AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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Via email: wudm@ndrc.gov.cn

Re: AIPLA Comments on State Council Anti-Monopoly Commission's Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (Draft for comment)

主题：　　美国知识产权法协会(AIPLA)对国务院反垄断委员会《关于滥用知识产权的反垄断指南》(征求意见稿)的意见

Dear Mr. Zhang:

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments to the Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights ("Guidelines") issued by the National Development and Reform Commission ("NDRC") on issues related to competition and intellectual property.

美国知识产权法律协会（"AIPLA"）感谢此次国家发展和改革委员会（简称"发改委"）给予我们机会就发改委《关于滥用知识产权的反垄断指南》（以下称《指南》）提出我们的建议。

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

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

We appreciated the opportunity last year to comment on the Questionnaire on IP Misuse, and we are grateful for this opportunity to follow up with comments in this related area. Please find below AIPLA's comments on these issues as raised by the Draft Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights.

我们感谢去年有机会能对发改委关于滥用知识产权意见征询提供我们的建议，以及有本次机会就相关问题提供补充意见。以下是AIPLA 针对由《关于滥用知识产权的反垄断指南》(征求意见稿)引发的与竞争和知识产权有关问题的一些建议。

Overall / In General

综述

Although the draft guidelines are Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights, AIPLA's comments focus on standard-setting agreements. AIPLA's views on intellectual property rights under standard-setting agreements requiring fair, reasonable, and non-discriminatory ("*FRAND*") licensing terms have consistently emphasized the need for transparency and flexibility, and for encouraging broad participation in standards-setting activities. The stakeholders in this context include users of standards as well as owners of intellectual property whose technology may be included in standards based on the consensus of interested stakeholders. Consistent with this position, AIPLA has noted the importance of strong Intellectual Property Rights ("IPR") protection in connection with standards-setting to preserve the incentives to invest in the development of technologies and contribute such technologies to collaborative standards-setting efforts. We provide comments on specific sections of the Anti-Monopoly Guidelines, as noted below.

虽然《指南》是关于关于滥用知识产权的反垄断指南，AIPLA 以下意见的重点放在标准制定协议上。AIPLA 的一贯观点是，在要求公平、合理和无歧视（"*FRAND*"）的许可条件的标准制定的协议范围内的知识产权，要强调对透明度与灵活性的需求，以及鼓励广泛参与标准制定活动的需求。在这种情况下的利益相关者包括标准的使用者以及知识产权的所有权人，所有权人的技术也许是经感兴趣的利益相关者的一致同意而被包括在标准之中。与此立场一致，AIPLA 注意到在标准制定过程中强力保护知识产权的重要性，以保持投资技术发展及将这些技术参与到协同标准制定中的动力。我们下面就《指南》的具体条款提出我们的意见。

Article I(III)(1) Overall Analyzing Framework: Analysis of Competition Situation in the Relevant Market

Article I(III)(1) concerns the analysis of competition within a relevant market, and proposes three methods for calculating market shares of the relevant technology market, including (1) the ratio of license fee income for the IPR at issue as compared to total license fee income in the relevant market; (2) using market share revenue in a downstream commodity market; and (3) considering the quantity ratio of relevant IPR to all IPR with substitutional relation. With respect to method (1), it is unclear what information will be sought for this analysis and whether sensitive business information will be protected from public disclosure so that competition is not harmed by competitors learning each other's sensitive business information, such as royalties, volumes, pricing and projections. With respect to method (2), it is unclear what market information will be used to calculate market share. With respect to method (3), it is unclear how substitutional relation will be determined.

第一条（三）款1 项　　总体分析思路: 相关市场的竞争状况分析

第 1 条第（三）款第 1 项涉及相关市场竞争状况的分析，提出了计算相关技术市场份额的三种方法，包括，（1）所涉知识产权的许可费收入在相关技术市场的许可费总收入的占比，（2）利用相关知识产权提供的商品在下游市场的市场份额的占比计算市场份额，（3）考虑相关知识产权在所有具有可替代关系的知识产权中的数量占比。关于（1），不十分清楚的是在这类分析中到底需要哪些具体信息，以及敏感的商业信息是否会得到保密以免公开披露，不让竞争者得到竞争对手的敏感商业信息如使用费、销量、价格、市场预测等而损害市场竞争。关于（2），用哪些市场信息来计算市场份额不很清楚。关于（3），可替代关系怎样确定也不很清楚。

Article II(I)(1) **IPAgreements that may Restrict or Eliminate Competition：*Joint R&D***

第二条（一）款1 项可能排除、限制竞争的知识产权协议：联合研发

In general, IPR provides IPR owners the right to exclude others from practicing their IP. The mere ownership of intellectual property rights does not necessarily confer market power. Proof of dominant market position should be based on evidence of market power, apart from the existence of the IPR. AIPLA recommends that this right should not be curtailed merely because a patent holder is found to have market power. With respect to Article II(I)(1), AIPLA respectfully recommends that it should not be sufficient to establish liability under the Anti-Monopoly Laws (AML) by the exercise of an IPR, even for an enterprise that has market power, and even where the acquisition arguably eliminates or restricts competition. In order to be held liable, the enterprise in question also must be using the IPR in a manner not contemplated by the IPR laws and administrative regulations.

一般来说，知识产权赋予知识产权所有人排他使用其知识财产的权力。仅仅拥有知识产权不一定带来市场势力，市场支配地位的证明应基于知识产权存在之外的市场势力证据。

AIPLA 建议，这种权利不应该仅仅因为专利权人拥有市场势力而削弱。关于第二条（一）款 1 项，AIPLA 尊敬地建议，行使知识产权应不足以产生违反反垄断法的法律责任，即便相关企业具有市场势力，甚至某收购行为也许可以算是排除或限制竞争。要承担法律责任，相关企业行使其知识产权的行为还必须超出知识产权法律、行政法规考虑的范围之外。

Article II(I)(2) Patent Pool and Article II(I)(3) Cross-Licensing

第二条（一）款2 项 专利联营 和 第二2 条（一）款3 项 交叉许可

Article II(I)(2) concerns patent pools, which is where two or more parties may "pool" together and jointly license their patents to others. It may be helpful to clarify that a party to a patent pool may license all or only some of its patents. Article (II)(I)(3) concerns cross-licensing, where parties agree to license each other's patents. AIPLA recommends clarifying that a patent cross-license may involve all or only some of a party's patents.

第二条（一）款 2 项涉及专利联营，即两个或两个以上权利人可以将专利"联营"在一起并共同将他们的专利许可给他人。 澄清下面这点也许会更好，专利联营的某一权利人可以许可其所有的或部分专利。第二条（一）款 3 项涉及交叉许可，即多个权利权人同意将各自的专利共同对外许可给对方。AIPLA 建议澄清专利联营或专利交叉许可可以涉及某一权利人的全部专利，也可以仅涉及部分专利。

The factors to consider under Article (II)(I)(3) include whether or not a license may present a barrier to entry in the market by others or could impede competition downstream. AIPLA is concerned that such factors may disincentivize parties from licensing and sharing patented technology. The rights to exclude others and to choose whether to grant a license are basic patent rights. When patent holders exchange patent license rights, they may add each other as competitors in their patented technology. A party who chooses not to license a competitor might be alleged to have created a barrier to market entry or impeded downstream competition under some of the factors raised in the cross-licensing subsection. AIPLA recommends that NDRC delete these factors or clarify with greater specificity factors concerning barriers to entry and factors hindering downstream competition so that these determinations do not impede a patent holder's legitimate right to decide to whether and to whom to grant a license.

第二条（一）款 3 项所考虑的因素中包括专利许可是否会构成第三方进入相关市场的壁垒，或可能阻碍了下游相关商品市场的竞争。AIPLA 担心，考虑这些因素可能会不鼓励当事人许可和共享其专利技术。排除他人使用和选择是否给予许可的权利乃是基本专利权。当专利权人交换专利许可时，他们也可能会将对方视为其专利技术的竞争对手。如果某一方选择不将专利权许可予竞争对手，他可能会被指控已经造成了进入相关市场的壁垒或阻碍了下游竞争。AIPLA 建议发改委删除这些因素，或者对有关市场壁垒或阻碍下游竞争的因素给出更加具体明确的说明，从而这些考虑不会阻碍权利人决定是否及给予何人许可的合法权利。

Indeed, all licensing agreements carry some degree of exclusive effect on others to enter into the

relevant market. A cross-licensing agreement/contract in and of itself should be duly respected and should not, by its simple existence, be presumed to constitute a competition law violation. Rather, a strong showing should be required to establish that any competition law violation has occurred.

确实，所有的许可合同都带着某种程度的排除他人进入相关市场的作用。交叉许可合同本身应受充分尊重，而不应该简单的因为其存在就假定为违反竞争法。相反，违反竞争法的行为判定要以充分的证据作基础。

Article II(I)(4) Standard-Setting

第二条（一）款 4 项：标准制定

The rise of standardized technology has created enormous social and economic benefits. Patented technology is now prevalent in many industry standards, and some of these standards cannot succeed without being able to take advantage of patented technology. Because the development of this technology may require great risk and enormous cost, standards might not attract the best technology without rewarding innovators with reasonable compensation. Many Standard-Setting Organizations (SSOs) seek to incentivize patent holders to contribute their technologies to standards through effective, FRAND-based IPR policies that could be with or without monetary compensation. These policies are carefully balanced to reflect the interests of all stakeholders and advance two equally important goals: (1) ensuring implementers who want to practice a standard reasonable access to FRAND licenses; and (2) providing reasonable compensation through licensing of standard-essential patents on fair and reasonable terms and conditions free of any unfair discrimination.

标准化技术的兴起创造了巨大的社会效益和经济效益。专利技术目前普遍于很多行业标准，甚至其中一些标准倘若没有利用专利技术就不能取得成功。由于这种技术的发展可能需要承受巨大的风险和甚多的成本，标准可能无法不经由给予合理的补偿金来奖励创新者进而吸引到最优秀的技术。许多标准制定组织寻求通过有效的、基于 FRAND 原则的知识产权政策（这些政策可能是有或没有金钱补偿）以激励专利权人贡献自己的技术。这类政策都是谨慎平衡的，以反映所有利益相关者的利益并促进两方平等重要目标：（1）即确保欲实施标准的实施者有合理的获取 FRAND 许可的管道，（2）通过基于公平合理条款且没有任何不公平歧视条件而许可标准必要专利来提供合理补偿。

Indeed, participants in standards development can represent many different interests, depending on a myriad of factors. Some firms invest in research and development and contribute patented technology to the standards development process. These firms may choose to license their patents to implementers and users as a way of generating revenue for further research and development. Other firms may use their patent portfolios defensively by entering into cross-licenses in order to protect their products that incorporate standardized technology where the sale of such products creates revenue for further research and development. Still other firms may decide not to invest in research and development, but instead choose to rely on products and services that utilize the standardized technology to support their business models. As many firms

support all of these business models, the lines demarcating the interests among various stakeholders may blur. It is therefore important that competition policies with respect to standards-essential patents ("SEPs") balance all of the interests among the various stakeholders.

参与标准制定的相关机构由于所选择经营方式的不同，在标准制定的过程中会有不同的考量依据。一部分机构会在研发中进行大量投入并将自己的专利技术加入标准制定过程当中。这部分机构往往选择将自己的专利技术授权给其他的使用者，并由此获取利润以支持进一步的研发工作。也有一部分机构会与其他专利权利人互相授权专利技术，以保障自己使用了相关标准技术的产品不致侵权。这部分机构也会选择将由经营此项产品获得的利润投入进一步的研发当中。还有一部分机构并不对研发进行投入，转而选择依靠使用标准技术的产品及服务来获利。由于大量的机构会同时使用这三种不同的经营方式，所以他们在标准制定当中的相关利益并不能被简单明确的划分。因此竞争法中有关基本标准专利技术的规定应平衡考量各利益相关人的诉求。

The Guidelines do not specifically address whether competition law should intervene where there are adequate contractual remedies for the alleged conduct. Promises to disclose patents or to license on FRAND terms have been found to be enforceable under contract law, which in turn looks to the intent of the parties. That intent generally reflects the necessary balance between (1) the innovators' incentives to invest in R&D and contribute to standards development and (2) the implementers' access to technologies under reasonable terms.

如果合同双方已针对某项行为在合同中达成了约定，竞争法是否应该干预？目前《指南》中没有特别提到。按 FRAND 条款做出的专利公开或许可保证已有经合同法强制执行的，而合同法注意合同双方的原始意图。合同双方的原始意图反应了以下两点之间的必要平衡：（1） 发明人有投资研发和参与标准制定的动机，(2) 实施者能在合理条件下获得技术使用权。

The traditional SSO approach of leaving the determination of FRAND terms and conditions to bilateral negotiations generally has been successful. Thousands of FRAND license agreements have been reached through such a process, and the deployment of collaborative standards has been enormously successful thanks to the access assurance provided by the FRAND ecosystem. To invoke competition law as a way to resolve disputes in this context without first determining the availability or adequacy of contract remedies could very likely disrupt the balance of interests that standards agreements attempt to strike. A breach of a FRAND obligation or the mere seeking of an injunction against implementers of an SEP should not on its own constitute an antitrust violation.

标准制定组织由合同双方决定 FRAND 条款的传统做法一般来说很见成效。通过这种做法已达成数以千计的 FRAND 合约，由 FRAND 体系提供的得取技术的保证也使合作标准的推行获得很大成功。 在这种情况下，如果在没有确定是否有适当合同手段来解决双方争议之前就引入竞争法，会很容易打乱本来标准协议试图达到的利益平衡。违反某项 FRAND 承诺，或者仅仅申请禁止实施标准必要专利的禁令，本身并不应足以构成垄断行为。

With respect to Article II(I)(4), AIPLA recommends clarifying the factors in analyzing whether standards activity restricts competition. For example, the second factor considers whether the standard setting organization excludes solutions of certain parties. The nature of the standard-

setting process requires choosing among proposed alternatives such that some alternatives are chosen and some are not. The mere fact that an alternative was not chosen should not be presumed to be an improper exclusion of a parties' solution. Rather, AIPLA suggests clarifying that the consideration is whether the standards-settings organizations are open to solutions offered and whether solution selection is not dominated by one undertaking or group.

关于第二条（二）款 4 项， AIPLA 建议澄清分析标准制定行为是否限制竞争的因素。例如，第二个因素考虑标准制定组织是否排斥特定经营者的相关方案。标准制定的过程中需要从提出的不同替代方案中进行挑选，有些提案会被选中，有些则不会。仅仅因某个提案未被选中，不应该推断标准制定组织有不当的排斥行为。相反，AIPLA 建议澄清如下，考虑标准制定是否限制竞争的因素是，标准制定组织是否愿意考虑各方提供的方案，以及挑选方案的过程是否并非由某一个经营者或团体所控制。

Article II(II)(1) Price Limitation

第二条（二）款1 项　价格限制

Any short-term effect of higher prices occurring during the limited term of an intellectual property right should be offset by access to patented technology, which can lower market entry costs and ideally create a virtuous cycle of dynamic competition.

任何在知识产权有限的有效期内短暂的价格抬升，因该由开放专利技术来得到弥补。这样既可以降低市场的入门代价，也能在理想情况下创造生动的良性循环竞争机制。

Article II(II)(3) No Challenge Clause and Article III(II)(4)(2). Imposing Unreasonable Trading Conditions

第二条（三）款3 项　不质疑条款　和　第三条（四）款2 项　附加不合理的交易条件

Article II(II)(3) concerns no challenge clauses in licensing agreements, which are referred to as a requirement that the licensee not raise a challenge to the validity of the licensed IPR. Article III(II)(4)(2) lists as a potentially unreasonable restriction a prohibition against challenging the IPR validity or prohibiting the licensee from filing a non-infringement lawsuit. Although this section generally appears properly limited to review of licenses that preclude challenging the validity of a patent, Article III(II)(4)(2) might be read to question licensing provisions that preclude a party from filing a lawsuit to challenge whether the IPR is infringed.

第二条（三）款 3 项是有关不质疑条款的规定。不质疑条款是指被授权人无权质疑被授权知识产权的有效性。第三条（四）款 2 项将不质疑条款以及禁止被授权人就侵权案件上诉的条款一同列为可能的不合理交易条件。虽然这一部分似乎局限于审查许可条约中禁止挑

战专利有效性的条款，但是第三条（四）款 2 项有可能会被解读为查问许可合同中是否有禁止被授权人到法院挑战侵权的条款。

There may be public policy reasons that favor permitting licensees to challenge the validity of patents. However, contractual provisions may attempt to prevent validity challenges to licensed patents. But whether a patent is infringed generally may differ from product-to-product and party-to-party such that a finding that a party does not infringe a patent may only benefit that party and no one else.

从公共政策的角度，也许有理由倾向于允许被许可者挑战专利的有效性，但合同条款可能会试图阻止被许可者挑战专利的有效性。可是，是否存在专利侵权行为，一般要看具体产品和具体当事人而定，因此，判定某方未侵权仅仅有益于该方，而非任何他人。

Further, AIPLA recommends that the enforceability of non-challenge clauses should be addressed under Chinese contract or intellectual property laws, rather than competition law. If the NDRC decides to retain this section as far as whether non-challenge clauses present a competition law issue, then AIPLA suggests that the NDRC consider, in addition to the five factors already listed in this section,

(i) whether virtually all parties with an interest in challenging the validity of the patents (including current licensees, potential licensees other competitors, etc.) are subject to similar restrictions,
(ii) the reasonableness of the non-challenge clause in the context of the particular license agreement at issue,
(iii) whether the non-challenge clauses are legally enforceable, and
(iv) whether such a contractual provision is likely to eliminate or restrict competition in the Chinese market.

AIPLA 另一个建议是，不质疑条款的有效性应根据中国的合同法或者知识产权法来判定，而不应该基于竞争法判定。如果发改委决定保留本款，规定不质疑条款涉及竞争法问题，那么 AIPLA 建议发改委在已有的五点考虑因素之外增加如下考虑因素：

1. 是否所有的权益相关者（包括目前的被许可人，以及潜在被许可人和其他竞争对象）都受到同样的限制；

2. 不质疑条款在具体许可协议情况下的合理性；

3. 不质疑条款是否有法律效力；

4. 这类合约条款是否会排除或限制市场竞争。

Article II(II)(4). Other Restriction Clauses

第二条（二）款 4 项　　其他限制条款

Each of these restrictions, however, may provide certain efficiencies. Moreover, each is generally considered based on extensive experience with the practices under a rule of reason analysis and is not prohibited per se. AIPLA respectfully suggests that this Article II(II)(4) be amended to clarify that the stipulated practices would be unlawful only where it is established by objective evidence that they cause actual anti-competitive harm in a properly defined relevant market and that the harm outweighs any procompetitive justification.

不过，所列限制条款每一项都可能会提高效率。此外，每一项一般都是根据合理原则下丰富的实践经验予以考虑的，而且本身并不违法。 AIPLA 谨建议修订本条款澄清如下，所列做法只有在下述情况下违法，即有客观证据证明，所列做法会对一个正确界定的相关市场造成实际反竞争伤害，并且其伤害超出任何促进竞争的理由。

Article II(III) Exemption for Agreement

第二条（三）款　协议的豁免

AIPLA supports establishment of a "15 percent" share safe harbor for competitors. AIPLA recommends including a statement clarifying that failing to qualify for a safe harbor does not in any way infer or presume that an arrangement is likely to be anticompetitive.

AIPLA 支持为竞争对手建立 持 15%"份额的避风港。 AIPLA 建议加入一条说明澄清，不能因无资格获得安全港就推断或假定某安排是反竞争行为。

Article III(II)(1) License IPR at Unfair High Royalty

第三条（二）款1 项 以不公平的高价许可知识产权

The negotiation of a reasonable royalty should be left to the parties. If the parties cannot reach an agreement concerning reasonable terms, courts are already equipped to determine reasonable royalties as damages for infringement using accepted legal standards. Attempts to place artificial limitations on an SEP owner's ability to seek reasonable royalties as damages would upset the critical balance between SSO participants by redefining the FRAND commitment to favor only the interests of potential licensees, without giving due regard to the interests of innovators. FRAND commitments are always voluntary. Even if a consensus of all stakeholders (including potential licensees) determines that a patented technology offers the technical solution desired, it does not mean that the SEP owner (i.e., the owner of patents covering such desired technology) can be compelled to forego reasonable compensation for making the technology available. Doing so would be tantamount to compulsory licensing, unless such an agreement had been expressly stated in the relevant SSO patent policy and the SEP owner had voluntarily agreed to that policy. A contrary approach would devalue SEPs, undermine the bargain struck by innovators in consideration for their contribution of patented technology for inclusion in standards, and disrupt the incentive scheme critical to ensuring successful standards development.

合理使用费的谈判应由当事双方处理。如果双方不能达成关于合理条款的协议，人民法院已经具备根据现有法律标准决定合理使用费作为侵权赔偿的能力。随意限制标准必要专利权利人索取合理使用费作为侵权赔偿的能力的尝试，等于对 FRAND 承诺重新定义，使天

平倾向于潜在被许可人的利益，而没有对创新者的利益给予充分考虑，这会破坏标准制定组织参与者之间的关键平衡。 FRAND 承诺总是自愿的。即使所有的利益相关者（包括潜在的被许可人）达成一致意见认为某项专利技术能提供所需的技术方案，这并不意味着标准必要专利权利人（即涵盖所需技术的专利拥有者）可以被强迫放弃对提供该技术的合理补偿。这样做相当于强制许可，除非这样的约定已在有关标准制定组织专利政策中明文规定，并且标准必要专利权利人自愿同意该政策。相反的做法将贬低标准必要专利，剥夺创新者用贡献其列入标准的专利技术换来的补偿代价，并扰乱保障发展标准制定的激励机制。

A determination of what constitutes a FRAND rate depends not only on all of the other terms and conditions that the relevant parties must negotiate as part of a license or cross-license involving SEPs, but also on whether SEPs alone are to be licensed, or whether they are to be licensed by the SEP owner along with its other patents or IPRs. Indeed, AIPLA is unaware of a formula or other detailed framework that can value an SEP outside of the specific transaction at issue.

在涉及标准必要专利的许可或交叉许可中，FRAND 利率的计算不仅取决于所有其它有关各方需要协商的条款、条件，同时也要看标准必要专利是否为单独许可内容，或者是还有其它专利或知识产权一起作为许可内容。AIPLA 不知道有何公式，或者其他详细的程序，可以用来在具体交易之外对标准必要专利进行估价 。

Article III(II)(2) Refusal to License

第三条（二）款 2 项 拒绝许可

Article III(II)(2) concerns a patent owner's refusal to license someone under their IPR. The right to exclude and decide who to license is an important, basic patent right. A compulsory licensing requirement is counter to that basic patent right. Such an improper compulsory licensing requirement could be the result of unreasonable governmental scrutiny of a patent owner exercising its right not to license someone.

第三条（二）款 2 项涉及专利权人拒绝给予他人知识产权许可。排他及选择被许可人是重要的基本专利权。强制许可与这一基本专利权相悖。如果政府对专利权人行使其拒绝许可权的行为进行不合理挑剔可能会形成不当强制许可。

Accordingly, AIPLA suggests that, before there is a review of this basic right to refuse to license someone, a prima facie case must be shown that the patent is extended beyond its scope or that there is an injury to competition and consumers. Further, AIPLA suggests that this section be amended to include a statement such as the following: We suggested the following sentence be added at the end of this Article in evaluating whether a refusal to license is justified or not, competition agencies shall focus on whether the conduct is exclusionary, and shall take into account legal principles found in China's intellectual property laws and obligations under the WTO TRIPs agreement.

因此，AIPLA 建议在审查拒绝许可这一基本权利之前，必须有初步证据显示专利行为已

超出专利范围或者对竞争和消费者造成伤害。此外，AIPLA 建议修订本条款，加入如下内容：在评估拒绝许可是否合理时，竞争管理机构应专注于行为是否具有排他性，并应考虑到中国知识产权法和世贸组织 TRIPS 协定义务之下的法律原则

Article III(II)(5) Discriminative treatment.

第三条（二）款5 项 差别对待

Article III(II)(5) concerns whether an IPR owner has improperly discriminated between different licensees. Importantly, improper discrimination does not exist merely because an IPR owner entered agreements with different terms and conditions for different entities; such circumstances do not mean that, as a whole, the different licensees provided and received different value of consideration overall. Thus, AIPLA is concerned that patent holders may face competition review whenever two licensees have different rates or terms. Justifying such rates may require disclosure of sensitive business information and undermines patent holders basic right of licensing and negotiating. AIPLA respectfully suggests that, before there is a competition agency review relating to licensing patents under different licensing terms, a prima facie case must be shown that the patent is extended beyond its scope and that there is injury to competition and consumers as a result of this extension.

第三条（二）款 5 项涉及知识产权权利人是否对不同的被许可人有不当歧视。重要的是，知识产权权利人仅仅与不同经营者签订了不同条件的协议并不足以构成不当歧视，这种情况并不意味着不同的被许可人总体上有不同的价值交换。因此，AIPLA 关注的是，一旦两个被许可人得到不同的利率或条件，专利权人就有可能面临反竞争调查。为设定这种利率提供理由，可能需要泄露敏感的商业信息，损坏专利权人许可谈判的基本权力。AIPLA 谨建议，在竞争管理机关对专利许可中不同条款进行审查之前，必须有初步证据显示专利行为已超出专利范围，并且其行为结果对竞争和消费者造成伤害。

General Comment – Legal Effect

总体意见 - 法律效力

Clarification is requested as to whether the Guidelines only provide administrative guidance on best practices in licensing IPR (similar to the Patent Examination Guidelines) or if the Guidelines themselves have full legal binding effect.

希望能够澄清，本《指南》是否仅仅提供对于知识产权许可最佳做法的行政指导（类似于专利审查指南），还是本《指南》本身具有完全的法律约束力。

Again, AIPLA appreciates the opportunity to provide these comments in response to the Anti-Monopoly Guidelines on Abuse of Intellectual Property Right. Please contact us if you would like us to provide additional information on any issues discussed above.

AIPLA 再次感谢有机会对《关于滥用知识产权的反垄断指南》提供意见和建议。如果贵方希望我协会提供关于上述任何问题的进一步说明或解释， 请随时与我们联系。

Sincerely,
诚挚的，

Denise W. DeFranco
President
American Intellectual Property Law Association
美国知识产权法律协会主席