意见的审阅。

附件

1. 《反不正当竞争法（修订草案送审稿）》（“反不正当竞争法（草案）”）非官方翻译件
2. 《反不正当竞争法草案》起草说明（“《起草说明》”）非官方翻译件

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF
ANTITRUST LAW AND INTERNATIONAL LAW ON THE DRAFT
ANTI-UNFAIR COMPETITION LAW OF THE PEOPLE’S REPUBLIC
OF CHINA**

March 24, 2016

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

The Sections of Antitrust Law and International Law of the American Bar Association (“Sections”) respectfully submit these comments to the Legislative Affairs Office of the State Council of the People’s Republic of China (“the LAO”) on the Anti-Unfair Competition Law (Revised Draft Submitted for Review) (“Draft AUCL”), which was published for public consultation.¹ The Sections offer these Comments in the hope that they will assist the LAO in refining the Draft AUCL. The Comments reflect the expertise and experience of their members with both antitrust and unfair competition laws around the world. The Sections offer these comments in the hope that they will assist the LAO in further refining the Draft AUCL and are available to provide additional comments, or to participate in consultations with the LAO, as the LAO deems appropriate.

Executive Summary

The Sections agree with the LAO’s emphasis on not duplicating or undermining the Anti-Monopoly Law (“AML”) in the Draft AUCL and urge the LAO to further limit the potential for conflict with the AML. Similarly, the Sections suggest that a provision be added to the AUCL to avoid any interpretation that would conflict with China’s intellectual property rights (“IPR”) laws. We also suggest that Article 2 be clarified so that it is not interpreted to conflict with, or supplant, the Consumer Rights Law.

The Sections also offer the following recommendations regarding specific provisions in the AUCL:

- Article 5, regarding use of commercial logos that confuse buyers, should be refined to focus more on an effects analysis instead of intent in determining whether there has been an offense.

¹ See Notice from the Legislative Affairs Office of the State Council on publication of the “Anti-Unfair Competition Law of the People’s Republic of China (Revised Draft Submitted For Review)” for public comments (published Feb. 25, 2016), *available at* <http://www.chinalaw.gov.cn/article/cazjgg/201602/20160200480277.shtml>, and Explanatory Notes on the drafting of the Draft AUCL (“Explanatory Notes”), *available at* <http://zqyj.chinalaw.gov.cn/draftExplain?DraftID=987>. The Sections’ comments are based on unofficial translations of the Draft AUCL and of the Explanatory Notes, both of which are appended as Appendices 1 and 2, respectively.

- Proposed new Article 6, prohibiting taking advantage of comparative advantage position, should be removed or narrowed to avoid undermining the AML and to advance the goal of fostering market competition. If Article 6 is not removed or narrowed, the Sections urge that the private right of action provided in Article 17 exclude any right for private parties to enforce Article 6, and that Article 19 be revised to ensure penalties that are more proportionate to the severity of the offense.
- Article 7 should be refined to clarify whether leniency or exemptions are available in cases of commercial bribery where there is self-reporting or the bribery results from the actions of a rogue employee in defiance of a clear compliance policy against commercial bribery.
- Article 8, prohibiting misleading commercial promotions, should be broadened to clarify the scope of acts considered to be misleading or deceptive, and should be revised to retain liability for agents that engage in such acts as provided in the current law.
- Articles 9 and 22, which increase the penalties for misappropriation of trade secrets and apparently transform the aspect of substantiality from a defense to a claim of misappropriation to a presumption of misappropriation, are welcome developments in protecting innovation.
- Articles 12 and 25, addressing bid-rigging, should be expanded in some ways and narrowed in others to further improve the complementarity between the AML and AUCL.
- Proposed new Article 13 of the Draft AUCL, which apparently imposes strict liability, with significant penalties provided under Article 26, for conduct that affect users' choice of or interfere with other undertakings' "network application services" without defining "network application service," should be clarified as to its scope. At the least, Article 26 should be revised to permit greater flexibility in imposing penalties for violations of proposed Article 13.
- The catch-all provision of Article 14 may be revised to simply refer to the definition of "unfair competition" in Article 2 to avoid confusion as to the scope of the provision.

General Comments

The Sections appreciate the thoroughness with which the LAO reviewed and updated the current law in the Draft AUCL, particularly the manner in which the LAO took into account complicating factors such as the interrelationship of the AUCL and the AML. The Sections also appreciate the refinement of the provisions relating to investigative powers, prohibitions, and penalties in the Draft AUCL in ways that will foster innovation, market competition, and consumer welfare.

The Sections agree with the LAO's emphasis in the Draft AUCL on avoiding duplication of or conflict with the AML.² The AML reflects a set of antitrust principles that curb anti-competitive acts by competitors acting together, and by individual businesses abusing their

² See Explanatory Notes § III(2)3.

dominant position, without chilling pro-competitive conduct. The Sections urge the LAO to further limit the potential for conflict with the AML. The Draft AUCL contains provisions that conflict with the purpose and operation of the AML, and these conflicts should be resolved in a manner that promotes the competition principles embodied in the AML. For example, as discussed below in the comments as to proposed new Article 6 of the Draft AUCL, the AML prohibits abuses of dominance only if the undertaking can be shown to enjoy a dominant market position.³ However, proposed new Article 6 of the Draft AUCL, which appears to address similar conduct, requires no such showing. Further refinement of the scope of the Draft AUCL to avoid undermining the careful trade-offs of the AML would be consistent with international practice.⁴

The LAO may also wish to further consider whether certain provisions involving intellectual property misappropriation should be included in the Draft AUCL when such acts are already addressed in other laws such as the Trademark Law, the Copyright Law, and the Criminal Law.⁵ The Sections respectfully suggest that the LAO consider adding a provision to the Draft AUCL similar to the provision in the first part of Article 55 of the AML stating that the exercise of IPR according to the IPR laws does not constitute a violation of the AUCL. This would avoid conflicts between the AUCL and other laws. Given that the second part of Article 55 of the AML already proscribes abuse of IPR, there is no need for the AUCL to have a similar provision regarding such abuse.

Article 2

Article 2 of the Draft AUCL defines “unfair competition” to be conduct “infringing upon the legitimate rights and interests of other undertakings or consumers,” whereas current Article 2 defines “unfair competition” only to be conduct “infringing upon the legitimate rights and interests of other undertakings” without reference to “consumers.” While the Sections appreciate the broadening of the definition of “unfair competition” so that it is closer to that in other jurisdictions, the Sections are concerned that this broadening may lead to the AUCL conflicting with, or supplanting, the Consumer Rights Law. The Sections therefore suggest that language be added to

³ See Anti-Monopoly Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), Art. 17, *available at* http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm (China).

⁴ See, e.g., U.S. Federal Trade Commission, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (“FTC Statement of Enforcement Principles regarding Unfair Methods of Competition”), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (in challenging an act as being an unfair method of competition, the Commission is guided by the goal of protecting consumer welfare, evaluates the conduct under a standard similar to the Rule of Reason, and will not challenge a practice under this law if enforcement of the antitrust laws is sufficient to remedy the harms arising from the practice).

⁵ See Explanatory Notes, § I (referencing one of the goals of the Draft AUCL as removing duplication with other intellectual property laws).

the proposed revised definition of “unfair competition” stating that nothing in the AUCL is intended to displace or supplant the Consumer Rights Law.⁶

In addition, the revised definition of “undertaking” focuses on persons or entities engaging or participating in the manufacture or operation of products or services. The Sections are uncertain why the revised definition omits “agents,” which is included in the current law. The Sections suggest that the definition be revised to include the agents of such persons or entities, for reasons explained in the discussion of Article 8.

Article 5

The intent of the proposed revisions in Article 5 of the Draft AUCL appears to be to broaden the reach of current Article 5 beyond counterfeiting (which is specifically addressed in other laws) to other situations in which a buyer may be misled as to the origins of a particular item. The Sections generally support this broadening, including the coverage provided to unregistered logos, and offer a few suggestions to refine the proposed revisions.

First, there is ambiguity as to whether Article 5 requires both a subjective intent to mislead and evidence of actual market confusion, for example, in Article 5(2) regarding use of a commercial logo in a manner similar to the “well-known” logo of another. The Sections encourage putting the focus of these provisions on actual deception or at least a demonstrable likelihood of consumers being misled. Article 5 should not require separate proof of an intent to deceive. Moreover, the Sections suggest the deletion of the requirement that the other commercial logo be “well known.”

Second, while the proposed revised Article 5 appears to cover counterfeiting with broader provisions, it omits express language barring counterfeiting, which may create doubt as to whether the revised AUCL will cover counterfeiting. If counterfeiting is clearly and sufficiently addressed in other laws, the Sections agree that it may be unnecessary to cover counterfeiting in the AUCL. On the other hand, if there are types of counterfeiting that may not be covered in other laws, the Sections suggest that the revised AUCL retain express prohibitions at least of those types of counterfeiting.

Articles 6, 17, 19

Proposed new Article 6 of the Draft AUCL prohibits “unfair trading” by an undertaking “taking advantage of its comparative advantage position” through engaging in certain types of

⁶ While the U.S. Federal Trade Commission (“FTC”) Act protects consumers against “unfair and deceptive practices” as part of United States unfair competition law, the United States has no specific federal consumer rights law.

conduct. With the possible exception of proposed Article 6(4),⁷ the prohibited types of conduct overlap with the types of prohibited conduct identified in Article 17 of the AML.⁸

However, the AML prohibits the conduct identified in AML Article 17 in circumstances that differ substantially from the circumstances under which the conduct identified in proposed Article 6 would be prohibited under the Draft AUCL. The AML prohibits those types of conduct only if the undertaking can be shown to enjoy a dominant market position, defined as “the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator to enter the relevant market.”⁹ Article 18 of the AML enumerates five specific factors for the determination of dominance, which are further elaborated in the State Administration for Industry and Commerce’s Provisions for Prohibition against Abuse of Dominant Market Position.¹⁰ In contrast, proposed Article 6 of the Draft AUCL prohibits those types of conduct when there is a showing of only a “comparative advantage position,” which is defined as “an advantageous position in a specific transaction held by an undertaking in terms of capital, technology, market access, distribution channel and material procurement, etc. and its trading counterparty is reliant on such undertaking and is difficult to switch to other undertakings.” This determination is relative to each transaction, thus making the determination for a given undertaking different depending on the counterparty involved in the transaction. This factor makes legal obligations unclear.

The Explanatory Note makes clear that the intention is to regulate acts by undertakings “that do not possess a market dominant position, but possess comparatively dominant positions in trading.”¹¹ Therefore, conduct by undertakings that is highly unlikely to harm competition in the market, because the undertakings do not possess substantial market power,¹² would nonetheless be constrained by this provision. Indeed, acts that merely constitute normal, aggressive business negotiation could run afoul of proposed Article 6. Aggressive negotiation can stimulate robust competition, and should be encouraged, not penalized. Moreover, the focus on comparative advantage, which is distinct from dominant market position and focuses on relative bargaining power rather than on market power, may interject enforcers into commercial negotiations, which

⁷ “An undertaking shall not engage in any of the following conduct of unfair trading by taking advantage of its comparative advantage position: . . . abusively overcharging or unreasonably demanding counterparties to offer other economic interests.” Draft AUCL Art. 6(4).

⁸ See AML Art. 17.

⁹ *Id.*

¹⁰ Provisions for Prohibition against Abuse of Dominant Market Position (promulgated by the State Admin. For Indus. & Commerce, Feb. 1, 2011, effective Feb. 1, 2011), Art. 10, available at <http://www.linklaters.com/pdfs/mkt/london/1b.pdf> (China).

¹¹ See Explanatory Note § III(2)2.

¹² 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 802d (4th ed., 2015) (“AREEDA & HOVENKAMP”); see also *Eastman Kodak Co. v. Image Technical Serv. Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (“Where a defendant maintains substantial monopoly power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”).

government is poorly suited for, and into normal market operations, which may impede normal market functioning. This would ultimately be detrimental to China's consumers and to the development of a healthy, market-oriented economy, as the prohibitions under proposed Article 6 would affect most directly China's most efficient and competitive firms.

Moreover, by prohibiting substantially the same types of conduct as are addressed by Article 17 of the AML, but with no requirement of showing market power, proposed Article 6 of the Draft AUCL would undermine the usefulness and effectiveness of the abuse of dominant market provisions of the AML, potentially making them irrelevant in light of the much lower standards of the AUCL. The purpose of competition law in general is to promote consumer welfare through the competitive process.¹³ A buyer that is able to use its position to extract more favorable terms from suppliers may in turn pass on the resulting savings for the benefit of consumers.¹⁴ But a law that penalizes the unilateral actions of such a buyer, or other entities, that otherwise lacks market power can not only lead to inappropriate government intervention into routine business decisions and agreements,¹⁵ but also increase the risk of chilling pro-competitive conduct.¹⁶ Indeed, such a prohibition on undertakings with a comparative, but not market dominant, advantage vis-à-vis their trading counterparties, with vague and undefined terms such as "justifiable reasons," may deter companies from doing business with small- or medium-sized counterparties or suppliers that the law ostensibly seeks to protect, thereby hurting economic efficiency and consumer welfare, as well as the small businesses that the proposed new article may be intended to protect.¹⁷

¹³ The international acceptance of this approach is demonstrated through its adoption in the United States and the European Union. *See, e.g.*, Neelie Kroes, Commissioner for Competition Policy, European Commission, Speech at the European Consumer and Competition Day, SPEECH/05/512 (Sept. 15, 2005), *available at* http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm ("Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies.").

¹⁴ Masako Wakui & Thomas Cheng, *Regulating abuse of superior bargaining position under the Japanese Competition Law: An Anomaly or a Necessity?* J. OF ANTITRUST ENFORCEMENT 1, 16 (2015) ("Wakui & Cheng").

¹⁵ The Japanese Fair Trade Commission ("JFTC") has, in the preamble to its guidelines regarding the application of the abuse of superior bargaining position provisions of Japan's Antimonopoly Act, recognized that such a statute should not be applied where negotiations are the result of the exercise of independent business judgment and free negotiations between transacting parties. JFTC, Guidelines Concerning Possible Abuse of Superior Bargaining Position under the Antimonopoly Act (Nov. 30, 2010) at 3 ("JFTC Abuse of Superior Bargaining Position Guidelines"), *available at* http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/101130GL.pdf.

¹⁶ *See, e.g., American Needle, Inc. v. National Football League*, 560 U.S. 183, 190 (2010); *see also* 3B AREEDA & HOVENKAMP ¶ 802d ("Third, the resulting litigation and uncertainty would deter much legitimate conduct. If every business without substantial market power were exposed to a costly and uncertain monopolization suit every time it acted in ways its competitors disapproved, it would be dissuaded from aggressive competitiveness that antitrust policy should encourage.").

¹⁷ There is also a danger that counterparties that are also competitors will mischaracterize benign actions that are superficially similar to those identified in proposed Article 6 to attack their rivals or trading partners and seek government intervention to enhance their bargaining position.

The chilling effect of this “unfair trading advantage” provision may be amplified by the fines that can be imposed under the Draft AUCL relative to the fines available under the AML. Although the AML proscribes more serious conduct by companies with a dominant market position that has anticompetitive effects, the fines under Article 19 of the Draft AUCL for violation of proposed Article 6 could potentially be much higher than those for violations of Article 17 of the AML.¹⁸ Because the penalties provided in Article 19 for Article 6 violations may be disproportionate, they may have chilling effects beyond being inconsistent with the penalty structure of the AML and its goals. In comparison, administrative fines under Japan’s Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (“AMA”) for abuse of superior bargaining position are lower than for other AMA violations, and generally substantially less than that provided for under the Draft AUCL.¹⁹

Though similar “abuse of superior bargaining position” or “unfair trading advantage” laws exist in other countries, those laws are not applied in the expansive manner that a literal reading of their language would suggest. In the United States, where business conduct may be proscribed under broad standards of unfairness under federal unfair competition laws, that standard is linked to the effects of that conduct on *consumers* rather than *competitors*.²⁰ In Japan, the “abuse of superior bargaining position” is most often applied to conduct between powerful retailers and their suppliers that arguably raises monopsony-like concerns and involves contractual issues that are otherwise difficult to litigate in the Japanese civil court system.²¹ In fact, since 2010, the JFTC has

¹⁸ Compare, e.g., Draft AUCL Art. 19 (penalties can be between one to five times illegal operating revenue if such can be calculated, or between RMB 100,000 to RMB 3,000,000 if such revenue cannot be calculated) with AML Art. 47 (“Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.”).

¹⁹ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Antimonopoly Act], Act No. 54 of Apr. 14, 1947), Ch. V, art. 20–6, available at http://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_05.html (“If an enterprise has committed an act in violation of the provisions of Article 19 (limited to an act under Article 2, paragraph (9), item (v) that the enterprise engaged in on a continuous basis), the Fair Trade Commission shall order the enterprise, pursuant to the procedures provided in Chapter VIII, Section 2, to pay to the national treasury a surcharge in an amount equivalent to one percent of the enterprise's sales to the counterparty to the act in violation. . . .”).

²⁰ See, e.g., 15 U.S.C. § 45n (unfair acts or practices can be found unlawful by the U.S. FTC only if “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”). Unfair acts or practices are different from unfair methods of competition that are also unlawful under the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq. (“FTC Act”). The FTC has also narrowed its enforcement of the unfair methods of competition prong of federal unfair competition law to avoid undermining the antitrust laws. FTC Statement of Enforcement Principles regarding Unfair Methods of Competition, note 4 above.

²¹ See, e.g., Wakui & Cheng, at 16–18, 20, 27–31; Frederic Jenny, Ad Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development, Abuse of Dominance (July 15, 2008) at 10–15 (“Jenny”), available at http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf. Monopsony involves a buyer with market power who coerces suppliers into charging lower prices than would be the case in a competitive market, thereby causing deadweight loss and allocative inefficiency in terms of making products scarcer than they would otherwise be. See, e.g., Wakui & Cheng, at 18. Japan also takes account of effects on competition in a broad sense even if market shares and the lack of market power may not control the outcome. See, e.g., JFTC Abuse of Superior

taken formal action based on an abuse of superior bargaining position in only six cases. The same concerns about large retailers with monopsony power coercing suppliers to the long-term detriment of consumers appear to motivate the “abuse of dependence” debate in France as well.²²

Therefore, the Sections recommend that proposed Article 6 be deleted. However, should proposed Article 6 be retained, the Sections suggest that its scope be narrowed by adding limitations similar to those in United States law or in the laws of other countries with prohibitions more closely analogous to proposed Article 6 to reflect the actual enforcement experience under those laws.²³ The Sections suggest that the same economic principles and analytical framework that support the AML be applied to the implementation of proposed Article 6. Under this framework, when the conduct identified by proposed Article 6 does not have an anticompetitive effect and instead results in enhanced efficiency and increased consumer welfare, it should not be deemed unfair.²⁴ If there is to be any residual role outside of the AML for a statutory provision such as proposed Article 6 for conduct by undertakings with a comparatively advantageous position, it should be limited to those circumstances in which multiple upstream suppliers are doing business with state-owned companies or government-sanctioned monopolies.²⁵ In addition, the Sections urge that the private right of action in Draft AUCL Article 17 exclude any right of private parties to bring an action for alleged violations of proposed Article 6.²⁶

Article 7

The Sections agree that commercial bribery is undesirable and have no view on whether such a prohibition is best included in the AUCL instead of in another law such as the Criminal Law. If Article 7 is retained, the Sections suggest that it may be helpful to undertakings if Article 7 were clarified to address whether there are obligations to self-report and leniency is available to undertakings that self-report. It may also be beneficial to include criteria for possible exemptions

Bargaining Position Guidelines at 3 (look at the risk of impeding fair competition in considering the degree of the disadvantage at issue and the extensiveness of the act); Wakui & Cheng at 5, 20.

²² Jenny at 10–12.

²³ See, e.g., Jenny at 17–18.

²⁴ At a minimum, more guidance on how to determine which aspects of conduct constituting unfair trading practices would provide undertakings with much needed clarity and predictability in arranging their business dealings.

²⁵ Cf. OECD, Global Forum on Competition. Competition and Poverty Reduction, Contribution from Japan, DAF/COMP/GF/WD(2013)7 (Jan. 18, 2013) at 3 (JFTC declared that the unfair trading advantage statute was added because given that the Japanese government had sanctioned the formation of cartels, there was a risk that these government-sanctioned cartels would abuse their position and exercise pressure on small- and medium-sized enterprises).

²⁶ In considering further eliminating or narrowing proposed Article 6, the LAO may wish to expressly consider the extent to which private contractual actions addressing potentially unequal relationships or transactions may suffice in China to protect companies against abuses of a superior bargaining position. Compare, e.g., Wakui & Cheng at 31–32 (noting civil actions in Japan may not be robust enough to serve this function) with, e.g., Task Force for Abuse of Superior Bargaining Position, Report on Abuse of Superior Bargaining Position, ICN Special Program for Kyoto Conference, ICN 7th Annual Conference (Apr. 14–16, 2008) at 35–36, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf> (several jurisdictions reported that private rights of action under contract or other laws were sufficient to remedy any such abuses).

or leniency, such as in situations where an undertaking has no knowledge of a rogue employee's conduct and has a comprehensive compliance policy. It may be inequitable to hold an undertaking responsible in all circumstances for a rogue employee's conduct.

Article 8

The Sections appreciate the apparent intent of Article 8 to resolve any overlap with the new Advertising Law and to broaden the prohibitions in current Article 9 against false advertising by prohibiting misleading commercial promotions, including deceptive forms of marketing. This is a welcome expansion of the law to protect China's consumers. The U.S. FTC Act similarly prohibits "unfair or deceptive acts or practices"²⁷ and this language has withstood the test of time in giving the FTC the breadth and flexibility to address new forms of advertising, promotion, and marketing.

However, there is ambiguity in Article 8 that suggests that the enumerated activities are the only actions prohibited by the Draft AUCL. The Sections therefore recommend that Article 8 be clarified to specify that it does not identify all conduct that can be considered to be deceptive or misleading, but rather merely provides examples of the types of acts that would be considered misleading or deceptive. For example, the following italicized text could be added to alleviate any potential ambiguity: "An undertaking shall not engage in any misleading or deceptive conduct in advertising products, goods or services, or in any commercial promotion, *including but not limited to:*"

In addition, guidelines as to good practices in various market sectors under the AUCL may be helpful. Such guidelines constitute an important component of the application of unfair competition principles in the consumer protection context around the world.²⁸ The publication of decisions and settlements involving the AUCL, after redacting confidential information, would also serve a similar useful role in providing businesses guidance as to how the often broad concepts of unfair competition law work in practice.²⁹

Finally, the Sections note that current Article 9 dealing with false advertising prohibits agents from engaging in advertising they know or ought to know is false. Proposed Article 8 does not include this provision for agents for reasons that are unclear to the Sections. Moreover, the definition of "undertaking" in Article 2 focuses on persons or entities engaging or participating in manufacture or operations of products or services, without mentioning agents, even though agents are mentioned in the current AUCL, further raising the possibility of that agents will not be liable

²⁷ 15 U.S.C. §45(a).

²⁸ Cf. The Canadian Competition Bureau Action Plan on Transparency, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03568.html; U.S. Federal Trade Commission Organization, Procedures and Rules of Practice, Industry Guides, 16 C.F.R. §§1.5–1.6, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=30da0f5ac979e28986a1ce6b9bc514f0&mc=true&tpl=/ecfrbrowse/Title16/16cfr1_main_02.tpl.

²⁹ Cf. U.S. Federal Trade Commission, 2014 Open Government Plan (June 2, 2014), *available at* <https://www.ftc.gov/system/files/attachments/open-government/opengovplan.pdf>.

for false promotion under the revised AUCL. It is useful to subject agents to liability for violations of Article 8 where they participated in the acts in question and “know or ought to know” of the deceptive nature of the actions. The “know or ought to know” standard for liability of agents for deceptive acts is one that has worked well for many decades in the United States.³⁰ The Sections recommend clarification on this point and further recommend that liability for agents be retained to fully protect consumers, as well as to protect undertakings when rogue agents engage in such conduct.

Articles 9, 22

The Sections believe that it is appropriate that the misappropriation of trade secrets continues to be prohibited in Article 9. Trade secrets involve business assets whose value derive from their status as confidential business secrets and can include customer lists, software, manufacturing processes, or databases.³¹ They are developed at great expense and can involve years of research.³² Their protection is of great concern to companies operating in China.³³ The Sections applaud the LAO not only for continuing to include trade secrets misappropriation as an AUCL violation, but also for clarifying that the licensing of trade secrets stolen from others constitutes inappropriate use and increasing the applicable penalties in Article 22 for carrying out such theft.

The Sections also support the proposed revisions to Article 22 that appear to create a presumption of misappropriation where there was access to the information and use of information that appeared similar. Historically, China has allowed for a defense to trade secrets theft where the trade secrets have been substantially altered, a defense that has been likened to a doctrine of equivalents for trade secrets.³⁴ The Sections welcome the proposed revisions in Article 22 that appear to transform substantiality from a defense into a presumption of misappropriation and would welcome even more explicit revisions in Article 22 to express that change. If a plaintiff can prove that its trade secret is substantially identical to the information being used by a defendant,

³⁰ See, e.g., *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968) (holding advertising agency liable because they knew or should have known the advertising claims at issue were deceptive); U.S. Federal Trade Commission, Enforcement Policy Statement Regarding Certain Imported Textile, Wool, and Fur Products, available at https://www.ftc.gov/system/files/documents/public_statements/299821/guaranty_policy_statement.pdf (imposing liability on clothing retailers for labeling violations only when they “knew or should have known” that representations by clothing manufacturers were false).

³¹ See, e.g., *Altavion v. Konica Minolta Systems Laboratory, Inc.*, 171 Cal. Rptr.3d 714, 719 (Cal. App. 1st Dist. 2014) (digital stamping technology allowing for self-authentication of documents should be protected as trade secrets).

³² U.S. House of Representatives, Committee on the Judiciary, H.R. Rpt. No. 113–657, Trade Secrets Protection Act of 2014, p.5, available at <https://www.congress.gov/congressional-report/113th-congress/house-report/657/1>.

³³ See Mark Cohen, *Slouching Towards Innovation – A Survey of the Surveys on China’s IPR Environment*, CHINA IPR (Jan. 1, 2016), available at <http://chinaipr.com/>.

³⁴ See Mark Cohen, *Of NDAs and Smoking Guns: China’s Evolving Landscape of Trade Secret Protection*, CHINA IPR (Feb. 2, 2016), available at <http://chinaipr.com/>. The substantial alteration of trade secrets is not a defense to liability for trade secret theft in other jurisdictions, including the United States.

and the conditions existed under which a defendant could get access to that trade secret, the defendant should then have the burden of proving its use of that information was legal.

The Sections also respectfully suggest that the LAO consider whether the AUCL should also provide expressly for trade secret holders to have avenues for immediate provisional relief, such as injunctive relief on an appropriate showing, as is true in the United States.³⁵

Articles 12, 25

Although the Explanatory Note states that provisions of the current law were removed in the Draft AUCL because those provisions duplicate provisions in the AML,³⁶ the first provision of Article 12 of the Draft AUCL retains a prohibition in the current AUCL barring collusive bid-rigging that appears to duplicate prohibitions in AML Article 13. Typically, collusive bid-rigging is proscribed under antitrust laws rather than under unfair competition laws. In contrast, the Draft AUCL appears to lack any provision barring non-public invitations to collude, which would appear to fall outside of the AML and that would be appropriate to bar under unfair competition principles.³⁷ Non-public, secret, invitations to collude have no procompetitive benefits and create significant risks of collusion or other anticompetitive behavior.³⁸ Therefore, the Sections respectfully suggest that if the first provision of Article 12 is retained, it be revised in a manner consistent with the AML by limiting it to non-public invitations to collude.

The second provision of Article 12 prohibits a form of bid-rigging—collusion between a bidder and a tenderer—that is not proscribed by the AML. The Sections view this type of business conduct as pernicious even where it may not be proscribed by antitrust law (such as when the collusion is between only one bidder and the tenderer or an agent or employee of the tenderer, so that the ostensible bidding process is a sham). However, the Sections question whether such conduct is best addressed in the AUCL or in another law such as contract or fraud law. Moreover, if the second provision of Article 12 is retained, the Sections question why the penalties provided in Article 25 for violations of Article 12 exclude the tenderer, and respectfully suggest that it may

³⁵ See, e.g., *id.*

³⁶ See Explanatory Note § III(2)3.

³⁷ See, e.g., Analysis of Agreement Containing Consent Order to Aid Public Comment at 2–3, *In re Valassis Commc'ns, Inc.*, F.T.C. File No. 051 0008 (Mar. 14, 2006); Analysis of Agreement Containing Consent Order to Aid Public Comment at 2–3, *In re U-Haul Int'l, Inc.*, F.T.C. File No. 081 0157 (Jun. 21, 2010). In *U-Haul*, U-Haul International settled FTC charges that it violated Section 5 of the FTC Act by inviting U-Haul's closest competitor, Avis Budget Group, to collude on prices for truck rentals. U-Haul and Budget at that time controlled more than 70% of the “do-it-yourself” one-way truck rental business in the United States. The FTC's complaint alleged that on several occasions between 2006 and 2008, U-Haul tried to increase rates for one-way truck rentals by privately and publicly communicating with Budget, the second-largest truck rental company in the United States.

³⁸ Such solicitations may signal competitors that a price increase will go unchallenged. Furthermore, allowing this conduct to continue without any sanctions “surely increases the prevalence of price-fixing agreements in some unknown degree because it increases the number of solicitations ... as more solicitations occur, more price-fixing agreements will result.” VI PHILLIP E. AREEDA AND HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1419e2, at 131 (2d ed. 2003).

enhance deterrence to extend the penalties in Article 25 for violation of Article 12 to tenderes as well as bidders.³⁹

In addition, the Sections suggest that Article 25 provide for mitigation of penalty or leniency where undertakings involved in bid-rigging voluntarily report the conduct and cooperate in the investigation of such conduct, similar to the leniency provided in AML Article 46.

Articles 13, 26

Proposed new Article 13 of the Draft AUCL prohibits four types of conduct using network technologies or application services that affect users' choice of or interfere with other undertakings' "network application services." As "network application service" is not defined in the Draft AUCL or, to the Sections' knowledge, in any other law or regulation, the intended scope of proposed Article 13 is unclear. For example, would proposed Article 13 apply only to Internet application service providers or would it apply to providers of infrastructure networks or telecommunications networks, or even to other virtual or physical network operators?⁴⁰ The Explanatory Note indicates that proposed Article 13 is intended to regulate conduct relating to the Internet using software and other technical methods.⁴¹ The Sections therefore suggest that "network application service" be defined or be replaced by another term, such as "Internet software application service" in proposed Article 13.

In addition, in some cases "interference" may be appropriate or normal. For example, the regular upgrade of network infrastructure may interfere with or even interrupt the normal operation of some network application services provided by other parties.⁴² Proposed Article 13 might have the effect also of providing claims under Article 17 for losses from changes in technology, upgrades, and other ordinary developments.

Therefore, the Sections suggest that proposed Article 13 be revised to apply only to intended and substantial interference with "other undertakings' normal business operations" and to prohibit only conduct with intended and substantial damaging effects on "users' choices" that is "without justification," so that undertakings may present justifications for any inadvertent interference. For example, the regular upgrade, modernization, or other improvements of network equipment and software in the performance of a network supplier's contract with a network operator, and ordinary operations of anti-malware and security services, should be recognized as justifications for any unintended interference with the other parties' services.

³⁹ The Sections recognize that such collusion between bidders and tenderes may involve a public entity, in which case Chapter 5 of the AML and Article 51 in the AML regarding violations of that Chapter may apply. Article 25 may be revised to provide that in such cases Chapter 5 and Article 51 of the AML applies.

⁴⁰ The Sections would also welcome clarification as to the impact or relationship, if any, proposed Article 13 is intended to have with respect to intellectual property rights or e-commerce laws.

⁴¹ Explanatory Note III(2)2.

⁴² Similarly, anti-malware services may "interfere" with infected or malicious code or apps in order to protect users.

Article 13(2), (4) prohibits conduct undertaken “without permission or authorization,” apparently from entities that are affected by the conduct. However, it may not always be practical to obtain such “permission or authorization.” For example, when an operating system is upgraded, application services running on the operating system may be interrupted, but it is not feasible to obtain permission or authorization from all application services providers before the upgrade. On the other hand, in some cases, impediment of other parties’ services may not be justified even if there is the “consent of users” that Article 13(1) envisions. Therefore, the Sections suggest deleting the references to “permission or authorization” and “consent of users” in proposed Article 13, and simply prohibiting conduct that is “without justification” as suggested above.

Article 13(3) raises similar concerns relating to upgrading and protecting systems. It may apply to normal upgrades that “make the users unable to properly use” incompatible applications, or to first-party or third-party security software that prevents apps or programs that are engaging in unsafe behavior from loading or staying loaded. Therefore, the Sections suggest adding “intentionally” and “without justification” to Article 13(3) as well.

Article 13(4) prohibits “interfering with or destroying the normal operation of network application services legitimately provided by other parties without permission or authorization.” The generality of the prohibition means that it can be applied to conduct that may already be prohibited by the other provisions in proposed Article 13. For example, “inserting hyperlinks in network application services provided by other undertakings to perform compelled target jump without permission or authorization,” which is prohibited in Article 13(2), could also be deemed “interfering with or destroying the normal operation of network application services.” The Sections suggest that if Article 13(4) is retained, it be revised to prohibit “*otherwise intentionally* interfering with or destroying the normal operation of network application services legitimately provided by other parties without permission or authorization and without justification.” to cover other types of undesirable conduct that may develop in the rapidly changing Internet industry and to avoid redundancy.

Finally, proposed Article 13 appears to establish “strict liability” for engaging in the listed types of conduct, with the exception of the type of conduct identified in Article 13(3). In some cases, this would result in significant punishment for inadvertent conduct or conduct with negligible effects, as Article 26 provides for a minimum penalty of RMB 100,000 for violations of proposed Article 13. Especially given the ambiguity in the prohibitions and that some “interference” may be normal and appropriate, the strict liability apparently imposed is inappropriate. At the least, Article 26 should be revised to permit greater flexibility in imposing penalties.

Article 14

Article 14 is a catchall provision, authorizing the State Administration for Industry and Commerce to determine what additional types of conduct may violate the law. The Sections recognize that the law cannot identify in advance all forms of unfair competition, and suggest that Article 14 be revised to state that “The State Administration for Industry and Commerce shall determine all other conduct that is ‘unfair competition’ defined in Article 2 that is prohibited by this Law, provided that any challenged conduct must be of a type likely to cause substantial injury to consumers without offsetting benefits. To promote transparency, the State Administration for

Industry and Commerce shall explain the consumer injury rationale for any such challenge in a particular case, and shall periodically publish guidance on such additional conduct, if any, that will be considered to violate the Law.” Such a revision may avoid confusion that may arise from the different language describing “unfair competition conduct” now in Article 14.

Article 15

Article 15 sets forth the investigative powers of the supervision and inspection agency. The Sections respectfully suggest that a requirement be added in Article 15, similar to that in AML Article 39, that before taking any of the specified actions, the investigating officers shall report in writing to the primary responsible person and obtain approval.

Article 28

Article 28 imposes liability where “an undertaking clearly knows or ought to know the unfair competition conduct proscribed in this Law” committed by a third party, and continues to deal with the third party in a way that supports the conduct. While Article 28 makes clear that the undertaking must be aware of the “conduct” itself, it is not clear whether the undertaking also must know that the conduct is illegal. It can be difficult for an undertaking to know whether the conduct of its business partners is illegal, and, in fact, often a business partner engaging in illegal conduct under the AUCL may actively conceal the illegality of the conduct from the undertaking. The Sections respectfully suggest that a requirement be added in Article 28 as to knowledge of illegality, and suggest that Article 28 be revised to state, “an undertaking clearly knows or ought to know of conduct by a third party, and also clearly knows or ought to know that the conduct constitutes unfair competition proscribed in this Law,” Such a revision would avoid imposing liability on an undertaking under circumstances that would not promote the goals of the AUCL.

Conclusion

The Sections appreciate the LAO’s consideration of these Comments on the Draft AUCL.

Appendices

1. Unofficial translation of Anti-Unfair Competition Law (Revised Draft Submitted for Review) (“Draft AUCL”)
2. Unofficial translation of Explanatory Notes on the drafting of the Draft AUCL (“Explanatory Notes”)

中华人民共和国反不正当竞争法
(修订草案送审稿)
People's Republic of China Anti-Unfair Competition Law¹
(Revised Draft Submitted for Review)

第一章 总 则
Chapter One General Provisions

第一条 为保障社会主义市场经济健康发展，鼓励和保护公平竞争，制止不正当竞争行为，保护经营者和消费者的合法权益，制定本法。

Article 1 This Law is formulated with a view to safeguarding the healthy development of socialist market economy, encouraging and protecting fair competition, preventing unfair competition conduct and protecting the legitimate rights and interests of undertakings and consumers.

第二条 经营者在经济活动中，应当遵循自愿、平等、公平、诚实信用的原则，遵守公认的商业道德。

本法所称的不正当竞争，是指经营者违反本法规定，损害其他经营者或者消费者的合法权益，扰乱市场秩序的行为。

本法所称的经营者，是指从事或者参与商品生产、经营或者提供服务（以下所称商品包括服务）的自然人、法人和其他组织。

Article 2 Undertakings shall, in their business activities, follow the principles of voluntariness, equality, fairness, honesty and credibility and observe the generally recognized business ethics.

‘Unfair competition’ stipulated in this Law refers to the conduct of undertakings, in violation of the provisions of this Law, infringing upon the legitimate rights and interests of other undertakings or consumers, and disturbing the market order.

‘Undertaking(s)’ stipulated in this Law refers to natural persons, legal persons or any other organizations engaging in or participating in manufacture or operation of products or provision of services (‘product’ referred to hereinafter includes service).

第三条 各级人民政府应当采取措施，制止不正当竞争行为，为公平竞争创造良好的环境和条件。

¹ The English version is an unofficial translation prepared by the Antitrust/Competition Group of AnJie Law Firm. Any suggestions or comments on the English translation are welcome. Please send that to AnJie Partner **Michael Gu** at michaelgu@anjielaw.com.

县级以上人民政府工商行政管理部门对不正当竞争行为进行监督检查；其他法律、行政法规另有规定的，相关部门也可以依照其规定进行监督检查。

Article 3 People's governments at all levels shall take measures to prevent unfair competition conduct and create a sound environment and good conditions for fair competition.

Administrative departments for industry and commerce of the people's governments at or above county level shall supervise and inspect unfair competition conduct; where other laws or administrative regulations stipulate otherwise, relevant departments may conduct such supervision and inspection accordingly.

第四条 国家鼓励、支持和保护一切组织和个人对不正当竞争行为进行社会监督。

国家工作人员不得参与、支持、包庇不正当竞争行为。

Article 4 The state encourages, supports and protects all organizations and individuals to carry out social supervision over unfair competition conduct.

No staff member of the state may participate in, support or cover up unfair competition conduct.

第二章 不正当竞争行为 **Chapter Two Unfair Competition Conduct**

第五条 经营者不得利用商业标识实施下列市场混淆行为：

（一）擅自使用他人知名的商业标识，或者使用与他人知名商业标识近似的商业标识导致市场混淆的；

（二）突出使用自己的商业标识，与他人知名的商业标识相同或者近似，误导公众，导致市场混淆的；

（三）将他人注册商标、未注册的驰名商标作为企业名称中的字号使用，误导公众，导致市场混淆的；

（四）将与知名企业和企业集团名称中的字号或其简称，作为商标中的文字标识或者域名主体部分等使用，误导公众，导致市场混淆的。

本法所称的商业标识，是指区分商品生产者或者经营者的标志，包括但不限于知名商品特有的名称、包装、装潢、商品形状、商标、企业和企业集团名称及其简称、字号、域名主体部分、网站名称、网页、姓名、笔名、艺名、频道节目栏目的名称、标识等。

本法所称的市场混淆，是指使相关公众对商品生产者、经营者或者商品生产者、经营者存在特定联系产生误认。

Article 5 An undertaking shall not engage in any of the following market confusion

conduct by making use of the commercial logo:

- (1) using, without authorization, well-known commercial logos of another undertaking, or using a commercial logo similar to another undertaking's well-known commercial logo and thus cause market confusion;
- (2) using its own commercial logo in a conspicuous way which is identical with or similar to a well-known commercial logo of another undertaking to mislead the general public and result in market confusion;
- (3) using a registered trademark or unregistered well-known trademark of another undertaking as a trade name in its business name to mislead the general public and result in market confusion; or
- (4) using a trade name or abbreviation of a name of a well-known enterprise or conglomerate as text-based logos in its trademark or main part of its domain name to mislead the general public and result in market confusion.

'Commercial logo' in this Law refers to a symbol that differentiates product manufacturers or traders, including but not limited to well-known products' unique names, packaging, decorations, shape of goods, trademarks, enterprises and conglomerates' names and abbreviations, trade names, main parts of domain names, website names, webpages, names, pen names, stage names, program names and logos of TV channels, etc.

'Market confusion' in this Law refers to misunderstanding by the general public of product manufacturers, traders or a particular relationship linked to product manufacturers or traders.

第六条 经营者不得利用相对优势地位，实施下列不公平交易行为：

- (一) 没有正当理由，限定交易相对方的交易对象；
- (二) 没有正当理由，限定交易相对方购买其指定的商品；
- (三) 没有正当理由，限定交易相对方与其他经营者的交易条件；
- (四) 滥收费用或者不合理地要求交易相对方提供其他经济利益；
- (五) 附加其他不合理的交易条件。

本法所称的相对优势地位，是指在具体交易过程中，交易一方在资金、技术、市场准入、销售渠道、原材料采购等方面处于优势地位，交易相对方对该经营者具有依赖性，难以转向其他经营者。

Article 6 An undertaking shall not engage in any of the following conduct of unfair trading by taking advantage of its comparative advantage position:

- (1) without justifiable reasons, restricting counterparties' trading partners;
- (2) without justifiable reasons, restricting counterparties to purchase certain designated products;
- (3) without justifiable reasons, restricting the trading terms and conditions between counterparties and other undertakings;
- (4) abusively overcharging or unreasonably demanding counterparties to offer other

economic interests; or
(5) attaching other unreasonable trading terms.

‘Comparative advantage position’ in this Law refers to an advantageous position in a specific transaction held by an undertaking in terms of capital, technology, market access, distribution channel and material procurement, etc. and its trading counterparty is reliant on such undertaking and is difficult to switch to other undertakings.

第七条 经营者不得实施下列商业贿赂行为：

- （一）在公共服务中或者依靠公共服务谋取本单位、部门或个人经济利益；
- （二）经营者之间未在合同及会计凭证中如实记载而给付经济利益；
- （三）给付或者承诺给付对交易有影响的第三方以经济利益，损害其他经营者或消费者合法权益。

商业贿赂是指经营者向交易对方或者可能影响交易的第三方，给付或者承诺给付经济利益，诱使其为经营者谋取交易机会或者竞争优势。给付或者承诺给付经济利益的，是商业行贿；收受或者同意收受经济利益的，是商业受贿。

员工利用商业贿赂为经营者争取交易机会或竞争优势的，应当认定为经营者的行为。有证据证明员工违背经营者利益收受贿赂的，不视为经营者的行为。

Article 7 An undertaking shall not engage in any of the following conduct of commercial bribery:

- (1) seeking economic interests for the organization, department or individual in the process of or from the reliance on public services;
- (2) providing economic interests between undertakings with no truthful records in the contract and the accounting document; or
- (3) providing or promising to provide economic interests to a third party who may influence the transaction, infringing upon the legitimate rights and interests of other undertakings or consumers.

Commercial bribery refers to the conduct that an undertaking provides or promises to provide economic interests to its trading counterparty or any third party who may affect the transaction, to induce such trading counterparty or third party to seek trading opportunities or competitive advantages for that undertaking. Conduct of providing or promising to provide economic interests shall be deemed as commercial bribe-offering; conduct of accepting or consenting to accept economic interests shall be deemed as commercial bribe-taking.

Commercial bribery conducted by the employee(s) to strive for trading opportunities or competitive advantages for an undertaking shall be deemed as the conduct of that undertaking. Commercial bribe-taking conducted by the employee(s) that is against an undertaking’s interests and is provable by evidence shall not be deemed as the conduct of that undertaking.

第八条 经营者不得实施下列引人误解的商业宣传行为：

- （一）进行虚假宣传或者片面宣传；
- （二）将科学上未定论的观点、现象作为定论的事实用于宣传；
- （三）以歧义性的语言或者其他引人误解的方式进行宣传。

Article 8 An undertaking shall not engage in any of the following misleading conduct of commercial promotion:

- (1) carrying out false promotion or biased promotion;
- (2) using inconclusive scientific opinions, phenomenon as conclusive facts for promotion; or
- (3) using ambiguous language or other misleading ways to conduct promotion.

第九条 经营者不得实施下列侵犯商业秘密行为：

- （一）以盗窃、利诱、胁迫、欺诈或者其他不正当手段获取权利人的商业秘密；
- （二）披露、使用或者允许他人使用以前项手段获取的权利人的商业秘密；
- （三）违反约定或者违反权利人有关保守商业秘密的要求，披露、使用或者允许他人使用其所掌握的商业秘密。

第三人明知或者应知前款所列违法行为，获取、披露、使用或者允许他人使用权利人的商业秘密，视为侵犯商业秘密。

本法所称的商业秘密，是指不为公众所知悉、具有商业价值并经权利人采取相应保密措施的技术信息和经营信息。

Article 9 An undertaking shall not engage in any of the following conduct to infringe upon the trade secrets:

- (1) obtaining a right owner's trade secrets by ways of stealing, luring, intimidation, fraud or other unfair means;
- (2) disclosing, using or allowing other party to use the trade secrets obtained from the right owner by the means stipulated in the preceding paragraph; or
- (3) disclosing, using or allowing other parties to use the trade secrets in its possession in violation of an agreement or against right owners' requirement for keeping trade secrets confidential.

The obtaining, disclosing, using or allowing other party to use the right owner's trade secrets by a third party is deemed as infringement upon the trade secrets, if the third party is aware of or should be aware of the illegal conduct stipulated in the preceding paragraphs.

"Trade secrets" in this Law refers to any technology information or business information which is unknown to the public, has commercial value and has been protected by relevant security measures by the right owner.

第十条 经营者不得向消费者实施下列有奖促销行为：

- （一）未明示其所设奖的种类、兑奖条件、奖金金额或者奖品等有奖促销信息，影响消费者兑奖；
- （二）采用谎称有奖或者故意让内定人员中奖等欺骗方式进行有奖销售；
- （三）对兑奖设定不合理条件；
- （四）抽奖式有奖促销，最高奖的价值超过两万元。

本法所称的有奖促销包括抽奖式有奖促销和附赠式有奖促销。在同等条件下，给予确定奖励的，是附赠式有奖促销；以偶然性的方法确定奖励种类或者是否给予奖励的，是抽奖式有奖促销。

Article 10 An undertaking shall not engage in any of the following prize-giving sales promotions to consumers:

- (1) without explicitly defining the categories of the prize, redeem terms, reward amount or the prize and other prize-giving sales promotions information, jeopardizing the prize redemption of consumers;
- (2) prize-giving sales promotions conducted by such deceptive means as falsely declaring to have prize or intentionally making a designated insider win the prize;
- (3) setting unreasonable terms and conditions for gift redemption; or
- (4) lottery-based sales promotions with the highest prize exceeding RMB 20,000.

“Prize-giving sales promotion” in this Law includes the lottery-based sales promotion and the gift-based sales promotion. The gift-based sales promotion means that the gift is certain under the same conditions; the lottery-based sales promotion means that the categories of prize and whether to reward prize are determined on a random basis.

第十一条 经营者不得捏造、散布虚假信息、恶意评价信息，散布不完整或者无法证实的信息，损害他人的商业信誉、商品声誉。

Article 11 An undertaking shall not fabricate and spread false information, malicious review information, spread incomplete or unverifiable information, which damaging other parties' business and product reputation.

第十二条 投标者不得串通投标，抬高标价或者压低标价。

投标者和招标者不得相互勾结，以排挤竞争对手的公平竞争。

Article 12 The bidders shall not conduct collusive bidding to raise or low the bidding prices.

The bidder and the tenderee shall not collude with each other to impede the fair competition from competitors.

第十三条 经营者不得利用网络技术或者应用服务实施下列影响用户选择、干扰其他经营者正常经营的行为：

（一）未经用户同意，通过技术手段阻止用户正常使用其他经营者的网络应用服务；

（二）未经许可或者授权，在其他经营者提供的网络应用服务中插入链接，强制进行目标跳转；

（三）误导、欺骗、强迫用户修改、关闭、卸载或者不能正常使用他人合法提供的网络应用服务；

（四）未经许可或者授权，干扰或者破坏他人合法提供的网络应用服务的正常运行。

Article 13 An undertaking shall not engage in any of the following conduct which affects users' choices or interfere with other undertakings' normal business operations by making use of network technologies or application services:

(1) impeding users' normal use of other undertakings' network application services through technological means without the consent of users;

(2) inserting hyperlinks in network application services provided by other undertakings to perform compelled target jump without permission or authorization;

(3) misleading, deceiving, or compelling users to modify, close, uninstall or make the users unable to properly use network application services legitimately provided by other parties; or

(4) interfering with or destroying the normal operation of the network application services legitimately provided by other parties without permission or authorization.

第十四条 经营者不得实施其他损害他人合法权益，扰乱市场秩序的不正当竞争行为。

前款规定的其他不正当竞争行为，由国务院工商行政管理部门认定。

Article 14 An undertaking shall not engage in other unfair-competition conduct that harms other parties' legitimate rights and interests, and disrupt market orders.

"Other unfair-competition conduct" prescribed in the preceding paragraph shall be determined by the administrative department for industry and commerce of the state council.

第三章 监督检查

Chapter Three Supervision and Inspection

第十五条 监督检查部门在调查不正当竞争行为时，有权行使下列职权：

（一）进入与被调查行为有关的营业场所或者其他场所进行检查；

- (二) 询问被调查的经营者、利害关系人或者其他有关单位、个人，并要求提供证明材料、数据和技术支持或者与不正当竞争行为有关的其他资料；
- (三) 查询、复制与被调查行为有关的协议、帐册、单据、文件、记录、业务函电、电子数据、视听资料和其他资料；
- (四) 责令被调查的经营者暂停涉嫌违法的行为，说明与被调查行为有关财物的来源和数量，不得转移、隐匿、销毁该财物；
- (五) 对涉嫌不正当竞争行为的财物实施查封、扣押；
- (六) 查询涉嫌不正当竞争行为的经营者的银行账户及与存款有关的会计凭证、账簿、对账单等；
- (七) 对有证据证明转移或者隐匿违法资金的，可以申请司法机关予以冻结。

Article 15 The supervision and inspection agency has the right to exercise the following functions and powers when investigating unfair-competition conduct:

- (1) conducting investigation of the business premises related to the investigated conduct or other premises;
- (2) inquiring the undertaking under investigation, interested parties or other relevant entities or individuals, and demanding them to provide evidential materials, data and technical support or other materials related to the unfair-competition conduct;
- (3) inquiring and reproducing agreements, books, receipts and invoices, documents, records, business correspondence, electrical data, audio files and other materials related to the investigated conduct;
- (4) ordering the undertaking under investigation to suspend the alleged illegal conduct, explain the origins and quantities of the properties related to the investigated conduct, and not to transfer, conceal or destroy such properties;
- (5) sealing up or seizing the properties related to the alleged unfair-competition conduct;
- (6) inquiring bank accounts and accounting books, bank statements, etc related to the deposits of the undertaking engaged in the alleged unfair-competition conduct; or
- (7) requesting judicial authorities to freeze account on situations where there is evidence to prove the conduct of transferring or concealing illegal funds.

第十六条 监督检查部门在调查不正当竞争行为时，被调查的经营者、利害关系人或者其他有关单位、个人应当如实提供有关资料或者情况，配合监督检查部门依法履行职责，不得拒绝、阻碍监督检查。

Article 16 The undertakings under investigation, interested parties or other relevant entities, individuals shall provide relevant materials or information truthfully, cooperate with the supervision and inspection agency to perform its duties in accordance with law, and shall not resist, impede the supervision and inspection when the agency investigates the unfair-competition conduct.

第四章 法律责任 Chapter Four Legal Liability

第十七条 经营者违反本法规定，损害他人合法权益的，应当停止侵害；给他人造成损害的，应当承担损害赔偿责任。

经营者或者消费者受到不正当竞争行为侵害的，可以依法向人民法院提起诉讼。

Article 17 An undertaking who violates the provisions of this Law and harms the legitimate rights and interests of any other party, shall cease the infringement; and such undertaking shall bear the liability of compensation if it causes damage to the other party.

Undertakings or consumers infringed by unfair competition conduct may file lawsuit at people's court in accordance with law.

第十八条 有本法第五条所列行为之一，引起纠纷的，由当事人协商解决；不愿协商或者协商不成的，当事人可以向人民法院起诉，也可以请求监督检查部门处理。

经营者违反本法第五条规定的，监督检查部门应当责令停止违法行为，没收违法商品，违法经营额五万元以上的，处违法经营额五倍以下的罚款，情节严重的，可以吊销营业执照；没有违法经营额或者违法经营额不足五万元的，处以二十五万元以下的罚款；违法经营额无法计算的，根据情节处以十万元以上一百万元以下的罚款。

违反本法第五条第一款第（三）项规定的，监督检查部门应当责令当事人在一个月内进行企业名称变更登记；期满未提出变更申请的，监督检查部门适用前款规定进行处罚，并由企业登记注册地的监督检查部门将该企业名称从企业信用信息公示系统中删除，以注册号或者统一社会信用代码代替该企业名称，并将该企业列入经营异常名录；情节严重的，可以直接吊销营业执照。

Article 18 Where any dispute arises from any of the conduct prescribed in Article 5 of this Law, the parties shall settle the dispute through negotiation; where the parties are unwilling to negotiate or the negotiation fails, the parties may file a lawsuit at people's court or request the supervision and inspection agency to handle the dispute.

The supervision and inspection agency shall order the undertaking in violation of Article 5 of this Law to stop illegal conduct and confiscate its illegal products. An undertaking whose illegal operation revenue is more than RMB 50,000, shall be imposed a fine of less than five times of its illegal operation revenue, and its licenses may be revoked if the circumstances are serious; a fine of less than RMB 250,000 shall be imposed if there is no illegal operation revenue or the illegal operation revenue is less than RMB 50,000; a fine of more than RMB 100,000 but less than RMB 1,000,000 shall be imposed on the basis of the seriousness of the illegal

conduct if the illegal operation revenue cannot be calculated.

The supervision and inspection agency shall order the undertaking who violates item (3), paragraph 1 of Article 5 of this Law to conduct enterprise name change registration within one month; An undertaking failing to file such application within the prescribed period shall be fined by the supervision and inspection agency pursuant to the preceding paragraph, and the local supervision and inspection agency of the place where the enterprise is registered shall remove the enterprise's name from the enterprise credit information publication system, and use the registration number or the unified social credit code to replace the enterprise's name, and include the enterprise in the list of enterprises with abnormal business operations; such undertaking's licenses may be revoked if the circumstances are serious.

第十九条 经营者违反本法第六条规定的，由地市级以上的监督检查部门责令改正，处以违法经营额一倍以上五倍以下的罚款；没有违法经营额或者违法经营额无法计算的，根据情节处以十万元以上三百万元以下的罚款。

被指定商品的经营者有违反本法第六条规定情形的，比照前款规定进行处罚。

Article 19 The supervision and inspection agency at or above the city level shall instruct the undertaking in violation of Article 6 of this Law to rectify its illegal conduct and impose a fine of more than one time but less than five times of its illegal operation revenue; a fine of more than RMB 100,000 but less than RMB 3,000,000 shall be imposed on the basis of the seriousness of the illegal conduct if there is no illegal operation revenue or the illegal operation revenue cannot be calculated.

An undertaking shall be fined pursuant to the preceding paragraph if its products are designated and violates Article 6 of this Law.

第二十条 经营者违反本法第七条规定的，监督检查部门应当责令停止违法行为，根据情节处以违法经营额百分之十以上百分之三十以下的罚款；构成犯罪的，依法追究刑事责任。

Article 20 The supervision and inspection agency shall order the undertaking in violation of Article 7 of this Law to cease illegal conduct and impose a fine of more than 10% but less than 30% of its illegal operation revenue; criminal liability of the undertaking shall be pursued in accordance with law if the conduct constitutes a crime.

第二十一条 经营者违反本法第八条规定的，监督检查部门应当责令停止违法行

为，处以违法经营额三倍以上五倍以下的罚款；没有违法经营额或者违法经营额无法计算的，根据情节处以十万元以上一百万元以下的罚款；情节严重的，可以吊销营业执照；构成犯罪的，依法追究刑事责任。

Article 21 The supervision and inspection agency shall order the undertaking in violation of Article 8 of this Law to cease illegal conduct and impose a fine of more than three times but less than five times of its illegal operation revenue; a fine of more than RMB 100,000 but less than RMB 1,000,000 shall be imposed on the basis of the seriousness of the illegal conduct if there is no illegal operation revenue or the illegal operation revenue cannot be calculated; such undertaking's licenses may be revoked if the circumstances are serious; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

第二十二条 经营者违反本法第九条规定的，监督检查部门应当责令停止违法行为，根据情节处以十万元以上三百万元以下的罚款；构成犯罪的，依法追究刑事责任。

商业秘密权利人能够证明他人使用的信息与其商业秘密实质相同以及他人有获取其商业秘密条件的，他人应当对其使用的信息具有合法来源承担举证责任。

Article 22 The supervision and inspection agency shall order the undertaking in violation of Article 9 of this Law to cease illegal conduct and impose a fine of more than RMB 100,000 but less than RMB 3,000,000; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

Where a right owner of trade secrets can prove that the information used by other party is substantively the same as its own trade secrets and the other party has the access to such trade secrets, the other party shall bear the burden of proving that the information is acquired through legitimate source.

第二十三条 经营者违反本法第十条规定的，监督检查部门应当责令停止违法行为，没收违法商品，根据情节处以十万元以上一百万元以下的罚款。

Article 23 The supervision and inspection agency shall order the undertaking in violation of Article 10 of this Law to cease illegal conduct, confiscate its illegal products, and impose a fine of more than RMB 100,000 but less than RMB 1,000,000 on the basis of the seriousness of the illegal conduct.

第二十四条 经营者违反本法第十一条规定的，监督检查部门应当责令停止违法行为，消除影响，根据情节处以十万元以上三百万元以下的罚款；构成犯罪的，

依法追究刑事责任。

Article 24 The supervision and inspection agency shall order the undertaking in violation of Article 11 of this Law to cease illegal conduct, eliminate consequences and impose a fine of more than RMB 100,000 but less than RMB 3,000,000 on the basis of the seriousness of the illegal conduct; criminal liability shall be pursued in accordance with law if the conduct constitute a crime.

第二十五条 经营者违反本法第十二条规定的，监督检查部门应当责令停止违法行为，根据情节处以十万元以上三百万元以下的罚款；构成犯罪的，依法追究刑事责任。

Article 25 The supervision and inspection agency shall order the undertaking in violation of Article 12 of this Law to cease illegal conduct and impose a fine of more than RMB 100,000 but less than RMB 3,000,000 on the basis of the seriousness of the illegal conduct; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

第二十六条 经营者违反本法第十三条规定的，监督检查部门责令停止违法行为，根据情节处以十万元以上三百万元以下的罚款。

Article 26 The supervision and inspection agency shall order the undertaking in violation of Article 13 of this Law to cease illegal conduct and impose a fine of more than RMB 100,000 but less than RMB 3,000,000 on the basis of the seriousness of the illegal conduct.

第二十七条 经营者违反本法第十四条规定进行不正当竞争行为的，监督检查部门责令停止违法行为，根据情节处以十万元以上三百万元以下的罚款；构成犯罪的，依法追究刑事责任。

Article 27 The supervision and inspection agency shall order the undertaking in violation of Article 14 of this Law by engaging in unfair competition conduct to cease illegal conduct and impose a fine of more than RMB 100,000 but less than RMB 3,000,000 on the basis of the seriousness of the illegal conduct; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

第二十八条 明知或者应知有违反本法规定的不正当竞争行为，仍为其提供生产、销售、仓储、运输、网络服务、技术支持、广告推广、支付结算等便利条件的，根据情节处以十万元以上一百万元以下的罚款。主动配合监督检查部门

调查，如实说明情况、提供证据的，可以从轻或者减轻处罚。

Article 28 Where an undertaking clearly knows or ought to know the unfair competition conduct prescribed in this Law and still provides conveniences such as production, sales, warehousing, transportation, web service, technical support, advertising promotion, payment and settlement, etc., such undertaking shall be imposed a fine of more than RMB 100,000 but less than RMB 1,000,000 on the basis of the seriousness of the illegal conduct. Such undertaking may be given a lighter or mitigated punishment if it actively cooperates with the supervision and inspection agency's investigation, truthfully provides explanations and submits relevant evidence.

第二十九条 违反本法规定转移、隐匿、销毁或者销售被查封、扣押、责令暂停销售商品的，监督检查部门可以没收涉案商品，处涉案商品价款一倍以上三倍以下的罚款；价款无法计算的，处以十万元以上一百万元以下的罚款；构成犯罪的，依法追究刑事责任。

Article 29 Where an undertaking violates this Law by transferring, concealing, destroying or selling products that have been sealed-up, seized or suspended from selling by orders, the supervision and inspection agency may confiscate the involved products of such undertaking and impose a fine of more than one time but less than three times of the price of the involved products; a fine of more than RMB 100,000 but less than RMB 1,000,000 shall be imposed if the price cannot be calculated; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

第三十条 对监督检查部门依法实施的调查，非因法定事由拒绝提供有关资料、情况，提供虚假资料、情况，隐匿、销毁、转移证据，或者有其他拒绝、阻碍调查行为的，由监督检查部门责令改正，处以二万元以上二十万元以下的罚款。

Article 30 Where an undertaking, without statutory reasons, refuses to provide relevant materials or information, provides false materials or information, conceals, destroys or transfers evidence, or otherwise refuses or impedes the investigation conducted by the supervision and inspection agency in accordance with law, the said agency shall instruct the undertaking to rectify its illegal conduct and impose a fine of more than RMB 20,000 but less than RMB 200,000.

第三十一条 对监督检查部门作出的决定不服的，可以依法申请行政复议或者提起行政诉讼。

Article 31 Where an undertaking is dissatisfied with the decision issued by the

supervision and inspection agency, it may apply for an administrative review or file an administrative lawsuit in accordance with law.

第三十二条 监督检查不正当竞争行为的国家工作人员滥用职权、玩忽职守的，依法给予处分；构成犯罪的，依法追究刑事责任。

Article 32 Where a staff member of the state, who is responsible for supervision and inspection of unfair competition conduct, abuses his/her power or neglects his/her duty, he/she shall be issued an administrative sanction according to law; criminal liability shall be pursued in accordance with law if the conduct constitutes a crime.

第三十三条 监督检查不正当竞争行为的国家工作人员徇私舞弊，对明知有违反本法规定构成犯罪的经营者故意包庇不使其受追诉的，依法追究刑事责任。

Article 33 Where a staff member of the state, who is responsible for supervision and inspection of unfair competition conduct, engages in malpractices for personal gain and intentionally harbors undertakings which he/she clearly knows to be guilty of crimes by violating the provisions of this Law, he/she shall be pursued for criminal liability in accordance with law.

第五章 附 则

Chapter Five Supplementary Provisions

第三十四条 本法规定的“以上”、“以下”，均包括本数。

Article 34 Terms in this Law that involve “more than”, “less than” shall include the number itself.

第三十五条 本法自 年 月 日起施行。

Article 35 This Law shall come into effect on YY/MM/DD.

**Notice from the Legislative Affairs Office of the State Council
on publication of the “Anti-Unfair Competition Law of the People's Republic of China”
(draft for review)" for Public Comments**

Publication Date: 2016-2-25

Since the implementation of the Unfair Competition Law of the People's Republic of China (hereinafter "Unfair Competition Law") in 1993, after more than 20 years of development, the extent of marketization of our nation's economy has greatly increased; and the total economy, the market size, the level and the situation of market competition have all undergone extremely extensive and profound changes. In order to realize the objectives of the Party Central Committee and the State Council concerning giving full play to the decisive role of the market in allocating resources; establishing fair, open, and transparent market rules; and building a unified and open market system with orderly competition, to better maintain the market order of fair competition, and to better safeguard consumers' lawful rights and interests, the State Administration for Industry and Commerce, after synthesizing various opinions, has revised the current Anti-Unfair Competition Law, and has formulated the Unfair Competition Law of the People's Republic of China (Revision Draft to be sent for Deliberation) (hereinafter "Deliberation Draft") to report to the State Council. The full text of the deliberation draft is hereby released to solicit opinions from all aspects of society, so as to fully understand the comments and recommendations of all aspects of society and to improve the quality of the legislation. Relevant units and individuals from all sectors having comments on amendments may present them through the following means prior to March 25, 2016:

Login in to the Chinese Government's legal information network (<http://www.chinalaw.gov.cn>), and submit comments of the draft for deliberation through the 'Comment Solicitation System for Laws, Regulation, and Rules:' on the left side of the home page.

Mail a letter to: Beijing City P.O. Box 2067 (postal code: 100035), and please specify on the envelope "Comments on Unfair Competition Law".

Send opinions via email to <fbzdjz@chinalaw.gov.cn>.

Legislative Affairs Office of the State Council

2/25/2016

Explanation on the drafting of "Anti-Unfair Competition Law of the People's Republic of China (Revision Draft For Review)"

I. The Necessity of Revising the "Anti-Unfair Competition Law"

Since the implementation of the Unfair Competition Law of the People's Republic of China (hereinafter "Unfair Competition Law") in 1993, after more than 20 years of development, the

extent of marketization of our nation's economy has greatly increased; and the total economy, the market size, the level and the situation of market competition have all undergone extremely extensive and profound changes. The current Anti-Unfair Competition Law can obviously no longer adapts to the novel need of economic development, and contains problems such as that its content is narrow and out-dated, that it contains various legal blank spots, that certain provisions are missing, that the administrative law enforcement is dispersed, that law enforcement standard is not unified, that the legal responsibility system is not perfect, and that the punishment is too lenient. With the promulgation of the Anti-Monopoly Law of the People's Republic of China and the revision of the Trademark Law of the People's Republic of China and the Advertising Law of the People's Republic of China, relevant legal provisions now overlap with and repeat each other. In recently years, voices and demands from all sectors of the society regarding the revision of the Anti-Unfair Competition Law have been very strong, and both NPC delegates and CPPCC members have submitted bills and proposals to revise the Anti-Unfair Competition Law. In order to realize the objectives of the Party Central Committee and the State Council concerning giving full play to the decisive role of the market in allocating resources; establishing fair, open, and transparent market rules; and building a unified and open market system with orderly competition, to better maintain the market order of fair competition, and to better safeguard consumers' lawful rights and interests, it is imperative to revise the Anti-Unfair Competition Law as soon as possible.

II. The Revision Process for the "the People's Republic of China Anti-Unfair Competition Law"

In 2010, the State Administration for Industry and Commerce and the State Council Office of Legislative Affairs have jointly organize experts to conduct special researches on the amending the Law The revision of the Anti-Unfair Competition Law has been successively listed as a backup item in the Legislative Plan for the 12th NPC Standing Committee, a research item in the 2014 State Council Legislative Work Plan and a backup for the 2015 State Council Legislative Work Plan, and the State Administrative for Industry and Commerce is in charge of drafting the revision. In 2014, the State Administration for Industry and Commerce organized university experts, practicing lawyers, and certain local bureaus for industry and commerce into eight research groups to conduct in-depth research on important questions regarding the revision of the Anti-Unfair Competition Law, and has held multiple seminars and symposiums on revision work. In 2015, The State Administration for Industry and Commerce has held numerous seminars and symposiums on the revision work to listen to the opinions of all sectors such as experts, scholars, local departments for industry and commerce and for market supervision, and has solicited the opinions of 38 Ministries and Commissions under the State Council including the National Development and Reform Commission and the Ministry of Commerce, in writing. On the basis of in-depth investigation and research and widely solicited opinions, combing the opinions of all sectors, [the Administration] has formulated the current Anti-Unfair Competition Law of the People's Republic of China (Review Draft for Review) (hereinafter "Revision Draft for Review").

III. Explanation Of Important Issues Regarding The "Draft Amendments For Deliberation"

The current Anti-Unfair Competition Law contains five chapters totaling 33 articles. The content amended by the Revision Draft for Review involves 30 articles of the current Law, of which seven articles are deleted and nine added, totaling 35 articles.

(1) Revised The Concept Of "Business Operator" In The General Provisions Section, Clarifying The Scope Of Oversight And Enforcement Authority.

1. Revised the definition of "business operators" in the Anti-Unfair Competition Law to mean "natural persons, legal persons or other organizations engaged in the production or trade of goods, or the provision of services," which expanded the scope of regulation, in line with the relevant provisions of the Anti-Monopoly Law.

2. Unified the anti-unfair competition law enforcement system. Article 3 of the current Anti-Unfair Competition Law stipulates that, "where laws or administrative regulations stipulate other department shall supervise and inspect, following those provisions." This provision has created problems such as that the ascertaining standards and punishment measures for suspected acts of unfair competition are not the same in different industries, which caused strong social reaction, and has affected the authority and fairness of law. The Revision Draft for Review makes clear in the General Provisions the general jurisdiction of the administrative departments for industry and commerce over acts of unfair competition, while providing that relevant departments can conduct supervision and inspection pursuant to the provisions of laws and administrative regulations.

(2) Revised And Improved Relevant Articles In The Section On 'Acts Of Unfair Competition' Adding Two Kinds Of Conduct And Deleting Four Articles.

1. In the revised and improved the behavior: First Cohesion "Trademark Law", delete the existing "Anti-Unfair Competition Law" impersonation registered trade marks Article 5 (a); and for the registered trademark of another unregistered well-known trademark as font size enterprise name used to mislead the public, resulting in unfair competition in the market has been confused regulation; the second is the use of the concept of adding expressly enumerated in the concept of commercial bribery and typical commercial bribery, commercial bribery is conducive to correct the difference between business and discount between stakeholders to encourage and promote fair competition; third is to clarify the difference between "Advertising law" and delete operators on advertising and other regulations; the current "anti-unfair competition law" with modified misleading false propaganda actually result in unfair competition to promote its behavior reduced. "Revised draft manuscript" clearly false and misleading propaganda both false propaganda, but also cause the relevant public misunderstanding publicity; Fourth, delete the existing "Anti-Unfair Competition Law," Article 5 (d) of the relevant "in forgery or fraudulent use of certification marks, famous signs and other signs on the quality of goods, falsifying the origin of the quality of goods made false and misleading representation "requirement, applicable to such acts," the revised draft manuscript "about misleading provisions publicity to investigate; Fifth complements the burden of proof provisions of trade secrets case; six is the concept of Premium sales revised to prize promotions, complements manifestation of unfair Premium sales. According to economic development, increased the maximum award amount of lottery-style prize promotions.

2. Added two types of acts: One was to regulate the acts of unfair competition undertaken by business operators that do not possess market dominant positions but possess comparatively dominant positions in trading; the other was to regulate acts that use software and other technological means to interfere with, restrict, and influence other business operators and users in the area of Internet. Furthermore, considering the fundamental role of the Anti-Unfair Competition Law in protecting market competition, and in order to regulate novel acts of unfair competition that may appear in the future, a residual clause is added to Article 14.

3. Deleted provisions on public utilities' acts of restricting competition, acts of tying arrangement, acts of selling below cost, and acts of administrative monopolies, to link up with the "Anti-Monopoly Law".

(3) Strengthened The Tactics For Supervision And Inspection And Increased Liability In The Sections On Supervision And Inspections And Legal Responsibility.

In view that in the current "Anti-Unfair Competition Law" the means and strength of supervision and inspection are lacking, the liability is light, the deterrent effect is not strong and so on, "Draft Revised draft" improve the supervision and inspection authority and responsibility of law enforcement agencies to give law enforcement agencies seizure of administrative enforcement measures liens, etc; while increasing the obligations of the parties to cooperate with the investigation and refused to cooperate, refused to accept the survey party provides accountability. Taking into account the economic development and the introduction of new or newly revised draw the liability laws, "Draft Revised draft," insisted the principle of punishment equivalent, increased the penalties for violations.