AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

July 10, 2014
Antimonopoly and Anti-unfair Competition Enforcement Bureau
State Administration for Industry and Commerce
People's Republic of China
国家工商总局竞争执法局
北京市西城区三里河东路8号
邮编：100820

Via e-mail: zfj@saic.gov.cn

Re: AIPLA Comments on the draft "Rules of the Administration for Industry and Commerce on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition"
美国知识产权法协会关于《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定(征求意见稿)》的意见

Dear Sir or Madam:
亲爱的先生或女士：
The American Intellectual Property Law Association ("AIPLA"), located in Arlington, Virginia, close by the United States Patent and Trademark Office ("USPTO"), is the largest association of intellectual property ("IP") practitioners in the United States. We have approximately 14,000 members from law firms, government agencies, the judiciary, and academia, including many foreign members from China and other countries.

美国知识产权法协会（AIPLA），位于弗吉尼亚州阿灵顿，相距美国专利和商标局（USPTO）不远，是美国规模最大的知识产权从业者协会，拥有会员大约 14,000 多名，会员来自律师事务所、政府机构、司法机构和学术机构，其中许多会员为来自中国及其他国家的外国成员。

We commend the State Administration for Industry and Commerce on providing the public with the opportunity to comment on the recently-released "Rules of the Administration for Industry and Commerce on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition". AIPLA appreciates the opportunity to provide the attached comments on the "Rules of the Administration for Industry and Commerce on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition" for your consideration, and we hope this is a transparent and productive exchange of views on improving the Antimonopoly and Anti-unfair Competition Law of China to the benefit of all legitimate rights holders, domestic and foreign alike.

我们十分赞赏国家工商总局给予公众就最近发布《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定(征求意见稿)》发表意见的机会。AIPLA 很高兴有机会提交其对《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定(征求意见稿)》的意见（随附）供贵局审议。为国内外所有合法权持有人利益，我们希望这是有关改进反垄断与反不正当竞争法的透明及建设性地交换意见。

If the State Administration for Industry and Commerce has any questions, requires further information, or wants to discuss AIPLA's comments, or other Antimonopoly and Anti-unfair Competition law issues, please let us know.

如贵局有任何疑问，需要进一步信息或与 AIPLA 讨论我们的意见或其他反垄断与反不正当竞争法事务，敬请告知我们。

Sincerely,
诚挚地，

Wayne Sobon
President
American Intellectual Property Law Association
主席
美国知识产权法协会

Attachment: AIPLA's Comments on Rules of the Administration for Industry and Commerce on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition

附件：美国知识产权法协会关于《工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定(征求意见稿)》的意见

Rules of the Administration for Industry and Commerce on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition 工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定			
原文 **Original Text (Chinese)**	**Original Text (English)**	**Comments (English)**	**意见 Comments (Chinese)**
第一条	**Article 1.**		
为了保护竞争和激励创新，制止经营者滥用知识产权排除、限制竞争的行为，根据《中华人民共和国反垄断法》（以下简称《反垄断法》），制定本规定。	These Rules are promulgated in accordance with the *Anti-Monopoly Law of the People's Republic of China* (hereinafter "AML") in order to protect competition, promote innovation, and to prevent undertakings from abusing intellectual property rights ("IPR") to eliminate or restrict competition.	[No Comment]	
第二条	**Article 2.**		
反垄断法与保护知识产权具有共同的目标，即促进创新和竞争，提高效率，维护消费者利益和社会公共利益。 经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用《反垄断法》；但是，经营者滥用知识产权，排除、限制竞争的行为，适用《反垄断法》。	The AML shares with IPR protection the same purpose of promoting innovation and competition, enhancing efficiency, and safeguarding consumer interests and public interests. The AML does not apply to undertakings' conducts of exercising their IPR in accordance with IPR-related laws and administrative regulations. But the AML does apply to undertakings' conducts of abusing their IPR to eliminate or restrict competition.	AIPLA agrees with the approach that intellectual property rights do not violate anti-monopoly laws when exercised in accordance with the laws and administrative regulations relating to intellectual property rights ("IPRs"). AIPLA recommends that the provision be clarified that the AML does apply when behavior both: (1) involves the exercise of market power that unreasonably eliminates or restricts competition; and (2) is either outside the scope of the IPRs or the IPRs are being misused.	美国知识产权法协会同意此一前提，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，不违反反垄断法。美国知识产权法协会建议本条清楚规定，同时满足下述两条的行为才适用反垄断法：（１）使用市场支配力不合理地排除、限制竞争；并且 （２）不在知识产权权利范围之内，或者，滥用知识产权。
第三条	**Article 3.**		
本规定所称经营者，是指	"Undertaking" referred to in these Rules		

从事商品生产、经营或者提供服务的自然人、法人和其他组织。其中，商品、服务包括技术。 本规定所称滥用知识产权排除、限制竞争行为，是指经营者违反《反垄断法》和其他有关知识产权的法律、行政法规的规定行使知识产权，实施垄断协议、滥用市场支配地位等垄断行为。 本规定所称相关市场，包括相关商品市场和相关地域市场，依据《反垄断法》和《国务院反垄断委员会关于相关市场界定的指南》进行界定，并考虑知识产权、创新等因素的影响。在涉及知识产权许可等反垄断执法工作中，相关商品市场可以是技术市场，也可以是含有特定知识产权的产品市场。 相关技术市场是指由行使知识产权所涉及的技术和可以相互替代的现有同类技术之间相互竞争所构成的市场。	means natural persons, legal persons and other organizations producing or trading products, or providing services. Products or services referred to herein include technology. "Abusing IPR to eliminate or restrict competition" referred to in these Rules means undertakings' monopolistic conducts, such as monopoly agreements or abusing dominant market position, during exercising their IPR in violation of the AML or other IPR-related laws and administrative regulations. "Relevant market" referred to in these Rules include relevant product market and relevant geographic market, and is defined in accordance with the AML and the *Guidelines on the Definition of Relevant Market* issued by the Anti-Monopoly Commission under the State Council, with factors like IPR and innovation taken into consideration. As for the anti-monopoly enforcement related to IPR licensing, relevant product market can be a technology market, or a product market involving a specific IPR. "Relevant technology market" means the market in which the technology involved in the exercise of IPR competes with its existing substitutable technologies.	AIPLA agrees with the approach that appropriate use of intellectual property rights is acceptable and only abuses of intellectual property rights will be scrutinized. AIPLA recommends that the Rules expressly provide that intellectual property rights should not be found to have been abused when exercised within their lawful scope AIPLA agrees with the definition of the relevant markets based on published guidance. AIPLA respectfully submits that the use of technology markets may be problematic. Technology markets may be inchoate and merely potential markets. The use of technology markets in the analysis may be speculative.	美国知识产权法协会同意此一前提，对于适当行使知识产权的行为可以接受，只有滥用知识产权的行为才被审察。美国知识产权法协会建议本法规明文规定，在合法范围内行使知识产权不属滥用知识产权。 美国知识产权法协会同意"相关市场"应依据公布的指南进行界定。 美国知识产权法协会尊敬地提出，使用"技术市场"也许会带来问题。技术市场可能刚起步，仅仅是潜在市场。在法律分析中使用"技术市场"可能大多是猜测。
第四条	**Article 4.**		
经营者不得在行使知识产权的过程中达成垄断协议。 经营者之间不得利用行使知识产	Undertakings shall not reach monopoly agreements during the exercise of IPR. Undertakings shall not reach the	Article 4 provides that agreements that satisfy Article 15 of the AML would not violate Articles 13 and 14 of the	第四条规定，符合《反垄断法》第十五条规定的协议，不违反《反垄断法》第十三条、第十四

权的方式达成《反垄断法》第十三条、第十四条所禁止的垄断协议。但是，经营者能够证明所达成的协议符合《反垄断法》第十五条规定的除外。	monopoly agreements prohibited by Article 13 and Article 14 of the AML by exercising IPR, unless they can prove that the concluded agreement falls within the scope provided by Article 15 of the AML.	AML. AIPLA supports this.	条。美国知识产权法协会支持这一规定。
第五条	**Article 5.**		
经营者行使知识产权的行为有下列情形之一的，可以不被认定为《反垄断法》第十三条第一款第（六）项和《反垄断法》第十四条第（三）项所禁止的垄断协议，但是有相反的证据证明该协议具有排除、限制竞争效果的除外： （一）具有竞争关系的经营者在受其行为影响的相关市场上的市场份额合计不超过百分之二十，或者在相关市场上存在至少四个可以以合理成本得到的其他替代性技术； （二）经营者与交易相对人在相关市场上的市场份额均不超过百分之三十，或者在相关市场上存在至少两个可以以合理成本得到的其他替代性技术。	Under any of the following circumstances, the exercise of IPR by undertakings will not be regarded as the prohibited monopoly agreement under Item (vi) of Article 13 (I) or Item (iii) of Article 14 of the AML, unless there's contrary evidence proving its eliminative or restrictive effects on competition: (i) the aggregate market share of the competing undertakings is no more than 20% in the relevant market that are affected by their conducts, or there are at least four other substitutable technologies that can be obtained with reasonable costs in the relevant market; or (ii) neither the undertaking nor its trading party accounts for more than 30% market share in their respective relevant market, or there are at least two other substitutable technologies that can be obtained with reasonable costs in the relevant market.	AIPLA supports establishment of a "20 percent" share safe harbor for competitors. Article 5 also sets forth a "30 percent" safe harbor for vertical relationships. Given the general procompetitive and efficient nature of vertical contracts, AIPLA suggests that a more lenient safe harbor (50 percent) would be appropriate. In addition, 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.	美国知识产权法协会支持给竞争者设立一个 "百分之二十" 市场份额的安全港。 第五条还给垂直交易关系设了一个"百分之三十" 的安全港。鉴于垂直交易合同的性质一般是鼓励竞争和高效率的，美国知识产权法协会建议，一个更宽松的"百分之五十"安全港是恰当的。 此外，美国知识产权法协会推荐加入一条解释：不能因不满足安全港资格，而以任何方式推断或假定某种安排很可能是反竞争的。
第六条	**Article 6.**		
具有市场支配地位的经营者不得在行使知识产权的过程中滥用市场支配地位，排除、限制竞	Undertakings with dominant market position shall not abuse their dominant market position to eliminate or restrict	AIPLA notes that intellectual property rights do not necessarily confer market power and proof of dominant market	美国知识产权法协会注意到，知识产权不一定带来市场支配力，证明市场支配地位的根据应该是

争。 市场支配地位根据《反垄断法》第十八条和第十九条的规定进行认定和推定。经营者拥有知识产权可以构成认定其市场支配地位的一个因素，但是经营者不仅仅因为拥有知识产权而直接被推定为在相关市场上具有市场支配地位。	competition during the exercise of IPR. “Dominant market position” shall be determined or presumed in accordance with Article 18 and Article 19 of the AML. The ownership of IPR by an undertaking can be one of the factors for such determination, but a dominant market position cannot be determined directly on the basis of holding IPR only.	position should be based on evidence of market power, apart from the existence of the intellectual property right. The essence of an IPR is the right to exclude. AIPLA recommends that this right should not be curtailed merely because the patent holder is found to have market power. AIPLA respectfully recommends that it should not be sufficient to establish liability under the AML merely to exercise 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.	市场支配力的证据，除去知识产权的存在。知识产权的本质就是一种排他性的权利。美国知识产权法协会建议，不要仅仅因为专利权人有市场支配力，而消减这一权利。美国知识产权法协会尊敬地建议，仅仅行使知识产权应该不足以构成违反《反垄断法》的法律责任，尽管有关企业拥有市场支配力，尽管有关收购行为可以说是排除、限制竞争。要追究法律责任，涉嫌企业行使知识产权的方式还必须在知识产权法律、行政法规考虑的范围之外。
第七条	**Article 7.**		
具有市场支配地位的经营者没有正当理由，不得在其知识产权构成生产经营活动必需设施的情况下，拒绝许可其他经营者以合理条件使用该知识产权。 认定知识产权构成生产经营活动必需设施，需要考虑的因素包括：该项知识产权在相关市场上没有合理的替代品，为其他经营者参与相关市场的竞争所必需；拒绝许可该知识产权将会导致相关市场上的竞争或者创新受到不利影响；许可该知识产权对该经营者不会造成不合理的损害等。	Undertakings with dominant market position shall not, without justification, refuse other undertakings to license under reasonable terms their IPR which constitutes an essential facility for business operation. To determine whether an IPR constitutes an essential facility or not, factors to be considered include: whether there’s no reasonable substitutes for the IPR in the relevant market, which is necessary for other undertakings to compete in the relevant market; whether refusal to license the IPR will cause the competition or innovation of the relevant market to be affected adversely; whether the licensing of the IPR will cause	AIPLA respectfully recommends that Article 7 be deleted. The essence of an IPR is the right to exclude. Because Article 7 would deny certain IPR holders the right to exclude, even though the IPR holders do not engage in any conduct inconsistent with IPR laws and administrative regulations, it contradicts Article 2.	美国知识产权法协会尊敬地建议删除第七条。知识产权的本质是一种排他性的权利。第七条与第二条相抵触，因为第七条剥夺了一些知识产权权利人排他的权利，尽管这些权利人没有参与任何与知识产权法律法规不一致的行为。

	unreasonable damage to the licensing undertaking.		
第八条	**Article 8.**		
具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施下列限定交易行为： （一）限定交易相对人只能与其进行交易； （二）限定交易相对人只能与其指定的经营者进行交易； （三）限定交易相对人不得与其竞争对手进行交易。	Undertakings with dominant market position shall not conduct exclusive trading as following without justification during the exercise of IPR: (i) requiring a trading party to exclusively trade with itself; (ii) requiring a trading party to exclusively trade with a designated undertaking; or (iii) requiring a trading party not to trade with any of its competitors.	AIPLA notes that exclusive trading is frequently pro-competitive. AIPLA recommends that the Rules be clarified to state that exclusive trading would be unlawful only where it is established by objective evidence that it causes actual anticompetitive harm in a properly defined relevant market and that harm outweighs any procompetitive justification.	美国知识产权法协会注意到，限定交易常常能促进竞争。美国知识产权法协会建议本法规说明，只有在由客观证据证明，限定交易会对一个恰当界定的相关市场带来反竞争的实际危害，而且这危害大于任何其促进竞争的正当理由的情况下，这种限定交易才违法。
第九条	**Article 9.**		
具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施同时符合下列条件的搭售行为： （一）许可或者转让知识产权时，违背交易相对人的意愿要求其接受其他知识产权或者其他商品、服务； （二）搭售品和被搭售品在性质和交易习惯上属于两个独立的商品； （三）实施搭售行为使该经营者将其在搭售品市场的支配地位延伸到被搭售品市场，排除、限制了其他经营者在搭售品或者被搭售品市场上的竞争。	Undertakings with dominant market position shall not engage in tying that satisfies all of the following conditions without justification during the exercise of IPR: (i) requiring a trading party to accept against her will another IPR or another product or service when licensing or transferring an IPR; (ii) the tying product and the tied product are two separate products in terms of their natures or trading practices; and (iii) the tying will leverage the undertaking's dominant market position in the market of tying products to the market of tied products, to eliminate or	AIPLA supports the effort to directly address the issue of tying which may be pro-competitive or anti-competitive, depending on the circumstances. Experience has shown that, for these reasons, tying should be considered under a rule of reason analysis. Article 9 would analyze tying arrangements under a series of factors that appear comparable to the rule of reason analysis. AIPLA supports this approach. AIPLA notes that tying is frequently pro-competitive. AIPLA recommends that the Rules be clarified to state that tying would be unlawful only where it is established by objective evidence that the IPR holder is using market power in a tying market to cause an	美国知识产权法协会支持中国工商管理机构对搭售行为进行规范的努力。搭售是促进竞争还是限制竞争得看搭售行为实际情况来判断。经验告诉我们搭售行为是否违法的判定应该根据原因是否合理的原则来分析。第九条 根据一系列的因素 对搭售行为安排根据一系列的因素 进行分析，和原因分析的方法类似。我们支持这样的处理方式。 我们也注意到搭售在很多情况下其实是促进竞争的。我们希望这次新规定能进一步澄清搭售行为只有在有客观证据证明知识产权权人在搭售市场中利用他的市场

	restrict competition in the market of tying products or tied products.	anticompetitive effect in the market for the tied product.	地位造成了他的搭售产品在市场上限制竞争的后果才是违法行为。
第十条	**Article 10.**		
具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，实施下列附加不合理限制条件的行为： （一）要求交易相对人将其改进的技术进行独占性的回授； （二）禁止交易相对人对其知识产权的有效性提出质疑； （三）限制交易相对人在许可协议期限届满后，在不侵犯知识产权的情况下制造、使用、销售竞争性商品或者研发、使用竞争性技术； （四）要求交易相对人为保护期已经届满或者被认定无效的知识产权继续支付费用； （五）禁止交易相对人与第三方进行交易； （六）要求交易相对人附加其他不合理的限制条件。	Undertakings with dominant market position shall not impose unreasonable restrictions as following without justification during the exercise of IPR: (i) requiring a trading party to exclusively grant back the technology improved by the trading party; (ii) prohibiting a trading party from challenging the validity of the IPR; (iii) restricting a trading party from manufacturing, using or selling competing products, or developing or using competing technologies in a way that will not infringe its IPR after the expiry of licensing agreement; (iv) requiring a trading party to pay for an expired or invalid IPR; (v) prohibiting a trading party from trading with any third party; or (vi) imposing other unreasonable restrictions on a trading party.	Article 10 imposes a number of restrictions on the terms that can be imposed on a trading party: (1) grant backs; (2) waiver of validity challenges; (3) post-expiration consideration; and (4) “unreasonable trading conditions.” 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 requests that this Article be amended to clarify that the stipulated practices would be unlawful only where it is established by objective evidence that they cause actual anticompetitive harm in a properly defined relevant market and that harm outweighs any procompetitive justification.	第十条禁止具有市场支配地位的经营者对交易相对人在没有正当理由的情况提出下列不合理限制条件：（1）要求交易相对人对技术改进独家回授；（2）要求放弃对其知识产权的有效性提出质疑；(3) 要求保护期届满后继续支付费用；和（4）其他不合理限制条件。然而这里提到的每个限制条件其实有可能会起到提高效率的好处。而且这每一种限制条件 根据经验在应用原因是否合理的分析原则的实践运作中经常被考虑到，一般不是自动就被法律禁止的。 美国知识产权法协会恳请第十条进一步被修正来澄清这些列出的限制条件只有在有客观证据证明它们对已恰当定义之特定市场造成了实际限制竞争的后果，而且这种伤害比该限制条件对促进竞争的好处要大的情况下才是违法行为。
第十一条	**Article 11.**		

具有市场支配地位的经营者没有正当理由，不得在行使知识产权的过程中，对条件相同的交易相对人实行差别待遇。	Undertakings with dominant market position shall not discriminate among trading parties with equal standing without justification during the exercise of IPR.	AIPLA respectfully requests that this Article be amended to clarify that the practice would be unlawful only where it is established by objective evidence that it causes actual anticompetitive harm in a properly defined relevant market and that harm outweighs any procompetitive justification.	美国知识产权法协会恳请第十一条进一步修正来澄清这种差别待遇的行为只有在有客观证据证明它对特定市场造成了实际限制竞争的后果，而且这种伤害比该行为对促进竞争的好处要大的情况下才是违法行为。
第十二条	**Article 12.**		
经营者不得在行使知识产权的过程中，利用专利联营从事排除、限制竞争的行为。 专利联营的成员不得利用专利联营交换价格、产量、市场划分等有关竞争的敏感信息，达成《反垄断法》第十三条、第十四条所禁止的垄断协议。但是，经营者能够证明所达成的协议符合《反垄断法》第十五条规定的除外。 具有市场支配地位的经营者或者专利联营管理组织没有正当理由，不得利用专利联营实施下列滥用市场支配地位的行为： （一）限制联营成员在联营之外作为独立许可人许可专利； （二）限制联营成员或者被许可人独立或者与第三方联合研发与联营专利相竞争的技术； （三）强迫被许可人将其改进或者研发的技术独占性地回授给专利联营管理组织或者联营成员； （四）禁止被许可人质疑联营专	Undertakings shall not use a patent pool to eliminate or restrict competition during the exercise of IPR: Members of a patent pool shall not exchange competitively sensitive information through the patent pool, such as price, output, or market allocation, to reach any monopoly agreement prohibited by Article 13 and Article 14 of the AML, unless they can prove the concluded agreement falls within the scope provided by Article 15 of the AML. Undertakings or patent pool organizations with dominant market position shall not abuse their dominant market position as following through the patent pool without justification: (i) restricting patent pool members from independently licensing its patent outside the patent pool; (ii) restricting patent pool members or licensees from developing competing technologies independently or	AIPLA supports Article 12 for acknowledging and recognizing that patent pools may have pro-competitive effects. The inclusion of an IPR in a standard does not necessarily confer market power, even where the IPR is essential to the standard. Nor is the fact that a patent may be essential determinative of whether it confers a dominant market position. AIPLA agrees with the Rules' recognition that a justification may be presented, and suggests adding a provision that contrary evidence may rebut this inference. AIPLA recommends further that the burden of proof should be on the party asserting a violation.	美国知识产权法协会支持第十二条对专利联营可能具有促进竞争效益所做出的肯定和承认。 一项知识产权，就算被吸收为产业标准核心专利，被吸收进标准本身并不一定授予专利权人市场支配力。某项专利可能是核心必要专利并无法决定该项专利是否带来市场支配地位。美国知识产权法协会赞同这一条允许相关专利联营行为提供正当理由。我们建议加入一个条款允许提供反驳标准专利导致市场支配地位之推断的反驳证据。美国知识产权法协会进一步建议举证责任应该是指控专利权人有违法行为的控方。

利的有效性； （五）对条件相同的联营成员或者同一相关市场的被许可人在交易条件上实行差别待遇。 本规定所称专利联营，是指两个或者两个以上的专利权人通过某种形式将各自拥有的专利共同许可给其他第三方的协议安排。其形式可以是为此目的成立的专门合资公司，也可以是委托某一联营成员或者某独立的第三方进行管理。	cooperation with a third party; (iii) compelling a licensee to exclusively grant back the technology improved or developed by the licensee to the patent pool organization or to its members; (iv) prohibiting a licensee from challenging the validity of the pooled patent; or (v) discriminating among patent pool member with equal standing or among licensees in the same relevant market in respect of trading terms. "Patent pool" referred to in these Rules means the agreement in which two or more patentees jointly license their respective patents to a third party via some forms, including a specific joint venture established for this purpose, or a delegated patent pool member or third party.		
第十三条	**Article 13.**		
经营者不得在行使知识产权的过程中，利用标准（含国家技术规范的强制性要求，下同）的制定和实施从事排除、限制竞争的行为。 具有市场支配地位的经营者没有正当理由，不得在标准的制定和实施过程中实施下列行为： （一）在知道其专利可能会被纳入有关标准的情况下，故意不向	Undertakings shall not take advantage of standard (including the mandatory requirements stipulated by the national technology specification) setting or implementation to eliminate or restrict competition during the exercise of IPR. Undertakings with dominant market position shall not conduct as following without justification during standard setting or implementation:	AIPLA supports the recognition in this Article that standards may provide substantial pro-competitive benefits. The Article provides that certain related behaviors may violate the AML. AIPLA respectfully requests providing clearer guidance in this regard. The Article appears to impose an obligation on a patent holder to declare patents as essential to a standard whether or not the patent holder participates in	美国知识产权法协会支持第十三条对产业标准可以提供大量实质促进竞争效应的肯定。该条款提到某些标准制定和实施的相关行为有可能违反反垄断法。我们恳请在这方面提供更明确的指导。 此条款似乎要求专利权人有披露拥有产业标准中核心专利的义务，不管该专利权人是否有参与

标准制定组织披露其权利信息，或者明确放弃其权利，但是在其专利成为某项强制性标准后却对该标准的实施者主张其专利权。 （二）在其专利成为标准必要专利后，违背公平、合理和无歧视原则，拒绝其他经营者以合理的条件实施该专利，或者以不公平的条件许可其专利，或者在许可其专利的过程中实施搭售行为。 本规定所称标准必要专利，是指实施该项标准所必不可少的专利	(i) deliberately not disclosing the information of its patent, which is known possible to be included as a standard, to standard setting organizations, or after explicitly waiving its rights, claiming its patent afterwards when it has become a mandatory standard; or (ii) after its patent is accepted as standard essential patent, refusing to license with reasonable conditions, licensing under unfair conditions, or tying a standard essential patent in violation of fair, reasonable, and non-discriminatory principle. “Standard essential patent” in these Rules refer to the patent that is indispensable to implement relevant standard.	the standard-setting process and to require patent searches in order to make such disclosures. This is not consistent with international norms, and experience has shown that this may be impractical, if not impossible, in practice. AIPLA respectfully recommends that this Article be amended to clarify that it applies only (1) to IPR holders that choose to participate in the creation of a standard, and (2) to the extent that that the conduct in question contravenes the rules of the relevant standards body. In addition AIPLA respectfully submits that the focus on patents that may possibly be included is too broad. Specifically, AIPLA recommends that this Article be limited to situations where a patent holder is participating in a standards-setting organization and knows that its IPR is essential, yet fails or refuses to declare such essential IPR.	标准制定过程，而且要求专利权人披露时做相关专利搜索。这样的要求和一般国际做法有出入。经验告诉我们这样的要求在实践中很难实现，不是不可能，但不实际。美国知识产权律师协会恳求建议这条被修正澄清改为 仅适用于 (1) 选择加入标准制定的知识产权权人；而且(2) 这些有问题的行为违反了相关标准制定机构的规定。 另外，美国知识产权法协会尊敬地提出此条款可能被包括其中的专利太广。尤其我们恳请这一条款应该仅适用于专利权人正在参与某标准制定，而且知道他的专利是标准核心必要专利，但该专利权人仍然拒绝或故意不披露他拥有的核心必要专利的情况下。
第十四条	**Article 14.**		
著作权集体管理组织不得在开展活动的过程中滥用知识产权，排除、限制竞争。 著作权集体管理组织在与其他经营者或者其他国家和地区的著作权集体管理组织达成的相关协议中，不得不合理地实施限制会员资格、地域范围等，限制权利人或者使用人的选择自由。	Collective management organization of copyright shall not abuse their IPR to eliminate or restrict competition during their activities. Collective management organization of copyright shall not unreasonably impose restrictions of membership or territorial scope on copyright holders or licensees in agreement with other undertakings or collective management organization of	[No comment]	

具有市场支配地位的著作权集体管理组织没有正当理由，不得实施下列滥用市场支配地位的行为： （一）拒绝对他人发放著作权的使用许可； （二）对条件相同的权利人或者被许可人实行差别待遇； （三）强迫被许可人接受其不需要的著作权许可； （四）限制权利人退出该组织。 本规定所称著作权集体管理组织，是指为著作权人和与著作权有关的权利人（简称权利人）的利益依法设立，根据权利人授权、对权利人的著作权或者与著作权有关的权利进行集体管理的社会团体。	copyright in other countries or regions. Collective management organization of copyright with dominant market position shall not abuse such dominant market position without justification, as following: (i) refusing to license copyright to others; (ii) discriminating among copyright holders or licensees that with equal standing; (iii) forcing licensee to accept copyrights which the licensee doesn't need; (iv) restricting copyright holder from withdrawing from the organization. "Collective management organization of copyright" referred to in these Rules means a social group which is established for the benefit of holders of copyrights or copyright-related rights, to collectively manage the copyrights or copyright-related rights under the authorization of the holders.		
第十五条	**Article 15.**		
具有市场支配地位的经营者不得在其知识产权期限已经届满或者无效的情况下，或者在他人已经提供不构成知识产权侵权充分证据的情况下，滥发侵权警告函，以排除、限制相关市场的竞争。	Undertakings with dominant market position shall not abusively issue infringement warning letter to eliminate or restrict competition if the IPR has expired or been voided, or if others have sufficiently proved that the IPR is not infringed.	AIPLA agrees that it is appropriate to hold an enterprise with a dominant position liable if it issues warning letters with respect to expired or voided IPR, provided that it is proven that the conduct causes actual harm to competition in a relevant market.	美国知识产权法协会赞同对有市场支配地位的企业要求负法律责任是适当的，当他在其知识产权期限已届满或无效情况下仍然给他人发侵权警告函，并且有证据证明该行为在相关市场上对竞争

		AIPLA respectfully suggests that this Article be amended to delete the provision allowing others to prove sufficiently that the IPR is not infringed. With the possible exception of products conforming to a standard and patents that are essential to practicing that standard, the question of whether one company's product infringes a particular patent is individual to that particular product, and is entirely unrelated to whether a second company's product infringes a particular patent. Even in the case of products conforming to a standard and patents that are essential to practicing that standard, the question of what constitutes sufficient proof is inherently vague and fails to provide companies with adequate notice of the conduct that might be deemed to be a violation.	造成了实际伤害的情况下。 美国知识产权法协会建议修正，删除在这一条里关于允许他人提供不构成知识产权侵权充分证据的条款。除非相关产品是实施某标准而且相关专利是核心标准专利的例外情况，一般来说某公司产品是否侵权某一专利是针对该特别产品的一个个别问题，和别的公司的产品是否侵权此专利完全不相关。即使在产品是实施某标准而且相关专利是核心标准专利的情况下，什么证据才构成不侵权的充分证据是个含糊的问题，无法提供公司企业对这类行为适当的法律明示在什么情况下会违反了这一条例。
第十六条	**Article 16.**		
经营者涉嫌滥用知识产权排除、限制竞争行为的，工商行政管理机关依据《反垄断法》和《工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定》进行调查。	If an undertaking is suspicious of abusing IPR to eliminate or restrict competition, the Administration for Industry and Commerce may launch investigation according to the AML and the Procedural Rules of the Administration for Industry and Commerce regarding the Investigation and Handing of Cases related to Monopoly Agreements and Abusing Dominant market position.	[No comment]	
第十七条	**Article 17.**		
分析认定经营者涉嫌滥用知识产权排除、限制竞争行为，可以采	The following procedures can be used in determining whether an undertaking	AIPLA believes that the approach of detailing the steps in the analysis is	美国知识产权法协会相信这种提出具体分析步骤的做法很合适且

取以下步骤： （一）确定经营者行使知识产权行为的性质和表现形式； （二）确定行使知识产权的经营者之间相互关系的性质； （三）界定行使知识产权所涉及的相关市场； （四）认定行使知识产权的经营者的市场地位； （五）分析经营者行使知识产权的行为对相关市场竞争的影响； 分析认定经营者之间关系的性质需要考虑行使知识产权行为本身的特点。在涉及知识产权许可的情况下，原本具有竞争关系的经营者之间在许可合同中是交易关系，而在许可人和被许可人都利用该知识产权生产产品的市场上则又是竞争关系。但是，如果当事人之间在订立许可协议时不是竞争关系，在协议订立之后才产生竞争关系的，则仍然不视为竞争者之间的协议，除非原协议发生实质性的变更。	abuses its IPR eliminate or restrict competition: (i) determining the nature and forms of exercising IPR by an undertaking; (ii) determining the relationship between the undertakings exercising IPR; (iii) defining the relevant market involved in the exercise of IPR; (iv) determining the market status of the undertaking exercising IPR; (v) analyzing the impacts of exercising IPR by the undertaking on competition in the relevant market. Analysis of nature of the relationship between undertakings needs to consider the characteristic of exercising IPR. Original competitors can be trading parties as for IPR license, but competitors as the same time in the market where the licenser and licensee both use the IPR to produce products. However, if the parties to a license agreement are competitors only after entering into the agreement, their agreement is not deemed as agreement between competitors unless there's a substantive change to the original agreement.	appropriate and provides greater predictability. AIPLA respectfully submits that the exercise of intellectual property rights within their lawful scope should not be considered to eliminate or restrict competition in the relevant market. Temporary restriction on competitors using the IPR is inherent in the exclusive rights granted by IPR. It is this right to exclude that provides incentives to innovate. In order to be liable under the anti-monopoly law, the patent holder must also be acting outside the scope of its IPR to exclude competition in a relevant market.	提供了可预测性。美国知识产权法协会尊敬地提出合法使用知识产权不应该视为在相关市场上排除或限制竞争。短期的通过知识产权来限制竞争者是知识产权依知识产权法赋予的排他权利。正是这个排他权利提供了发明创造的动力。 所以专利权人只有在他的知识产权权利范围外在相关市场上排除竞争才应负反垄断法的法律责任。
第十八条	**Article 18.**		
分析认定经营者行使知识产权的	The following factors shall be taken into consideration when analyzing and	AIPLA supports the inclusion of these factors, but further recommends	美国知识产权法协会支持第十八

行为对竞争的影响，应当考虑下列因素： （一）经营者与交易相对人的市场地位； （二）相关市场的市场集中度； （三）进入相关市场的难易程度； （四）产业惯例与产业的发展阶段； （五）在产量、区域、消费者等方面进行限制的时间和效力范围； （六）对促进创新和技术推广的影响； （七）经营者的创新能力和技术变化的速度； （八）与认定行使知识产权的行为对竞争影响有关的其他因素	assessing competitive impact of exercising IPR by an undertaking: (i) the market position of the undertaking and its trading parties; (ii) the concentration ratio of the relevant market; (iii) the difficulty of entering into relevant market; (iv) industry practices and development stage of the industry; (v) the duration and scope of restraints in respect of output, region, consumers, etc; (vi) the impact on innovation and technology promotion; (vii) the undertaking's innovation capacity and the pace of technology advancement; (viii) other factors related to assessing competitive impact of exercising IPR.	consideration of whether the sixth and seventh factors can be adequately determined. Because they are predictive and hypothetical, they may introduce unpredictability and speculation into the analysis.	条所提出的分析因素，并希望对第六和第七因素的可适当判断性做进一步研究。因为这两个因素具预测性和假设性，他们可能造成分析时的不可预测和不合理的推断。
第十九条	**Article 19.**		
经营者滥用知识产权排除、限制竞争的行为构成垄断协议的，由工商行政管理机关责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款；尚未实施所达成的垄断协议的，可以处五十万元	Where the abuse of IPR to eliminate or restrict competition by an undertaking constitutes monopoly agreement, the Administration for Industry and Commerce shall order the undertaking to cease the violation, confiscate its illegal gains, and impose a fine of 1 to 10 percent of the turnover in the preceding	AIPLA suggests removal of "a fine of no more than RMB 500,000," and in its place insert "with a reasonable maximum".	美国知识产权法协会建议更换“五十万元以下的罚款”为“合理的最高罚款”

以下的罚款。 经营者滥用知识产权排除、限制竞争的行为构成滥用市场支配地位的，由工商行政管理机关责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款。 工商行政管理机关确定具体罚款数额时，应当考虑违法行为的性质、情节、程度、持续的时间等因素。	fiscal year; where the monopoly agreement has been reached but not implemented, the Administration for Industry and Commerce can impose a fine of no more than RMB 500,000. Where the abuse of IPR to eliminate or restrict competition by an undertaking constitutes abusing dominant market position, the Administration for Industry and Commerce shall order the undertaking to cease the violation, confiscate its illegal gains, and impose a fine of 1 to 10 percent of the turnover in the preceding fiscal year. The Administration for Industry and Commerce shall consider the nature, circumstances, seriousness and duration of the violation and other factors when determining the specific magnitude of the fine.		
第二十条	**Article 20.**		
本规定由国家工商行政管理总局负责解释。	These Rules shall be subject to be interpreted by the State Administration for Industry and Commerce.	[No comment]	
第二十一条	**Article 21.**		
本规定自 2014 年 月 日起施行。	These Rules shall come into effect as of [ ], 2014	[No comment]	