美国律师协会国际法部对反不正当竞争法司法解释草案的修改建议

2021 年 9 月 17 日

本文表达的观点谨代表美国律师协会国际法部门提出。以下观点未经过美国律师协会理事会和会员代表大会的审核或批准，不代表美国律师协会的立场。

美国律师协会国际法部（“国际法部”）谨就《最高人民法院关于适用〈中华人民共和国反不正当竞争法〉若干问题的解释（征求意见稿）》（“征求意见稿”）向中华人民共和国最高人民法院（“最高院”）提交以下修改意见。

国际法部致力于研究国际法律问题、促进法治以及提供与跨境活动相关的法律教育、政策、出版和实践援助。国际法部成员总数超过 11,000 人，包括个体从业者、企业法律顾问、政府和政府合作实体的律师、法律学者等，代表了 100 多个国家。国际法部的 56 个委员会涵盖全球竞争法、贸易法、数据隐私和数据安全法以及与这些领域有交集的法律领域，例如并购和合资。从国际法部成立至今的过去这一个世纪中，国际法部一直在于国际法律政策有关的讨论中发声。[1] 特别是在竞争法和竞争政策方面，国际法部几十年来一直为世界各地的政府提供观点和建议。[2]

国际法部感谢有机会对征求意见稿提供建议。为节省贵院时间，国际法部重点关注征求意见稿就《反不正当竞争法》第七条禁止商业贿赂规定的实施缺少相关指导的问题。国际法部理解征求意见稿侧重于《反不正当竞争法》中有关知识产权的条款，最高人民法院可能会就《反不正当竞争法》以商业贿赂为重点问题发布进一步的司法解释。

具体而言，国际法部谨建议，商业贿赂问题是一个重要领域，应在征求意见稿的最终版本中有所涵盖。最终版本应明确确认，在任何商业交易中，交易相对方（无论是个人还是单位）不属于《反不正当竞争法》第七条规定的三类商业贿赂受贿人。

该解释将确认交易一方直接向交易相对方（而不是交易相对方的员工或代理人等第三方）提供的回扣、折扣、销售奖励和其他商业利益不构成《反不正当竞争法》第七条规定的商业贿赂。[3] 该解释与 2018 年《反不正当竞争法》修订条款的语言和目的一致，也与反贿赂和反腐败执法方面的国际惯例一致。 从根本上说，这种解释将通过明确区分同交易相对方的合理商业协议和向交易相对方的员工和受托人支付的不当利益而使中国企业在商业环境中受益。

《反不正当竞争法》第七条禁止商业贿赂。该条规定：

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[1] 美国律师协会国际法部政策，*见* https://www.americanbar.org/groups/international_law/policy/about/.

[2] 国际法部以往建议见 https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

[3] 即直接给予交易相对方的付款或商业利益是交易对价的一部分。

经营者不得采用财物或者其他手段贿赂下列单位或者个人，以谋取交易机会或者竞争优势：

（一）交易相对方的工作人员；

（二）受交易相对方委托办理相关事务的单位或者个人；

（三）利用职权或者影响力影响交易的单位或者个人。

经营者在交易活动中，可以以明示方式向交易相对方支付折扣，或者向中间人支付佣金。经营者向交易相对方支付折扣、向中间人支付佣金的，应当如实入账。接受折扣、佣金的经营者也应当如实入账。

经营者的工作人员进行贿赂的，应当认定为经营者的行为；但是，经营者有证据证明该工作人员的行为与为经营者谋取交易机会或者竞争优势无关的除外。

第七条将商业贿赂仅限于三类不同的受贿人，其中不包括交易中的直接相对方。第一类涵盖交易相对的员工。 第二类包括交易相对方委托的第三方。 第三类是对交易具有“职权或影响力”的单位或个人，这意味着受贿人对交易相对方在接受或执行交易方面的决定或行为具有影响力，反过来也说明了受贿人是交易相对方以外的第三方。

相比之下，《反不正当竞争法》1993 年旧版的规定没有限制止不正当利益的受贿方范围，而是概括性地禁止“采用财物或者其他手段进行贿赂”。 这导致有关部门的执法经常针对涉嫌贿赂的单位（而不是个人）。 在许多此类案件中，交易方因向直接交易相对方（而不是相对方的员工或代理人）提供利益而受到处罚。 例如，供应商因直接向其客户和经销商（而不是其员工）提供折扣、回扣、营销支持、免费产品和其他利益而受到调查。 在大多数其他国家和地区，占市场主导地位的公司的此类商业行为可能会引起反垄断问题，但不会涉及商业贿赂的规定。

因此，在 2017 年关于修订《反不正当竞争法》的征求意见期内，国际法部就建议修订《反不正当竞争法》的商业贿赂规定，明确将商业贿赂限制于“向个人不当提供或支付利益，诱导或鼓励收受方违反对第三人的法律义务。”[4] 国际法部解释在其中解释道：“该等修改将与反贿赂反腐败执法的国际主流实践一致，根据《反垄断法》的一般反垄断原则下评价回扣、折扣、对消费者和竞争者给予促销奖励的影响。”[5]

《反不正当竞争法》修订后，商业贿赂的情形限定为向上述三类对象提供不当利益。 在这三类对象没有包括直接交易相对方的情况下，直接向交易相对方提供不当利益

[4] 《美国律师协会反托拉斯法部、知识产权法部和国际法部关于<中华人民共和国反不正当竞争法（草案）>的联合意见》，2017 年 3 月 24 日，第 2 页。参见 2017 年第 2-4 条评论。 为便于参考，本文件引用了 2017 年建议相关部分。

[5] 同上，见第 2 页。

不会违反《反不正当竞争法》第七条。 显然，该条款修订的目的是消除单位可能因向其直接客户提供更多产品、服务和利益而构成商业贿赂从而受到处罚的风险。

然而，即使在《反不正当竞争法》修订后，国际法部了解到交易方仍然可能因为直接向其交易相对方（而不是员工、代理人或其他第三方）提供利益而受到《反不正当竞争法》下的调查，修订前的执法实践仍在延续而未改变。

相应地，国际法部谨建议，征求意见稿的最终版应当确认，在双方的商业交易中，交易相对方本身不应属于《反不正当竞争法》第七条所列的三类受贿方中的任何一种。

结论

国际法部感谢最高院考虑上述针对征求意见稿的建议。

附录

《美国律师协会反托拉斯法部、知识产权法部和国际法部关于<中华人民共和国反不正当竞争法（草案）>的联合意见》，2017 年 3 月 24 日

COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE DRAFT JUDICIAL INTERPRETATION OF THE ANTI-UNFAIR COMPETITION LAW

September 17, 2021

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

The International Law Section of the American Bar Association ("the Section") respectfully submits these comments to the Supreme People's Court of the People's Republic of China ("the SPC") on the Judicial Interpretation of the Anti-Unfair Competition Law (Draft for Comment) ("the Draft JI").The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input to debates relating to international legal policy.[1] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[2]

The Section appreciates this opportunity to comment on the Draft JI. In the interest of time, the Section focuses in these comments on the omission in the Draft JI of any guidance regarding the implementation of Article 7 of the Anti-Unfair Competition Law (AUCL), which prohibits commercial bribery. The Section recognizes that the Draft JI focuses on provisions of the AUCL concerning intellectual property and that the SPC may issue further Judicial Interpretations regarding the AUCL focusing on commercial bribery.

Specifically, the Section respectfully recommends that commercial bribery is an important area that should be addressed in the final version of this Draft JI, and the final JI should at the least make clear that, in any commercial transaction, the counterparty, whether an individual or an entity, is not included in the three categories of recipients of commercial bribery listed in Article 7 of the AUCL.

[1] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[2] Past comments of the International Law Section are available at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

This interpretation would confirm that rebates, discounts, marketing incentives, and other commercial benefits provided by one transaction party directly to the transaction counterparty (as opposed to a third party such as an employee or agent of the counterparty) do not constitute commercial bribery under Article 7 of the AUCL.[3] This interpretation is consistent with the language and apparent intent of the 2018 amendments to the AUCL, and with prevailing international practice in anti-bribery and anticorruption enforcement. Fundamentally, this interpretation would benefit Chinese businesses by confirming a clear distinction between appropriate commercial agreements with counterparties and inappropriate inducements to the employees and fiduciaries of counterparties.

Article 7 of the AUCL prohibits commercial bribery. It provides:

> *A business operator shall not resort to bribery, by offering money or goods or by any other means, to any of the following entities or individuals, in order to seek a transaction opportunity or competitive advantage,*
>
> *1. any employee of the counterparty in a transaction;*
>
> *2. any entity or individual entrusted by the counterparty in a transaction to handle relevant affairs; or*
>
> *3. any other entity or individual that is to take advantage of powers or influence to influence a transaction.*
>
> *A business operator may expressly give a discount to the counterparty or pay a commission to the middleman of a transaction in the course of transaction activities. Where a business operator gives a discount to the transaction counterparty or pays a commission to the middleman, it shall truthfully enter it in his account books. A business operator that accepts such discount or commission shall also enter it into its account books.*
>
> *The act of an employee of a business operator bribing any other individual shall be deemed an act of the business operator itself, unless otherwise proven by the business operator with evidence that such act is not related to efforts in seeking a transaction opportunity or competitive advantage.*

Article 7 thus confines bribery to three distinct categories of recipients. None of these categories include the direct counterparty in a transaction. The first category covers the counterparty's employees. The second category covers third parties entrusted by the counterparty. The third category refers to entities or individuals with "powers or influence" over a transaction; this implies that the recipient has influence over the decisions or conduct of the counterparty in the acceptance or performance of a transaction, which in turn implies that the recipient is a third-party other than the transaction counterparty itself.

[3] Payments or commercial benefits given directly to the counterparty are part of the consideration in the transaction.

In contrast, the 1993 text of the AUCL did not limit the potential recipients of prohibited payments of benefits. Instead, it broadly prohibited "bribery by using money, gifts or other means to sell or buy goods." This resulted in frequent enforcement actions under the AUCL involving alleged bribery of entities (as opposed to individuals). In many of these cases, transaction parties were penalized for providing benefits to the direct counterparties (as opposed to the individual employees or agents of the counterparty). For example, suppliers were investigated for offering discounts, rebates, marketing support, free-of-charge products, and other benefits directly to their customers and distributors (as opposed to their employees). In most other jurisdictions, such commercial practices by dominant firms might raise antitrust or antimonopoly concerns, but would not implicate bribery rules.

Accordingly, during the 2017 public comment period concerning proposed amendments to the AUCL, the Section recommended the revision of the AUCL rules against commercial bribery to "expressly limit commercial bribery offenses to improper offers or payments of benefits to individuals to induce or reward violations of legal duties to third parties."[4] The Section explained that: "[t]his revision would comport with prevailing international practice in anti-bribery and anticorruption enforcement, and would allow the effects of rebates, discounts, and promotional incentives on consumers and competitors to be assessed under general antitrust principles pursuant to the Anti-Monopoly Law ('AML')."[5]

The AUCL was subsequently amended to limit commercial bribery offenses under the AUCL to improper payments to the three categories discussed above. To the extent that none of these three categories include the direct transaction counterparty, the provision of benefits directly to a transaction counterparty would not violate Article 7 of the AUCL. The apparent purpose of this amendment was to eliminate the risk that companies may be penalized for commercial bribery for providing their direct customers with more products, services, and benefits.

However, even after the amendments to the AUCL, the Section understands that transaction parties continue to be investigated under the AUCL for providing benefits directly to their transaction counterparties (as opposed to employees, agents, or other third parties), following, without change, the enforcement practice under the former language of the AUCL.

Accordingly, the Section respectfully suggests that the final JI confirm that, in the context of a commercial transaction between two parties, the transaction counterparty itself does not fall within any of the three categories of bribery recipients listed in Article 7.

Conclusion

The Section appreciates the SPC's consideration of these Comments on the Draft JI.

[4] Comments of the American Bar Association Sections of Antitrust Law, Intellectual Property Law, and International Law on the Draft Anti-Unfair Competition Law of the People's Republic of China, March 24, 2017, at 2. See generally, 2017 Comments at 2-4. For ease of reference, the 2017 Comments are appended and incorporated by reference.

[5] *Id*. at 2.

Appendix

Comments of the American Bar Association Sections of Antitrust Law, Intellectual Property Law, and International Law on the Draft Anti-Unfair Competition Law of the People's Republic of China, March 24, 2017

美国律师协会反托拉斯法部、知识产权法部和国际法部

关于《中华人民共和国反不正当竞争法（草案）》的联合意见

2017 年 3 月 24 日

本意见仅代表三部门观点，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，不代表美国律师协会政策。

美国律师协会反托拉斯法部、知识产权法部和国际法部（“三部门”）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）》（“《反不正当竞争法》（草案）”）提交以下意见[1]。三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）。本意见反映了其全球成员在反垄断和反不正当竞争法领域的专业知识和经验。如果法制办认为合适，三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。

反托拉斯法部和国际法部曾就更早拟定修改的《反不正当竞争法》草案（“托拉斯法年《反不正当竞争法》（草案）”）提交意见（“提交意见年意见”）[2]，并对《反不正当竞争法》（草案）的修改采纳了 2016 年意见表示感谢，如删除 2016 年《反不正当竞争法》（草案）中与利用相对优势地位相关的条文。

第六条

《反不正当竞争法》（草案）第六条是对 2016 年《反不正当竞争法》（草案）第五条的修改。《反不正当竞争法》（草案）修改更加关注实际欺骗或消费者受误导的可能，而不再关注卖方主观意图，三部门对此表示赞赏。无论从消费者保护的哪个方面来说，对买方的实际或可能影响才是评价是否损害消费者的适当标准。对于第六条未明确造假构成不正当做法，三部门再次表示忧虑。三部门建议《反不正当竞争法》明确规定“造假”为不正当行为，并予禁止。

第七条

《反不正当竞争法》第八条目前为中国普遍禁止商业贿赂提供了主要法律基础。2016年《反不正当竞争法》（草案）对第八条作出了重大修改；《反不正当竞争法》（草

[1] 请见关于公布《中华人民共和国反不正当竞争法（修订草案）》公开征求意见的通知（2017 年 2 月 26 日公布），见 http://www.npc.gov.cn/npc/xinwen/2017-02/26/content_2008334.htm, 以及起草《反不正当竞争法（草案）》说明（“《起草说明》”），见 http://www.npc.gov.cn/COBRS_LFYJNEW/user/UserIndex.jsp?ID=8227601. 三部门的意见是根据《反不正当竞争法（草案）》的非官方译文作出，译文见 http://www.chinalawtranslate.com/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%8F%8D%E4%B8%8D%E6%AD%A3%E5%BD%93%E7%AB%9E%E4%BA%89%E6%B3%95%EF%BC%88%E4%BF%AE%E8%AE%A2%E8%8D%89%E6%A1%88%EF%BC%89/?lang=en#_Toc475861595.

[2] 为方便参考，附上 2016 年意见。

案）第七条代替了《反不正当竞争法》第八条，并有其他改动。法条措辞强调将回扣、折扣和佣金妥为记录在案，并就违法雇员的行为免除雇主义务，三部门对此表示非常欢迎。

然而，三部门建议，第七条修改明确将商业贿赂犯罪限制于“向个人不当提供或支付利益，诱导或鼓励收受方违反对第三人的法律义务。”该等修改将与反贿赂反腐败执法的国际主流实践一致，根据《反垄断法》（“《反垄断法》”）的一般反垄断原则下评价回扣、折扣、对消费者和竞争者给予促销奖励的影响。

根据国际反贿赂公约和许多司法管辖区的规定，“贿赂”是指向个人员工、代理或其他受托人不当提供或支付有价值物，意图诱导或鼓励收受方违反对第三人的法律义务（通常是收受人的雇主）。

例如，《联合国反腐败公约》（“《联合国反腐败公约》”）（中国为签约方之一）第一条号召各签约方为“故意直接或间接向公职人员许诺给予、提议给予或者实际给予该公职人员本人或者其他人员或实体不正当好处，以使该公职人员在执行公务时作为或者不作为”设立刑法犯罪。类似的，《经济与合作发展组织禁止在国际商业交易中贿赂外国公职人员公约》将贿赂形容为“故意向外国公职人员提议给予、许诺给予或实际给予该公职人员或第三人任何不正当金钱利益或其他好处，无论直接还是通过中介，以使该公职人员在执行公务时作为或不作为，以在国际商业交易中获得或持有商业或其他不正当利益”。[3]

尽管这些国际公约着眼于政府官员的贿赂，类似原则也适用于针对私人领域员工商业贿赂的国内法。[4] 例如，《香港防止贿赂条例》第9(2)条规定“任何人无合法权限或合理辩解，向任何代理人提供任何利益，作为该代理人作出以下行为的诱因或报酬，或由于该代理人作出以下行为而向他提供任何利益，即属犯罪 何人无(a)作出或不作出，或曾经作出或不作出任何与其主事人的事务或业务有关的作为；或(b)在与其主事人的事务或业务有关的事上对任何人予以或不予，或曾经予以或不予优待或亏待。”《新加坡防止腐败法》第6条标题写明“与代理人的腐败交易行为”，类似地规定任何人“向任何代理人非法给予、同意给予或提供任何贿赂，并企图以此作为诱因或酬金，使其在委托人的事务或业务范围内，为或不为一定现实的或预计的行为，或使其在委托人的事务或业务范围内，表现出或不表现出对某人的赞赏与厌恶的任何人”构成犯罪。

这些定义反映了通说，即贿赂是有害的，因为贿赂使个人满足自身私人利益（收受

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[3] 《经济与合作发展组织禁止在国际商业交易中贿赂外国公职人员公约》第 1 条第 1 节，OECD/IME/BR(97) (1997 年 12 月 17 日), http://www.oecd.org/site/adboecdanti-corruptioninitiative/39360623.pdf.

[4] 美国没有联邦法律统一禁止商业贿赂，但是商业贿赂在特殊情形下可能违反不同的联邦法律。尤其是，《鲁滨孙-帕特曼法》第 2(c)节为因“代理、代表或其他中介”的商业贿赂行为而受到损害的买方创设了私人诉讼理由。见《<鲁滨孙-帕特曼法>下目前的反垄断法律趋势：Mom & Pop 商店 vs. 大公司》pp.11-12，Beasely Allen 等人，2007 年，https://www.beasleyallen.com/webfiles/Current%20Trends%20in%20Antitrust%20Law%20Under%20the%20Robinson%20-%20Patman%20 Act.pdf. 在美国的大多数州，商业贿赂可能导致州的侵权行为法下的责任，或可能违反州法律。三部门在此的意见与这些法律一致。

贿赂），而不履行对其他实体的法律义务。在官员腐败语境下，贿赂诱导政府官员和国家机关工作人员将个人利益置于公共职务之上；在商业贿赂语境下，贿赂诱导私人企业员工或代理人追求自身私人利益，而抛弃对雇主或委托人的法律义务。

然而，《反不正当竞争法》（草案）对贿赂的禁止更加宽泛。《反不正当竞争法》（草案）未明确定义关键词“贿赂”。因此，缺少了《经济合作与发展组织公约》和外国反贿赂法律中关于贿赂定义的许多关键要素。并且，《反不正当竞争法》（草案）第七条延续了商业贿赂收受者为“实体”而非个人的规定。

缺少这些限制因素，《反不正当竞争法》关于商业贿赂的规定已解释为：在其他司法管辖区域不构成贿赂犯罪的许多商业行为，也在该法禁止之列。

尤其是，在其他司法管辖区域内视为正当竞争行为的对经销商、零售商以及其他销售渠道合作商的报酬、奖励，在《反不正当竞争法》下认定为商业贿赂。例子有工商管理部门对零售商店产品放置奖励、佣金回扣、排他性报酬开展调查。在一些情况下，即使双方账簿已经准确记载付款，仍会遭受处罚。近来，上海工商管理部门处罚了几家外国轮胎生产制造商的上海子公司，原因是发现这些公司为促进轮胎销售向下游零售商提供奖励的项目构成商业贿赂。工商管理部门公开声明表明，处罚奖励项目的原因在于零售商推广有促销奖励项目的轮胎，而不推广其他竞品，而不在于奖励未经经销商或销售商授权。

三部门相信《反垄断法》关于滥用支配地位的禁止性规定，对于处理此类商业奖励产生的问题，提供了更有力的法律依据。在其他司法管辖区域内，禁止享有重要市场权力、占有支配地位的企业实施排除竞争的行为，这些规定已适用于许可费折扣、排他性回扣和其他有损竞争的排他性销售行为。《反不正当竞争法》将该等行为作为商业贿赂处罚，实际上可能限制了提高效率、使消费者受益的销售行为，也可能使《反垄断法》在这方面的规定多而失当。关键是，通过对相关方市场力量开展阈值评估，以及仔细权衡对消费者福利和经济效率利弊，《反垄断法》下调查对避免产生反竞争效果的风险有所裨益。在《反垄断法》框架下，占支配地位企业的一些促销做法可能实际具有排他效果，进而损害消费者，从而因此予以禁止。另一方面，不占支配地位的企业针对经销商和零售商的善意奖励项目则很可能合法。将商业贿赂违法限定为向个人给予要约或报酬，旨在诱导或奖励收受方违反对第三人义务的行为，可化解阻却有益行为的风险。

因此，三部门建议，修改第七条，使商业贿赂定义与香港和新加坡法律所体现国际普遍实践一致。

第八条

三部门赞同对《反不正当竞争法》（草案）第八条的修改，消除了所禁止的虚假广告行为仅限 2016 年《反不正当竞争法》（草案）列举项目的任何暗示。第八条明确禁止所有虚假或引人误解的广告，禁止其他虚假或引人误解的商业行为。这将促使出台针对新新形式广告和营销的监管规定，保护消费者。《美国联邦贸易委员会法》15 U.S.C. §45 第 5 条对“商业中或影响商业的不正当或欺骗性行为或实践”的类似禁止规定，在美国有效执行超过一个世纪。

但是，依旧存在的问题是，第八条对于其是否仅适用于卖方，还是同样适用于代理人和其他第三人的规定不明确。第八条禁止“商业经营者”从事引人误解的商业行为，并将“商业经营者”定义为从事货物或服务贸易的个人或组织。在很多情况下，不直接出售货物或服务的实体可能代表商业经营者从事欺骗性营销策略，例如广告代理人或关联营销合作方。三部门认为，执法对象应以商业经营者和其他代表商业经营者的实体为妥。因此，三部门建议修改第八条，在“商业经营者”后增加“代表商业经营者行为的代理人或其他人”，使其适用范围不限于于商业经营者。

第九条、第十条和第二十四条

保护商业秘密不受侵犯对于促进创新和公平竞争非常重要，对此中国法院在多起根据《反不正当竞争法》判定的案件已有认可[5]。全国人大常委会在《反不正当竞争法》（草案）中既拓宽了商业秘密侵犯的范围，也加强了相关的惩罚力度，三部门对此表示欢迎。在此基础上，三部门诚挚建议全国人大常委会可考虑进一步扩大侵犯商业秘密的禁止性规定范围。[6]

第九条和第十条中保留了有关侵犯商业秘密可基于不同类型行为（包括但不限于企业经营者或雇员实施的盗窃与贿赂）的规定，三部门对此表示欢迎。第九条仍规定商业经营者不能违反保密/不披露合同义务或要求而使用商业秘密，三部门对此亦表示欢迎。三部门赞同在第十条中保留了如下规定：即在第三人“明知或者应知”商业秘密来源于本法第九条规定的途径时，则可由该等第三人对侵犯商业秘密的行为承担责任。上述规定与其他司法区域一致，并且也符合国际商业秘密法的主流。三部门赞同在第十条中纳入如下明确要求，即“国家机关工作人员、律师、注册会计师等专业人员对其在履行职责过程中知悉的商业秘密应当予以保密。”

第二十四条（即 2016 年《反不正当竞争法》（草案）第二十二条）授权工商行政管理部门责令权利人的雇员和前雇员（而不仅仅是第三人）停止违法行为，并可对权利人的雇员和前雇员处以高达十万元人民币的罚款[7]，以此进一步加强对侵犯商业秘密的惩罚，

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[5] J. Benjamin Bai & Guoping Da，中国商业秘密保护策略（*Strategies for Trade Secret Protections in China*），9 J. NW. J. OF TECH. & INTELL. PROP.，2011 年春，第 351，354，371-74 页。事实上，2016 年美国和欧盟均通过颁布新法加强商业秘密保护。美国颁布了《保护商业秘密法》（Defend Trade Secrets Act），作为联邦处理侵犯商业秘密行为的新法律依据。欧盟颁布了《商业秘密指令》（Trade Secrets Directive），要求成员国在 24 个月之内颁布国内立法，至少为商业秘密提供《指令》所规定的最低限度的保护。

[6] 三部门谨建议颁布商业秘密法以提供更全面的保护。

[7] 对于经营者而言，《反不正当竞争法》（草案）第二十四条区分了两种情形，即非法侵犯商业秘密的，工商行政管理机关可处十万元以上五十万元以下的罚款；情节严重的，工商行政管理部门可处五十万元以上三百万元以下的罚款。这一区分与《刑法》第二百一十九条的司法解释类似，后者规定侵犯商业秘密为犯罪行为，但将受害者损失区分为一般损失、重大损失和特别严重的损失，而相应损失数额范围分别为五十万元以下、五十万元至二百五十万元、二百五十万元以上。参见国会图书馆，商业秘密保护：中国

三部门对此表示欢迎。此外，在后续行政和民事诉讼中，工商行政管理部门和受害人可获得该等调查中查获的有力证据[8]。能否追究侵犯商业秘密的刑事[9]和民事责任对于保护并加强商业秘密在激励创新与竞争中的关键地位至关重要，而且也关乎能否实现《起草说明》中既定的加强商业秘密保护的目标。

但是，尽管中国法院认可民事主体有权就潜在泄露商业秘密的行为获得初步禁令[10]，但《反不正当竞争法》（草案）并未对潜在滥用商业秘密的行为做出禁止性规定。美国和欧洲等其他法域均通过法令明确认可法院有权针对潜在威胁或即将披露商业秘密的行为采取行动，这正是因为商业秘密一经公开则价值全无。因此，三部门谨建议在修订《反不正当竞争法》时将中国法院在个案判决（包括一些具有指导意义案例[11]）中已认可的规则加以明确规定，即商业秘密权利人应能够获得初步禁令以防止潜在威胁披露或滥用商业秘密。

（Protection of Trade Secrets: China），2013 年 8 月， http://www.loc.gov/law/help/tradesecrets/ china.php；Bai & Da, *supra*, 9 J. NW. J. OF TECH. & INTELL. PROP. 2011 年春，第 351 页，第 364-65 页。若该等区分是为了与前述司法解释保持一致，那么在《反不正当竞争法》中引入这种在其他情况下可能模糊的区分方式，不应导致适用该等更为严厉的罚款手段（以协助执法）时的无故拖延。无论如何，三部门认为：至少对于《反不正当竞争法》目的而言，可以（或应当）根据对《反不正当竞争法》的司法解释以及其他法域的实践对于损失进行广义界定。参见 Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. 第 361 页。

[8] 参见国会图书馆，商业秘密保护：中国（Protection of Trade Secrets: China），2013 年 8 月，http://www.loc.gov/law/help/tradesecrets/ china.php ；Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. 第 364-65 页, 第 374 页。此外，中国受害方可以寻求有关查封和保全证据命令，这也可作为单方面获得前雇员、竞争对手等可能持有之商业秘密的一种方式。Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. 第 363 页。

[9] 《刑法》第 219 条规定侵犯商业秘密为刑事犯罪。2016 年《反不正当竞争法》（草案）第二十二条首次明确规定：如果侵犯商业秘密行为构成犯罪，将依法追究刑事责任；该规定已被新的《反不正当竞争法》（草案）第三十四条所取代并加以扩大（根据该条：违反《反不正当竞争法》规定，构成犯罪的，将依法追究刑事责任）。

[10] 参见国会图书馆，商业秘密保护：中国（Protection of Trade Secrets: China），2013 年 8 月，http://www.loc.gov/law/help/tradesecrets/ china.php；知识产权指导性案例：走向中国特色知识产权判例法的漫长道路（IPR Model Cases: Part of the Long Journey towards IPR Case Law with “Chinese Characteristics”），中国知识产权博客，2013 年 11 月 11 日， https://chinaipr.com/2013/11/10/ipr-model-cases-part-of-the-long-journey-towards-ipr-case-law-with-chinese-characteristics/。

[11] 知识产权指导性案例：走向中国特色知识产权判例法的漫长道路（IPR Model Cases: Part of the Long Journey towards IPR Case Law with “Chinese Characteristics”），中国知识产权博客，2013 年 11 月 11 日， https://chinaipr.com/2013/11/10/ipr-model-cases-part-of-the-long-journey-towards-ipr-case-law-with-chinese-characteristics/。

最后，《反不正当竞争法》的司法解释针对侵犯商业秘密之诉提供了实体性抗辩，即通过不正当手段获取商业秘密之人可对商业秘密进行实质性修改，从而构成对《反不正当竞争法》的抗辩[12]。就三部门所知，目前似乎没有任何其他法域承认此种抗辩。虽然此类抗辩对于公开授予的权利（如专利权）可能具有意义（以限制授权范围），但对于需保护其机密并遵守私人协议的权利（如商业秘密）而言则几无意义。事实上，此类抗辩鼓励侵权，与《反不正当竞争法》及其《起草说明》所阐释的立法目的并不相符。由于《反不正当竞争法》（草案）对此抗辩问题未作规定，因而令此类抗辩之有效性存疑[13]。三部门谨建议在《反不正当竞争法》中明确规定将不再承认这一抗辩[14]。

第十一条

《反不正当竞争法》（草案）第 11 条保留了原《反不正当竞争法》第 12 条，该条禁止经营者“违背购买者的意愿搭售商品”和附加“其他不合理的条件”。这一禁止性规定与《反垄断法》第 17 条第 5 款重合。

《反垄断法》第 17 条第 5 款禁止具有市场支配地位的经营者通过“没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件”滥用市场支配地位。但是，《反不正当竞争法》（草案）第 11 条在禁止此类行为时可能无需满足《反垄断法》规定要求，包括经营者需具有市场支配地位。此外，《反垄断法》还要求被禁止的搭售行为需限制竞争，拟议第 11 条则未作规定。

搭售行为既可产生反竞争效果，也可产生促进竞争效果（依情况而定），这在经济学文献中早有共识。虽然具有市场支配地位的经营者可利用搭售将其市场势力从一种产品扩展至另一种产品，但搭售是大型和小型企业均广泛使用的一种手段，而且通过降低成本、提高质量，搭售可产生促进竞争的效果。例如，许多产品是以打包形式出售，以降低包装

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[12] 参见国会图书馆，商业秘密保护：中国（Protection of Trade Secrets: China），2013 年 8 月，http://www.loc.gov/law/help/tradesecrets/ china.php；Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. 第 360 页。另参见 Mark Cohen，保密协议与确凿证据：中国商业秘密保护之演变（*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/。

[13] 本《反不正当竞争法》（草案）删除了 2016 年草案的第二十二条，该条显然将使实质性抗辩变为有利于商业秘密权利人的推定——若未对商业秘密进行实质性修改，那么若发现商业秘密由非商业秘密权利人之外的经营者持有，则可推定该商业秘密是通过不正当手段获得的。在反托拉斯法部和国际法部 2016 年的《联合意见》中，两部门对 2016 年《反不正当竞争法》（草案）中的拟议修订表示欢迎，并期待能够进行更为明确的修订来体现这一变化。参见 2016 年《联合意见》，第 9 页。

[14] 尽管最高人民法院可以通过出台司法解释来废除这一通过司法产生的抗辩，但三部门建议：在法律规定中明确否定这一抗辩将会消除所有的歧义。

和库存管理成本。此外，如果客户一次性购买多个产品，其总搜索成本也会降低。[15] 而且，搭售也能使企业提高质量。如果某家企业的产品与某独立供应商的产品组合销售，那么企业可能会担心最终产品的质量。而搭售则可确保最终产品的质量。[16]因此，虽然搭售在某些情况下会损害竞争，但通常对购买人和消费者有利。然而，与《反垄断法》第 17 条不同的是，第 11 条并未针对经营者拥有有效正当搭售理由这一情况提供例外。

第 11 条并不限于具有市场支配地位的经营者，不要求搭售需排除或限制竞争，也未留有余地让经营者为其行为提供正当理由。因此，这一规定可能会惩罚那些对消费者和经济有利的行为。此外，如果保留此条，那么第 11 条与《反垄断法》第 17 条间的重合性规定很可能会在允许进行何种搭售行为这一问题上给企业造成混乱。

第 11 条额外禁止附加“其他不合理条件”同样存在问题。本条规定未具体说明何种条件构成“不合理条件”，而这会导致大量对经营者与消费者都有利的合同条款受到本法的处罚。这一规定缺乏明确性，而且也未要求具有市场支配地位的经营者使用不合理条件、或不合理条件损害竞争，因而可能会抑制公平竞争。

因此，三部门建议自经修订的《反不正当竞争法》终稿中删去第 11 条。[17]

第十四条

《反不正当竞争法》（草案）第 14 条对 2016 年《反不正当竞争法》（草案）第 13 条进行了修订。由此可见 2016 年的一些意见（如删除某些意思不明的表述，从而提高了明确性）已获采纳，三部门对此表示感谢。此外，第 14 条第 4 款加入“恶意”一词，从而明确了只有在*故意*情况下才就“对其他经营者合法提供的网络产品或者服务实施不兼容”承担责任。

三部门谨建议进一步明确第 14 条规定，并确认仅有故意、恶意行为属第 14 条规管范围。建议可对第 14 条引语部分进行如下修订并将“恶意”一词包含在内：

“经营者不得恶意利用技术手段在互联网领域从事下列影响用户选择、干扰其他经营者正常经营的行为：”

如 2016 年意见中所述，鉴于当今电信网络的复杂性，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可能会不时导致对其他方产品及服务的非故意及临时不兼容或“干扰”（尽

[15]例如，可参见Dennis Carlton & Jeffrey Perloff，现代工业组织（*Modern Industrial Organization*），2005年第4版)，第319页。

[16] 例如，可参见Dennis Carlton & Jeffrey Perloff，现代工业组织（Modern Industrial Organization），2005年第4版，第321页。

[17] 事实上，2016 年公布的《反不正当竞争法》（草案）删去了这一条款。

管供应商尽最大努力避免此等情形）。第 14 条引语部分的拟议修订确认无意因上述非故意技术问题而对经营者进行惩罚。若对该等行为之合法性仍模棱两可，那么经营者可能会因为担心对无意“干扰”承担责任而不愿改善网络产品和服务。事实上，互联网技术继续得以维护和提高有利于消费者利益。

第十五条

对于针对第 15 条作出的修订，三部门表示欢迎。该修订取消了针对“其他不正当竞争行为”的兜底性禁止规定，而是规定国家工商行政管理总局（工商总局）单独或会同国务院其他部门研究提出应当认定为不正当竞争行为的意见，并报国务院决定是否应被认定为不正当竞争行为或属于《反不正当竞争法》未明确涉及的其他行为。三部门建议在国务院决定是否应依《反不正当竞争法》认定其他不正当竞争行为之前，工商总局或国务院应首先就此征求公众意见，并在新认定的不正当竞争行为接受《反不正当竞争法》执法规制前充分提前通知公众。

第 15 条还要求被认定为不正当竞争的行为应严重破坏“竞争秩序”。三部门建议：就一家经营者针对另一家经营者采取之行为，工商总局在向国务院建议根据第 15 条进行认定之前，可适用如下两个指导原则，即：(1) 根据竞争法对应的公共政策来指导对该等行为的认定；以及 (2)现有竞争法对相关行为的执法不足以解决相关行为所产生的竞争损害。[18]

结论

三部门期待全国人大常委会能够考虑以上对《反不正当竞争法》（修订草案）的意见。

附件

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

[18] 美国联邦贸易委员会 2015 年 8 月 13 日公布的《联邦贸易委员会法案第五条下“不正当竞争方法”执法原则的声明》对上述原则有明确规定，见 https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf，而且通常适用于对在市场上具有反竞争效果的行为进行审查。

COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW, AND INTERNATIONAL LAW ON THE DRAFT ANTI-UNFAIR COMPETITION LAW OF THE PEOPLE'S REPUBLIC OF CHINA

March 24, 2017

The views stated in this submission are presented on behalf of the Sections of Antitrust Law, Intellectual Property 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, Intellectual Property Law, and International Law of the American Bar Association ("Sections") respectfully submit these comments to the Legislative Affairs Commission ("the LAC") of the Standing Committee of the National People's Congress of the People's Republic of China ("the NPCSC") on the Anti-Unfair Competition Law (Revised Draft) ("Draft AUCL"), which was published for public consultation.[1] The Sections offer these Comments in the hope that they will assist the NPCSC in further 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 are available to provide additional comments or to participate in consultations with the NPCSC or the LAC, as they deem appropriate.

The Sections of Antitrust Law and International Law submitted comments ("2016 Comments") to the Legislative Affairs Office of the State Council of the People's Republic of China on an earlier draft of proposed revisions to the Anti-Unfair Competition Law ("2016 Draft AUCL"),[2] and appreciate the incorporation of revisions in the Draft AUCL that are consistent with the 2016 Comments, such as the deletion of the provision introduced in the 2016 Draft AUCL relating to taking advantage of comparative advantage position.

Article 6

Article 6 of the Draft AUCL is a revision of Article 5 of the 2016 Draft AUCL. The Sections appreciate the revisions in the Draft AUCL to focus more clearly on actual deception or a likelihood of consumers being misled and move away from a focus on the subjective intent of the seller. In all aspects of consumer protection, the actual or likely effect on buyers is the

[1] *See* Notice on publication of the "Anti-Unfair Competition Law of the People's Republic of China (Revised Draft)" for public comments (published Feb. 26, 2017), *available at* http://www.npc.gov.cn/npc/xinwen/2017-02/26/content_2008334.htm, and Explanatory Notes on the drafting of the Draft AUCL ("Explanatory Notes"), *available at* http://www.npc.gov.cn/COBRS_LFYJNEW/user/UserIndex.jsp?ID=8227601. The Sections' comments are based on an unofficial translation of the Draft AUCL at http://www.chinalawtranslate.com/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%8F%8D%E4%B8%8D%E6%AD%A3%E5%BD%93%E7%AB%9E%E4%BA%89%E6%B3%95%EF%BC%88%E4%BF%AE%E8%AE%A2%E8%8D%89%E6%A1%88%EF%BC%89/?lang=en#_Toc475861595.

[2] For ease of reference the 2016 Comments are appended.

appropriate lens through which to evaluate whether there is consumer harm. The Sections reiterate a concern that Article 6 lacks specific reference to counterfeiting as an unfair practice. The Sections recommend expressly identifying "counterfeiting" as one example of an unfair act prohibited by the AUCL.

Article 7

Article 8 of the AUCL currently provides the principal legal basis for China's general prohibition against commercial bribery. The 2016 Draft AUCL would have significantly altered Article 8. Article 7 of the Draft AUCL, which replaces Article 8 in the AUCL, incorporates additional changes. The Sections are encouraged by the inclusion of language emphasizing the proper documentation of rebates, discounts, and commissions, and exempting employers in situations where the acts are those of a rogue employee.

However, the Sections recommend that the revision of Article 7 expressly limit commercial bribery offenses to improper offers or payments of benefits to individuals to induce or reward violations of legal duties to third parties. This revision would comport with prevailing international practice in anti-bribery and anticorruption enforcement, and would allow the effects of rebates, discounts, and promotional incentives on consumers and competitors to be assessed under general antitrust principles pursuant to the Anti-Monopoly Law ("AML").

Under international anti-bribery conventions and the bribery laws of many jurisdictions, a "bribe" is defined as an improper offer or payment of something of value to an individual employee, agent, or other fiduciary with the intent to induce or reward the recipient for acting in violation of the recipient's legal duties to a third party (typically the employer of the recipient).

For example, Article 1 of the United Nations Convention against Corruption ("UNCAC") (to which China is a party) calls on parties to establish criminal offenses for "when committed intentionally…the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." Similarly, the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions describes bribery as "intentionally to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[3]

Although these international conventions focus on bribery of government officials, similar principles apply in domestic laws focusing on commercial bribery of private sector employees.[4]

[3] Organization for Economic Cooperation and Development, Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions Art. 1, § 1, OECD/IME/BR(97) (Dec. 17, 1997), http://www.oecd.org/site/adboecdanti-corruptioninitiative/39360623.pdf.

[4] The United States does not have a federal statute generally prohibiting commercial bribery, although commercial bribery may violate various federal statutes in certain circumstances. In particular, Section 2(c) of the Robinson-Patman Act creates a private cause of action for buyers who have been damaged by commercial bribery of an "agent, representative, or other intermediary." *See* Beasely Allen et al., Current Trends in Antitrust Law Under the Robinson-

For example, Section 9(2) of the Prevention of Bribery Ordinance of Hong Kong provides that "[a]ny person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's - (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business" commits an offense. Article 6 of Singapore's Prevention of Corruption Act, captioned "Corrupt Transactions with Agents," similarly provides that any person who "corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business" commits an offense.

These definitions reflect the prevailing view that bribery is harmful because it causes individuals to serve their own private interests (in the receipt of the bribe) rather than perform their lawful duties to the entities they are supposed to serve. In the context of official corruption, bribes induce government officials and personnel of state institutions to place their personal interests above their public duties; in the context of commercial bribery, bribes induce employees or agents of private companies to serve their private interests rather than discharge their legal duties to their employers or principals.

The prohibition of bribery under the Draft AUCL, however, is much broader. The critical term of "bribery" is not explicitly defined in the Draft AUCL. Consequently, many key elements of the definition of bribery under the OECD Convention and foreign bribery statutes are absent. Moreover, Article 7 of the Draft AUCL retains the provision that the recipient of a commercial bribe may be an "entity" rather than an individual.

Without these limiting factors, the AUCL's rules against commercial bribery have been construed to prohibit many commercial practices that would not constitute bribery offenses in other jurisdictions.

In particular, payments and incentives for distributors, retailers, and other sales channel partners that are viewed as legitimate procompetitive practices in other jurisdictions, have been condemned as commercial bribery under the AUCL. Examples include investigations by Administrations of Industry and Commerce (AICs) of incentives for product placement in retail stores, commissions for referrals, and payments for exclusivity. In some cases, payments were condemned even if they were accurately recorded in the parties' books. Recently, AICs in the Shanghai region have penalized the local subsidiaries of several foreign tire manufacturers upon finding that programs providing incentives for downstream retailers to promote sales of their tires constituted commercial bribery. Published statements by the AICs suggest that these incentive programs were condemned because retailers promoted the tires covered by incentive programs

Patman Act: Mom & Pop Shops vs. The Big Corporations, 2007, at 11-12 https://www.beasleyallen.com/webfiles/Current%20Trends%20in%20Antitrust%20Law%20Under%20the%20Robinson%20-%20Patman%20 Act.pdf. In most U.S. states, commercial bribery may give rise to liability under state tort law, or violate state statutes. The Sections' Comments are consistent with these laws.

over competing tires – not because the incentives were unauthorized by the distributors or dealers.

The Sections believe that the AML's prohibitions of abuse of dominance provide a superior legal basis to address concerns arising from such commercial incentives. In other jurisdictions, rules against anticompetitive conduct by dominant firms with substantial market power have been applied to loyalty discounts, exclusionary rebates, and other exclusionary sales practices that harm competition. Penalizing such practices as commercial bribery under the AUCL may actually deter sales practices that promote efficiency and benefit consumers. It may also effectively render the AML superfluous in this respect. Critically, inquiries under the AML help avoid the risks of counterproductive results by generally entailing a threshold assessment of the market power of the relevant parties, and a careful weighing of the beneficial and harmful effects to consumer welfare and economic efficiency. Under the AML framework, some promotional practices by dominant firms might be prohibited based on their actual exclusionary effects and resulting harm to consumers. At the same time, bona fide incentive programs for distributors and retailers by non-dominant firms would likely be legal. Limiting commercial bribery offenses to offers or payments to individuals to induce or reward breaches of their duties to third parties would address the risks of deterring beneficial conduct.

Accordingly, the Sections recommend that Article 7 be revised to define commercial bribery consistent with prevailing international practices, as illustrated by the Hong Kong and Singapore statutes.

Article 8

The Sections applaud the revisions to Article 8 of the Draft AUCL that eliminate any suggestion that the actions enumerated in the 2016 Draft AUCL are the only types of false advertising prohibited. Article 8 is clear in prohibiting all false or misleading advertising and other false or misleading commercial activity. This will allow for regulation of new forms of advertising and marketing where needed to protect consumers. The similar prohibition against "unfair or deceptive acts or practices in or affecting commerce" in Section 5 of the U.S. Federal Trade Commission Act, 15 U.S.C. § 45, has allowed for effective enforcement in the United States for over a century.

The concern remains, however, that Article 8 is unclear as to whether it applies only to sellers or also to agents and other third parties. Article 8 prohibits "Business operators" from engaging in misleading commercial activity and defines "business operators" as individuals or organizations engaged in the trade of goods or services. In many cases, entities not directly selling goods or services may be engaged in deceptive marketing tactics on behalf of business operators, including, for example, advertising agencies or affiliate marketing partners. The Sections respectfully maintain that enforcement may be appropriate against both a business operator and another entity acting on its behalf. Therefore, the Sections recommend revising Article 8 to broaden its application beyond business operators, by adding "and their agents or others acting on their behalf" after "business operators."

Articles 9, 10, 24

Safeguarding trade secrets against theft is important to fostering innovation and fair competition – as courts in China have begun to recognize in a number of cases under the AUCL.[5] The Sections commend the NPCSC for including in the Draft AUCL an enhancement of both the scope of, and penalties against, theft of trade secrets. However, the Sections respectfully suggest that the NPCSC may wish to consider further expanding the scope of the prohibitions on the theft of trade secrets.[6]

The Sections applaud the retention in Articles 9 and 10 of provisions stating that the theft of trade secrets can be based broadly on different kinds of conduct, including but not limited to theft and bribery, committed either by business operations or by employees. The Sections also commend the continuing provision in Article 9 that business operators cannot use trade secrets in breach of confidentiality or non-disclosure agreements or requests. The Sections applaud the retention in Article 10 of the provision that third parties can be held liable for the theft of trade secrets when they "clearly know or should know" that the source of the trade secrets involves conduct described in Article 9. These provisions are consistent with those in other jurisdictions, and within the mainstream of trade secrets law internationally. The Sections commend the inclusion in Article 10 of an express requirement that "employees of state organs, and professionals such as lawyers and certified public accountants shall keep confidential the trade secrets they learn of in the course of performing their duties."

The Sections appreciate the further strengthening in Article 24 (which was Article 22 in the 2016 Draft AUCL) of the penalties for misappropriation of trade secrets, by granting AICs the power to order a cessation of illegal conduct by employees and former employees of rightsholders, instead of just by third parties, and to seek fines of up to 100,000 RMB against employee and former employees of rightsholders.[7] In addition, in follow-on administrative and civil actions, the

[5] J. Benjamin Bai & Guoping Da, *Strategies for Trade Secret Protections in China*, 9 J. NW. J. OF TECH. & INTELL. PROP. 351, 354, 371-74 (Spring 2011). In fact, both the United States and the European Union strengthened trade secret protections in 2016 by enacting new laws. The U.S. enacted the Defend Trade Secrets Act, creating a new federal cause of action for trade secret misappropriation. The EU put into force its Trade Secrets Directive, which gives each Member State twenty-four months to enact national laws that provide at least the minimum levels of protections for trade secrets required by that Directive.

[6] The Sections respectfully suggest the enactment of a trade secrets law to provide a more comprehensive treatment.

[7] Insofar as undertakings are concerned, Article 24 of the Draft AUCL draws a distinction between unlawful theft of trade secrets, where AICs can impose fines of 100,000 to 500,000 RMB, and unlawful theft of trade secrets where the circumstances are serious, where the AICs can impose fines of between 500,000 RMB and 3,000,000 RMB. This distinction appears similar to that in judicial interpretations of Article 219 of the Criminal Law, which criminalizes the theft of trade secrets but draws a distinction between losses, serious losses, and exceptional losses incurred by victims, with the thresholds being under 500,000 RMB, 500,000 to 2,500,000 RMB, and more than 2,500,000 RMB. Library of Congress, Protection of Trade Secrets: China (Aug. 2013), http://www.loc.gov/law/help/tradesecrets/china.php; Bai & Da, *supra*, 9 J. NW. J. OF TECH. & INTELL. PROP. 351, 364-65 (Spring 2011). If this distinction is intended to conform with these judicial interpretations, then introducing this otherwise possibly vague distinction into the AUCL should not lead to undue delay in the use of these enhanced fines to aid in enforcement. In all events, the Sections believe that losses can be, or should be, defined broadly at least for AUCL purposes pursuant to the Judicial Interpretation of the AUCL and in accordance with the practice in other jurisdictions. *See* Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. at 361.

AICs and victims have the powerful asset of the evidence seized in such investigations.[8] The ability to pursue criminal,[9] as well as civil, liability for trade secrets is important to preserving and strengthening the key role of trade secrets in stimulating innovation and competition, and to realizing the objective of the Draft AUCL of strengthening commercial secret protection, as stated in the Explanatory Notes.

However, although the courts in China have recognized the right of civil parties to obtain a preliminary injunction against the threatened disclosure of trade secrets,[10] the Draft AUCL still lacks a prohibition against the threatened misuse of trade secrets. Other jurisdictions including the United States and in Europe expressly recognize by statute the power of the courts to act against the threatened or imminent disclosure of trade secrets precisely because a trade secret can lose all value once it is public. Consequently, the Sections respectfully suggest that the AUCL be revised to expressly codify what Chinese courts have recognized in individual cases – including some with guiding force[11] – that holders of trade secrets should be able to obtain preliminary injunctions to prevent the threatened disclosure or misuse of trade secrets.

Finally, judicial interpretation of the AUCL created a substantiality defense against claims of trade secret misappropriation, *i.e.*, substantial modifications to trade secrets made by someone who obtained those trade secrets by improper means could constitute a defense to the AUCL.[12] No other jurisdiction appears to recognize such a defense insofar as the Sections are aware. While such a defense may make sense for publicly conferred rights, like patents, so as to limit the scope of the grant, it makes little sense for rights such as trade secrets that depend on safeguarding confidentiality and honoring private agreements. In fact, such a defense rewards theft, which is inconsistent with the goals of the AUCL and those expressed in the Explanatory Notes. Because

[8] Library of Congress, Protection of Trade Secrets: China (Aug. 2013), http://www.loc.gov/law /help/tradesecrets/china.php; Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. at 364-65, 374. In addition, parties in China have the ability to seek orders seizing and preserving evidence, which may also be useful as a form of *ex parte* seizures of trade secrets that may be in the hands of ex-employees, competitors, or the like. Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. at 363.

[9] Article 219 of the Criminal Law criminalizes theft of trade secrets. The language in Article 22 of the 2016 Draft AUCL providing expressly for the first time that criminal liability shall be pursued in accordance with law if the trade secrets misconduct constitutes a crime has been superseded and broadened by Article 34 of the Draft AUCL, which provides that where any violations of the AUCL constitutes a crime, criminal liability will be pursued in accordance with law.

[10] Library of Congress, Protection of Trade Secrets: China (Aug. 2013), http://www.loc.gov/law/help/tradesecrets/ china.php; IPR Model Cases: Part of the Long Journey towards IPR Case Law with "Chinese Characteristics," CHINA IPR BLOG (Nov. 11, 2013), https://chinaipr.com/2013/11/10/ipr-model-cases-part-of-the-long-journey-towards-ipr-case-law-with-chinese-characteristics/.

[11] IPR Model Cases: Part of the Long Journey towards IPR Case Law with "Chinese Characteristics," CHINA IPR BLOG (Nov. 11, 2013), https://chinaipr.com/2013/11/10/ipr-model-cases-part-of-the-long-journey-towards-ipr-case-law-with-chinese-characteristics/.

[12] Library of Congress, Protection of Trade Secrets: China (Aug, 2013), http://www.loc.gov/law/help/tradesecrets/ china.php; Bai & Da, *supra*, 9 NW. J. OF TECH. & INTELL. PROP. at 360. *See also* Mark Cohen, *Of NDAs and Smoking Guns: China's Evolving Landscape of Trade Secret Protection*, CHINA IPR (Feb. 2, 2016), http://chinaipr.com/.

the Draft AUCL is silent on this defense, it leaves open the question of its validity.[13] The Sections respectfully suggest that it would be desirable to clarify in the AUCL that this defense will no longer be recognized.[14]

Article 11

Article 11 of the Draft AUCL retains Article 12 of the AUCL, which prohibits business operators from "tie-in the sale of goods against buyers' wishes" and attaching "other unreasonable conditions." This prohibition overlaps with one in Article 17, Paragraph 5, of the AML.

AML Article 17, Paragraph 5, prohibits undertakings with a dominant market position from abusing that position by "implementing tie-in sales without any justification or imposing any other unreasonable transaction terms in the course of transactions." However, Article 11 of the Draft AUCL would potentially prohibit such conduct, without the requirements under the AML, including that the business operator have a dominant market position. In addition, the AML, unlike proposed Article 11, requires that the prohibited tie-in sale restrict competition.

It has been long recognized in economic literature that tie-in sales can have both anticompetitive and procompetitive effects depending upon the circumstances. While tie-in sales may be used by a firm with a dominant market position to extend its market power from one product into another, tie-in sales are widely used by both big and small businesses, and they can have procompetitive effects by reducing costs or raising quality. For example, many products are sold as a package to reduce costs associated with packaging and inventory management. Also, total search cost can be lower if buyers purchase multiple items together.[15] In addition, tie-in sales may allow firms to improve quality. A firm may have concerns about the quality of final product if its product is paired with the product of an independent provider. Tie-in sales can assure the quality of final product.[16] Thus, while tie-in sales may in some circumstances harm competition, they often can be beneficial to purchasers and consumers. However, unlike Article 17 of the AML, Article 11 does not create an exception for when the business operator has valid justifications for the tie-in.

Article 11 is not limited to business operators with a dominant market position, does not require that the tie in eliminate or restrict competition, and has no scope to allow a business operator to offer justifications for its conduct. Therefore, this provision has the potential to penalize

[13] The Draft AUCL omits a provision in Article 22 of the 2016 Draft AUCL that apparently would turn the defense of substantiality into a presumption favoring trade secret holders - if a trade secret was not substantially modified, it would be presumed that it was obtained by improper means if found in the hands of an undertaking other than the holder of that trade secret. In their 2016 Comments, the Sections of Antitrust Law and International Law welcomed the proposed revisions in the 2016 Draft AUCL and would have welcomed even more explicit revisions to express that change. 2016 Comments at 10.

[14] While the Supreme People's Court may remove this judicially created defense by judicial interpretation, the Sections respectfully suggest that a statutory provision expressly disavowing this defense would remove all ambiguity.

[15] *See, e.g.*, Dennis Carlton & Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION (4th Ed., 2005), at 319.

[16] *See, e.g.*, *id*., at 321.

conduct that will be beneficial to consumers and the economy. Moreover, if it is retained, the overlapping provision of Article 17 of the AML is likely to cause confusion for businesses as to what tie-in sales may be allowed.

Article 11's additional prohibition on attaching "other unreasonable conditions" also raises concerns. The Article does not specify what might constitute an "unreasonable condition," which could leave a wide range of contract terms that benefit both business operators and customers subject to condemnation under this law. This lack of clarity, along with no requirement that the unreasonable conditions be used by an operator with a dominant market position or that the conditions harm competition, could stifle fair competition.

The Sections therefore recommend that Article 11 be deleted from the final revised AUCL.[17]

Article 14

Article 14 of the Draft AUCL is a revision of Article 13 of the 2016 Draft AUCL. The Sections appreciate that a number of the 2016 Comments appear to have been taken into account, such as the deletion of certain undefined phrases, thus enhancing clarity. In addition, the word "maliciously" has been added to Article 14(4) to make clear that liability for "causing incompatibility with network products or services lawfully provided by other business operators" will only occur if the acts are *intentional*.

The Sections respectfully suggest that Article 14 be further clarified to confirm that only intentional, malicious acts fall within its scope. The introductory phrase of Article 14 could be revised to include the word "maliciously":

"Business operators must not use technological means <u>maliciously</u> […] in the internet field, to influence user choices or interfere with other business operators' normal business operations by means of the following acts:"

As noted in the 2016 Comments, given the complexity of today's telecommunications networks, the regular upgrade, modernization, or other improvements of network equipment and software in the good faith performance of a network supplier's contract with a network operator, and the ordinary operations of anti-malware and security services, could from time to time cause unintended and temporary incompatibility or "interference" with the other party's products and services, despite the supplier's best efforts to avoid such incidents. The proposed modification of the introductory text of Article 14 will confirm that there is no intention to penalize business operators for such unintended technical problems. If ambiguity on the legality of such acts remains, business operators might be unwilling to improve network products and services because of fear of liability for accidental "interference." It is in the interest of consumers that the technology of the internet continues to be maintained and improved.

[17] Indeed, the 2016 Draft AUCL omitted this provision.

Article 15

The Sections welcome the revisions to Article 15 eliminating the catch-all prohibition against "other unfair competition conduct" and instead providing that the State Administration for Industry and Commerce (SAIC), alone or together with other departments, will research and submit opinions to the State Council for its decision on whether to designate as acts of unfair competition other conduct that is not expressly addressed by the AUCL. The Sections suggest that before the State Council determines whether to designate additional acts of unfair competition under the AUCL, the SAIC or the State Council should first solicit public comments on the proposed new designations, and provide adequate advance notice to the public before any newly designated unfair competition conduct becomes subject to enforcement under the AUCL.

Article 15 also requires that any additional conduct that is designated as an act of unfair competition should be found to seriously disrupt the "order of competition." The Sections suggest that the SAIC, before recommending to the State Council the designation under Article 15 of conduct directed by one undertaking towards another undertaking, apply the following two guiding principles: (1) designation of such conduct is guided by the public policy underlying the competition laws; and (2) enforcement against the conduct under existing competition laws is insufficient to address the competitive harm arising from the conduct.[18]

Conclusion

The Sections appreciate the NPCSC's consideration of these Comments on the Draft AUCL.

Appendix

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

[18] These principles were enunciated in U.S. Federal Trade Commission's August 13, 2015 *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf, and are generally appropriate in reviewing conduct that has an anticompetitive effect in the market.

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。

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[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]。

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[2]请见《起草说明》第三条第二款第三项.

[3]请见《反垄断法》（全国人大常务委员会 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

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[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”）；另请请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

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[13] 这一方法所得到的国际认可体现在美国和欧盟对其的接受。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)）；另请请见 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相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，其可能在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

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[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，日本将的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

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[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]。

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[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

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[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。

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[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责任。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]

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[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 that 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

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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.international competitionnetwork.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 tenderee—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 tenderee or an agent or employee of the tenderee, 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 tenderee, 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 tenderees 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.

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[39] The Sections recognize that such collusion between bidders and tenderees 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 Law[1]
(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、企业和企业集团的名称及其简称、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' 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.