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Ms. Ren Airong
Director General
Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau
State Administration for Industry and Commerce
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Via email to: qishuanglin@saic.gov.cn

**Re: AIPLA Comments on State Administration for Industry and Commerce
Guidelines for Anti-Monopoly Enforcement Against Abuse of Intellectual
Property Rights**

主题：美国知识产权法协会(AIPLA)对国家工商总局《关于滥用知识
产权的反垄断执法指南》的意见

Dear Director General Ren:

尊敬的任爱荣局长：

The American Intellectual Property Law Association (“AIPLA”) welcomes this opportunity to submit comments on the Guidelines for Anti-Monopoly Enforcement Against Abuse of Intellectual Property Rights (“SAIC *Guidelines*”) issued by the State Administration for Industry and Commerce (“SAIC”).

美国知识产权法律协会（“AIPLA”）感谢此次国家工商总局（简称“SAIC”）给予我们机会就SAIC《关于滥用知识产权的反垄断执法指南》（以下称《指南》）提出我们的建议。

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition

law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective global laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

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

AIPLA was only recently able to secure an English translation of the text of the SAIC Guidelines. In view of the limited time available to prepare comments, AIPLA submits the following high-level observations on the SAIC Guidelines. AIPLA would welcome the opportunity to prepare more detailed comments and to discuss with you the SAIC Guidelines and any of these comments. We are grateful for this opportunity to submit these comments.

AIPLA直到最近几天才得到SAIC《指南》的英译文本。由于准备时间有限，AIPLA对SAIC《指南》提出以下的笼统意见。AIPLA十分期待能有机会准备更详尽的评论，并能与贵方当面探讨SAIC《指南》以及任何以下意见。我们感谢此次有机会提出以下建议。

AIPLA offers three general observations on the SAIC Guidelines.

AIPLA对SAIC《指南》提出三点总体意见。

First, draft guidelines on the enforcement against abuse of intellectual property rights (IPR) under the anti-monopoly laws of China have now been proposed by at least two different Government agencies: the National Development and Reform Commission of the State Council (NDRC) and the State Administration for Industry and Commerce (SAIC). Although the guidelines proposed by SAIC and NDRC overlap and deal generally with anti-monopoly enforcement against abuses of intellectual property rights, they each vary in substantial and significant respects. AIPLA is concerned that if inconsistent guidelines are issued by multiple agencies, it may lead to uncertainty and create unnecessary risk. Inconsistent application of the anti-monopoly law in the area of IP-related conduct can create unnecessary risk and foment uncertainty among both users and owners of intellectual property rights that would place an unnecessary compliance burden on both users and owners of IPR, and may well chill the development of innovation, as well as economic activity generally. AIPLA is also concerned that even if a final set of guidelines is consolidated by compromise from multiple overlapping, but diverse, sets of guidelines, the consolidated guidelines would not be effective and efficient for achieving the desired goal of protecting fair competition while encouraging innovation as to promote healthy development of the market economy. Therefore, AIPLA recommends that a single consolidated set of standards, applying a uniform set of guidelines, be adopted and implemented by one agency. In the alternative, the responsible agencies could identify respective areas of specialization and promulgate uniform standards and guidelines within each of these areas of specialization in a more coordinated process.

首先，至少两个不同的政府机构已起草了依据反垄断法的关于知识产权滥用执法的指南草案，分别为：国务院国家发展和改革委员会（NDRC）和国家工商总局（SAIC）。尽管 SAIC 和 NDRC 起草的指南涵盖同一领域，总体来讲涉及关于知识产权滥用的反垄断执法，但是两者之间存在实质性和显著的分歧。AIPLA 担心由多个管理机构发布相悖的指南可能导致不确定性，造成不必要的风险。知识产权相关管理领域的反垄断执法不一致可能会造成不必要的风险，让知识产权的使用者和所有者都感到无所适从，给双方都带来不必要的守法负担，并且很可能抑制创新，以及其它经济发展行动。AIPLA 还担心，由多个领域交叠但内容分歧的指南版本经协调让步后统一为一份最终的指南版本，恐怕难以有效地实现所要达到的目地，即保护公平竞争、鼓励创新，以促进市场经济的健康发展。因此，AIPLA 建议由单一管理机构制定单一执法标准、采用一致统一的执法指南。或者，更好地协调不同的管理机构之间的合作，由各管理机构根据其各自负责专门领域制定其本领域内一致统一的执法标准和指南。

Second, AIPLA has submitted comments previously with respect to both SAIC's proposed rules on Prohibition of Abusing IPR to eliminate or restrict competition and NDRC's proposed guidelines for anti-monopoly enforcement against abuse of intellectual property rights. In view of the short time available between obtaining an English translation of the SAIC guidelines and the due date for submission of comments, it has not been possible for AIPLA to prepare a thorough analysis and comments on the SAIC Guidelines. Nonetheless, many of the specific provisions addressed in the SAIC Guidelines are also addressed in the SAIC Rules and NDRC Guidelines. Attached are copies of AIPLA's comments on the SAIC rules, submitted July 10, 2014, and on the NDRC Guidelines, submitted February 9, 2016. AIPLA hopes that these substantive comments will be useful to SAIC in reviewing its proposed Guidelines.

其次，AIPLA 此前就 SAIC 发布的关于禁止滥用知识产权排除、限制竞争行为的规定以及 NDRC 发布的关于滥用知识产权的反垄断指南提出过我们的意见。由于我们得到 SAIC 《指南》草案第七稿的英文翻译时，距提交意见期限已很接近，AIPLA 没有时间对 SAIC 《指南》进行深入分析，提出详细意见。尽管如此，鉴于 SAIC 《指南》中所许多内容在上面提到的 SAIC 规定和 NDRC 指南中也有涉及，我们随函附上 AIPLA 于 2014 年 7 月 10 日对于 SAIC 规定提出意见，和 2016 年 2 月 9 日提交的对于 NDRC 指南的意见。AIPLA 希望其中的实质性意见和建议能对 SAIC 审阅其《指南》时有所帮助。

Third, the proposed SAIC Guidelines differ in material respects from generally-accepted international standards of antitrust enforcement. For example, the SAIC Guidelines provide a list of factors that "may be considered," rather than specific factual findings that must be made (to the extent relevant) in order to find a violation of the anti-monopoly laws. Under generally-established standards of antitrust enforcement, several critical factual findings must be made before a violation can be found. These typically include: the definition of a relevant product market; a finding of market power in the relevant product market, based on economic factors; behavior or acts that constitute an abuse of this market power; resulting in injury to competition in the relevant product market; as well as injury to a competitor and other relevant findings. AIPLA respectfully submits that the proposed SAIC Guidelines, although providing a factorial analysis that includes many of these factors, leave the standard uncertain and vague with respect

to what specifically must be found in order to determine that there has been a violation of the anti-monopoly laws.

第三，SAIC《指南》与被广泛接受的反垄断执法国际标准之间存在实质性区别。例如，SAIC《指南》提供了一些“可以考虑的”因素，而没有明确规定裁定违反垄断法行为需要先认定哪些（相关）事实依据。依照普遍认可的反垄断执法标准，在能够发现违反垄断法行为之前必须认定一些重要事实。这些事实通常包括：相关产品市场的界定；基于经济因素认定在相关产品市场中的市场支配地位；构成滥用市场支配地位的行为表现；导致相关产品市场竞争受到损害；对某竞争对手的损害，以及其他相关事实认定。AIPLA 谨指出，SAIC《指南》尽管在其因素分析中包含了这些因素，但判定标准并没有十分明确清晰地阐明，需要判定哪些具体事实才能决定是否有违反垄断法行为。

Further, the SAIC Guidelines correctly recognize that they are not to create a presumption of market power based on the possession of intellectual property rights; yet, they repeatedly reference that intellectual property rights may be considered as a factor in determining whether or not the owner possesses market power. AIPLA respectfully submits that these are different questions. The question is not whether the right to exclude granted by a patent might affect competition; rather, the issue is whether the patentee possesses market power in a relevant product market. Such a determination should be based on economic and legal factors relating to the characteristics of the market itself and not presumed or implied based on the existence of intellectual property rights.

此外，SAIC《指南》中正确指出，不能仅仅根据拥有知识产权就直接推定在相关市场上具有支配地位。然而，SAIC《指南》中却又重复提及，在确定知识产权所有者拥有市场支配地位时，拥有知识产权可作为考虑因素。AIPLA 谨指出，这涉及不同的问题。问题不在于专利所授予的排他权利是否可能影响竞争，而是在于专利权人是否在相关产品市场拥有市场支配地位。确定市场支配地位应当基于与市场本身的特性相关的经济和法律因素，不应当基于知识产权的存在做出推断或假定。

AIPLA recommends that whatever Guidelines are adopted, they should conform more closely with generally-established international standards of anti-trust enforcement.

AIPLA 建议，最终采用的《指南》应当更接近已被普遍认可的国际反垄断执法标准。

AIPLA regrets that the limited time available to it to review the SAIC Guidelines does not permit it to prepare more detailed comments. To the extent more time is permitted to provide comments, AIPLA would welcome the opportunity to do so.

AIPLA 很遗憾由于时间限制，不能够准备对《指南》更详尽的意见。如果能给予我们更多时间的话，AIPLA 非常欢迎能有机会提供进一步意见。

If a consolidated draft of Guidelines is prepared, AIPLA would appreciate that AIPLA and the public be given an opportunity and sufficient time to fully consider them and offer constructive comments.

在《指南》草案经过统筹形成正式统一版本之前，AIPLA 非常希望我们和公众能够再有机会，和足够的时间，充分考虑《指南》内容并提供建设性意见。

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

AIPLA 再次感谢这次对《关于滥用知识产权的反垄断执法指南》提供上述意见的机会。如果您希望我们就以上所讨论的问题提供进一步信息和意见，请与我们联系。

Sincerely Yours,
此致



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