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2020 年 9 月 30 日

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关于：关于强化行政许可过程中商业秘密和保密商务信息保护的指导意见（征求意见稿）

致司法部:

美国知识产权所有人协会(下称“IPO 协会”)感谢有机会对 2020 年 8 月 14 日发布的《关于强化行政许可过程中商业秘密和保密商务信息保护的指导意见（征求意见稿）》(下称“指导意见草案”)提交意见的机会。

IPO 协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有一百七十五家公司会员以及大约一万两千名个人会员。这些个人会员有些从属于公司会员或律所成员，有些是发明人、作者或律师会员。IPO 协会的会员遍及三十多个国家。

IPO 协会提倡有效和实惠的知识产权，为会员提供广泛的服务，包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

IPO 协会感谢《指导意见草案》提出的为进一步加强行政许可过程中的商业秘密和保密商务信息保护工作，切实维护市场主体合法权益的目标。我们注意到，《指导意见草案》似乎是对《中美第一阶段经贸协定》（下称“第一阶段协定”）中有关保护提交给政府部门的未披露信息，商业秘密，或保密商务信息相关条款的反映。实际上，IPO 协会把这次征求意见的邀请视为两国之间落实加强知识产权保护共识的一项重要而且有用的方式，正如在《第一阶段协议》提出的那样。希望我们的意见能够有助于《指导意见草案》的最终定稿。

一般性意见

我们注意到，《指导意见草案》在标题和整个草案中使用了各种术语来描述申请材料中提供的信息：“商业秘密”、“保密商务信息”和“商业信息”。根据《第一阶段协议》第 1.9 条，中国同意禁止任何刑

事、民事、行政方面，或监管程序的政府人员或第三方专家或顾问未经授权披露“未披露信息,商业秘密,或保密商务信息”。

为明确起见，并符合中国《第一阶段协议》第 1.9 条下的承诺，我们建议《指导意见草案》所保护的信息应包括“未披露信息”、“商业秘密”、和“保密商务信息”。也就是说，未披露信息不一定上升到商业秘密或保密商务信息的级别也将在《指导意见草案》中得到保密保护。因此，我们建议，在草案涉及保护行政审批过程中提交的保密信息的所有情况下，应使用“**未披露信息、商业秘密、或保密商务信息**”。

IPO 协会赞成列入保护行政审批过程中提交的机密信息的规定（例如第 3 条至第 8 条）。在行政程序中提供尽可能多的透明度，使人们相信行政机关在妥善处理申请人的申请材料，以便保护申请材料中所包含的未披露信息，商业秘密， 或保密商务信息的机密性。我们认为，《指导意见草案》应（i）向行政机关提供如何处理未披露信息，商业秘密， 或保密商务信息的重要指南，以及（ii）为申请人提供足够的透明度，以便如有必要，申请人可以采取足够的措施，以确保其对申请材料中所含未披露信息，商业秘密, 或保密商务信息的保密权不会受到损害。

与这种理解一致，作为一项初步事项，我们注意到，《指导意见草案》未指定在申请流程结束后应如何处理机密信息。为了保护提交的信息中包含的所有机密信息的机密性，应要求将此类机密信息退还给其所有者，或者将其销毁。因此，IPO 协会建议增加新的条款，第 8.1 条，内容如下：

> **第 8.1 条**
>
> **程序结束后的机密信息处理。**在涉及行政许可申请的所有程序结束后，由一方向行政许可机构或任何其他参与程序的各方提供的所有未披露信息，商业秘密， 或保密商务信息应由这些实体销毁，或由这些实体退还给提供机密信息的一方。

此外，IPO 协会很高兴看到第 7 条中包含了有关披露通知和异议的规定。根据第 7 条中包含这些条款的原则，我们建议将通知和异议的规定也包含在其他类似涉及披露或共享机密信息的条款中。因此，IPO 建议将第 7 条的以下措辞用于**第 4、5、6 和 8 条**中的每一项。

> 在行政许可机关依法公开权利人未披露信息，商业秘密， 或保密商务信息之前，要允许未公开的信息，商业秘密， 或保密商务信息的权利人在合理期限内提出异议；权利人认为行政许可机关的行为侵犯其合法权益的，可以依法申请行政复议或者提起行政诉讼。

第一条

如一般性意见部分所述，根据《第一阶段协议》第 1.9 条，中国同意对行政许可过程中提供的任何“未披露信息、商业秘密或保密商务信息”提供保护。因此，行政机关无需根据《中华人民共和国反不正当竞争法》（下称“反不正当竞争

法”），确定申请人的信息是否构成“商业秘密”。只要申请人的信息构成未披露信息、商业秘密、或保密商务信息，就应予以保护。该信息是否是符合《反不正当竞争法》定义的“商业秘密”，不应成为此类信息是否受到保护的决定因素。这也将减轻行政实体，根据《反不正当竞争法》，试图查明申请人的申请材料是否构成“商业秘密” 的负担。

此外，由于第 1.9 条保护的“未披露信息”不一定达到《反不正当竞争法》规定的“商业秘密”或“保密商务信息”，因此，我们尊重地认为，第 1 条中的以下排除不必要，应予以删除：

> [对可以通过公开渠道获知、不具有商业价值、未采取有效保密措施的商业信息，不得作为商业秘密和保密商务信息。]

此外，第 1 条规定，申请人对需要保密的商务信息要予以标明。我们注意到，在时不时提交文件和/或与行政机关进行通信时，某些材料，例如电子信件或其他文件，可能会因疏忽而没有正确标记。这一事实最终可能导致无意间公开披露未披露信息，商业秘密， 或保密商务信息，从而破坏了商业秘密所有人的权利，这与《指导意见草案》的意图背道而驰。因此，我们建议在第 1 条中增加一条规定，规定在一段合理的时间段（例如 3 个月），申请人可通过追溯标记无意提交而没有适当标记的材料来解决问题。

因此，IPO 协会建议修改第 1 条，如下所示：

> 行政许可申请人在向行政机关申请办理行政许可事项时，~~对按照反不正当竞争法等法律法规界定的商业秘密要予以明示，~~对需要保密的**未披露信息，**商业秘密**，或保密商务信息**~~也~~要予以标明。~~对可以通过公开渠道获知、不具有商业价值、未采取有效保密措施的商业信息，不得作为商业秘密和保密商务信息。~~
>
> **申请人未标注需要保密的未披露信息，商业秘密，或保密商务信息的，应当在合理期限内追溯标注此信息，此信息应被保护。**

第二条

我们注意到，第 2 条规定，行政许可机关应当“**避免**要求提交无关材料，切实保护商业秘密和保密商务信息。”（以粗体字强调）

由于指导意见草案的目的是进一步加强对行政许可过程中保密信息的保护，我们认为这个目的可以通过不要求申请人披露与行政许可程序无关的信息达到。因此，我们建议用更强烈的语言，即“不得要求”来强调这一原则。我们认为这将更好地防止申请人被要求提交与当前事项无关的信息。这与《第一阶段协定》第 1.9 条第一款相一致，该条规定中国应“将提供信息的请求限制在不超过合法行使调查或监管权力所需的范围内”。

此外，对于行政许可机关要求申请人公开申请人认为无关的材料，规定一个上诉程序是有益的，这样如果行政机关坚持公开这些材料申请人可以有追索权。因

此，我们建议允许申请人向适当的上级实体提出上诉，以最终决定此事。这与《第一阶段协定》第 1.9 条第二（五）款一致，该条规定中国应“建立申请豁免信息披露程序，以及对向第三方披露信息提出异议的机制”。因此，IPO 协会建议对第 2 条进行以下修订：

> 行政许可机关要按照依法确有必要的原则确定申请人提交材料的范围，~~避免~~**不得**要求提交无关材料，切实保护**未披露信息，**商业秘密**，**和保密商务信息。**申请人对申请提交的材料范围内含有无关材料提出异议，行政许可机关坚持要求的，可以申请行政复议或者提起行政诉讼。**

第四条

拟议的第 4 条第三句涉及“因工作需要借阅、复制、摘抄”在申请过程中提交的机密信息的。该句应修改为仅限于根据第六条的要求被允许接触的人员，以明确允许接触的范围应限于特定人员，与履行相应职责无关的人员或任何其他第三方不得接触。因此，IPO 协会建议对第 4 条进行以下修订：

> **4. 加强涉密档案管理。**行政许可机关要建立健全涉密档案管理制度，对涉及商业秘密和保密商务信息的纸质材料，要在归档卷宗封面作出标识；对涉及商业秘密和保密商务信息的电子信息要在文档中作出标识，并作加密处理。归档后，**根据第六条允许接触的人员**确因工作需要借阅、复制、摘抄涉及**未披露信息，**商业秘密，和保密商务信息归档材料的，要履行报批手续并作出具体记录，不得私自借阅、复制、摘抄涉及**未披露信息，**商业秘密，和保密商务信息的档案材料。需要携带含有**未披露信息，**商业秘密，和保密商务信息档案材料外出的，要指定专人负责，并采取必要的安全措施。

第五条

第 5 条涉及保护须由第三方（例如由指定专家）评估的机密材料。第 5 条应更明确地执行《第一阶段协定》第 1.9 条第二（四）款，该条规定中国“确保与信息提交方有竞争关系，或与调查或监管结果有实际或可能经济利益关系的第三方专家或顾问，不得接触到此类信息”。首先，我们建议，除了保密要求外，还应限制第三方使用申请人的未披露信息，商业秘密， 或保密商务信息。也就是说，第三方评估机构只能将申请人的未披露信息，商业秘密， 或保密商务信息用于特定申请的评估目的，不得用于其他用途。第二，由于申请人的材料通常包含竞争敏感信息，第三方评估者需要是中立的、无利害关系的一方，不能是申请人的竞争对手。

第三，为了透明度，并给申请人通知和提出异议的机会，第三方评估机构的身份应告知申请人，并应在向第三方评估机构披露之前给予申请人提出异议的机会。如“一般性意见”所述，我们也建议将第 7 条中的相同原则和措辞纳入第 5 条在向第三方评估机构披露机密信息之前。因此，IPO 协会建议对第 5 条进行以下修订：

在委托第三方评估时，提交的有关材料中涉及**未披露信息，**商业秘密和保密商务信息的，行政许可机关要与评估机构签订保密协议，明确保密范围、保密期限，**仅为评估目的的使用限制**，保密义务和违约责任，严防评估机构将其知悉的**未披露信息，**商业秘密和保密商务信息公开、披露，**使用**，或者交易。在聘请有关专家参加论证会时，要与其签订保密协议，明确相应保密义务和责任。**第三方评估机构应为中立、无利害关系的实体，不是申请人竞争对手。申请人应被告知第三方评估机构的身份，如果第三方评估机构不是中立和无利害关系的实体，或者是申请人的竞争对手，申请人则有合理的期限提出异议。**

在行政许可机关依法将权利人未披露信息，商业秘密和保密商务信息公开或给第三方评估机构揭露之前，要允许未公开的信息，商业秘密和保密商务信息权利人在合理期限内提出异议；权利人认为行政许可机关的行为侵犯其合法权益的，可以依法申请行政复议或者提起行政诉讼。

第七条

拟议的第 7 条规定：“行政许可机关对政府信息公开申请人申请公开事项涉及商业秘密和保密商务信息的，可以不予公开。”该条应当明确，政府信息公开也应当如此可能包含“未披露信息”以及商业秘密或保密商务信息。此外，本文还应明确行政许可机关作出公开决定的情形，并应明确行政许可机关作出公开决定的标准。此外，第 7 条应解释或举例说明第 7 条中提到的“重大社会公共利益”情况的意图，以便明确这一例外只应在有限的情况下使用。

第八条

拟议的第 8 条规定，行政许可机关需要与其他行政机关共享信息的，共享信息中包含的保密信息“**应当**以防止在信息共享过程中泄露的方式进行处理”（以粗体字强调）。

IPO 协会认为，行政机关采取适当措施防止未披露信息，商业秘密，或保密商务信息泄露至关重要。这与指导意见草案提出的进一步加强对行政许可过程中提交的保密信息的保护，切实维护市场主体合法权益的目标相一致。这也与第一阶段协议第 1.9 条第二（二）款相一致，该条规定，中国应“将有权接触所提交信息的人员仅限于实施合法调查或监管的政府工作人员”。为此，我们建议用更有力的术语来指导行政机关对商业秘密信息进行处理，以防止泄露。此外，还应明确规定，《指导意见》规定的保密保护要求适用于所有机构间共享申请人的机密信息。因此，IPO 协会建议进行以下修订：

因行政处罚、行政强制、行政检查等行政执法行为需要与其他行政机关共享信息的，要**必须根据本指南的要求**对其中包含的**未公开信息，**商业秘密**，**和保密商务信息进行脱密处理，防止在信息共享过程中泄

露商业秘密和保密商务信息。无法作脱密处理的，要**根据本指南的要求**明确告知共享机关加强保密管理，承担相应保密义务和责任。

第九条

拟议的第 9 条规定，“行政许可机关要加强对工作人员的保密教育和管理，明确承担的保密义务和责任。”鉴于《第一阶段协定》第 1.9 条规定的义务，第九条规定的教育应当包括定期教育工作人员对该行政许可机关的工作人员擅自泄露未公开的信息、商业秘密或者保密商务信息可能受到的民事和刑事处罚，并定期向工作人员通报中国各地行政许可机关工作人员受到的刑事起诉和处罚情况。因此，IPO 协会建议进行以下修订：

> 9. **强化保密义务**。行政许可机关要加强对工作人员的保密教育和管理，明确承担的保密义务和责任。任何行政许可机关及其工作人员不得违反保密义务或者违反权利人有关保守**未披露信息**，商业秘密**，** 和保密商务信息的要求，披露、使用或者允许他人使用其所掌握的**未披露信息**，商业秘密**，** 和保密商务信息；不得以转让**未披露信息**，商业秘密，和保密商务信息作为取得行政许可的条件；不得在实施行政许可过程中，直接或间接要求权利人转让**未披露信息**，商业秘密**，** 和保密商务信息；不得向与权利人有竞争关系或者与调查、监管结果有经济利益关系的第三方专家或顾问披露商业秘密和保密商务信息。**教育内容应包括定期提醒行政许可机关工作人员未经许可泄露未公开信息、商业秘密或者保密商务信息可能受到的民事和刑事处罚，以及中国各地对行政许可机关工作人员的刑事起诉和处罚情况的定期更新**。

第十条

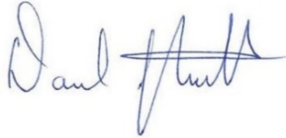
拟议的第10条规定，违反行为应受到“依纪依法给予处分”，并应“构成犯罪”受到刑事起诉。这些陈述很有价值，但不清楚它们在多大程度上反映了目前的做法。为了更好地执行第一阶段协议第 1.9 条第二（六）款，IPO 协会建议在第 10 条的开头添加语言，以利用行政机关在起草所需法律变更方面的经验。建议和实施的刑事、民事和行政处罚应足以阻止未经授权的披露。因此，IPO 协会建议进行以下修订：

> 10. **严肃责任追究。行政机关对擅自泄露未公开的信息、商业秘密或者商业秘密的，应当给予行政处罚，包括停止或终止聘用。行政机关应当建议修改专门适用于该行政机关工作人员的刑法和民法，对未经授权披露未披露信息、商业秘密、或保密商务信息的行为，给予罚款和监禁等处罚**。对行政机关及其工作人员滥用职权、玩忽职守、徇私舞弊违反保密义务和责任，泄露其知悉的**未披露信息**，商业秘密**，** 和保密商务信息的，依纪依法给予处分；构成犯罪的，依法追究刑事责任。对其他自然人、法人和非法人组织违反反不正当竞争法有关规定侵犯权利人商业秘密和保密商务信息的，依法追究相应责任。

感谢司法部给于 IPO 协会提交这份意见的机会，我们也非常愿意进一步交流或者能有机会提供更多的信息。

在此附上本信的翻译版本。

此致



Daniel J. Staudt
美国知识产权所有人协会主席

附件：《*关于强化行政许可过程中商业秘密和保密商务信息保护的指导意见（征求意见稿）*》的反馈意见—英文版

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30 September 2020

Ministry of Justice
Administrative Law Enforcement
Coordination and Supervision Bureau
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Via Email: zfjdjzhc@chinalaw.gov.cn

Re: Guiding Opinions on Strengthening the Protection of Commercial Secrets and Confidential Business Information in the Process of Administrative Licensing (Draft for Solicitation of Comments)

Dear Ministry of Justice:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the draft entitled *Guiding Opinions on Strengthening the Protection of Commercial Secrets and Confidential Business Information in the Process of Administrative Licensing (Draft for Solicitation of Comments)* ("Guiding Opinions Draft") published on 14 August 2020.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes 175 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO appreciates the objectives stated in the Guiding Opinions Draft to further strengthen the protection of trade secrets and confidential business information in the administrative licensing process, and effectively safeguard the legitimate rights and interests of market entities. We note that the Guiding Opinions Draft appears to reflect certain provisions of the recent Phase One Economic and Trade Agreement between the United States of America and the People's Republic of China ("Phase One Agreement") relating to protection of undisclosed information, trade secrets, or confidential business information submitted to government authorities. Indeed, IPO views this invitation for comments as an important and useful implementation of the two countries' agreement to strengthen their cooperation regarding intellectual property

protection, as memorialized in the Phase One Agreement. We hope that our comments below will be helpful during the process of finalizing the Guiding Opinions Draft.

General Comments

We note that the Guiding Opinions Draft uses various terminology in the title and throughout the Draft to describe information provided in the application materials: "trade secrets" (商业秘密), "confidential business information" (保密商务信息), and "business information" (商务信息). Under Article 1.9 of the Phase One Agreement, China agreed that it shall prohibit the unauthorized disclosure of "undisclosed information, trade secrets, or confidential business information" (未披露信息, 商业秘密, 或保密商务信息) by government personnel or third party experts or advisors in any criminal, civil, administrative, or regulatory proceedings.

For purposes of clarity, and for consistency with China's commitment under Article 1.9 of the Phase One Agreement, we recommend that the information to be protected under the Guiding Opinions Draft be that which constitutes "undisclosed information, trade secrets, or confidential business information." This means that confidential information such as undisclosed information that does not necessarily rise to the level of "trade secret" or "confidential business information" will also be afforded confidentiality protection under the Guiding Opinions Draft. Thus, we recommend that in all instances where the Draft addresses the protection of confidential information submitted during the administrative approval process, that "***undisclosed information, trade secrets, or confidential business information***" be used.

IPO applauds the inclusion of provisions for the protection of confidential information submitted during the administrative approval process (*e.g.*, Articles 3 through 8). Providing as much transparency as possible in, and with respect to, the administrative process builds confidence that the administrative agency is properly handling the application materials of the applicant so that the confidentiality of all undisclosed information, trade secrets, or confidential business information contained within the application materials will be preserved. We believe that the Guiding Opinions Draft should serve to provide both (i) important guidelines to the administrative agency as to how it should treat the undisclosed information, trade secrets, or confidential business information and (ii) sufficient transparency to the applicant so that the applicant can take sufficient measures, if necessary, to ensure that its rights to the confidentiality of all undisclosed information, trade secrets, or confidential business information contained within the application materials will not be compromised.

Consistent with this understanding, as a preliminary matter, we note that the Guiding Opinions Draft does not specify what should be done with the confidential information after the application process has ended. In order to protect the confidentiality of all confidential information contained within the submitted information, such confidential information should be required to be returned to its owner, or in the alternative, destroyed. IPO therefore recommends the addition of a new article, Article 8.1, reading as follows:

Article 8.1

Handling of Confidential Information After the Conclusion of Proceedings. *After all proceedings involving the application for*

> *administrative licenses have concluded, all undisclosed information, trade secrets, or confidential business information provided by one party to the administrative licensing agency or to any other parties involved in the proceeding shall be destroyed by those entities, or returned by those entities to the party who provided the confidential information.*

In addition, IPO is pleased to see the inclusion of provisions for notice and objection to disclosure in Article 7. Consistent with the principle behind the inclusion of these provisions in Article 7, we recommend that notice and objection provisions also be included in other articles similarly involving disclosure or sharing of confidential information. IPO therefore recommends adapting the following language from Article 7 to each of **Articles 4**, **5**, **6**, and **8**:

> *Before administrative licensing organs make public any undisclosed information, trade secrets, or confidential business information according to law, right holders of the undisclosed information, trade secrets, or confidential business information shall be allowed to raise their objections within a reasonable time limit; and where such right holders believe their legitimate rights and interests are infringed by the acts of the administrative licensing organs, the right holders may, according to law, apply for an administrative review or file an administrative litigation.*

Article 1

As explained in the General Comments section, under Article 1.9 of the Phase One Agreement, China has agreed to provide protection of any "undisclosed information, trade secrets, or confidential business information" provided in the administrative licensing process. For this reason, it is not necessary for an administrative entity to have to determine if the applicant's information constitutes a "trade secret" under the *Anti-Unfair Competition Law of the People's Republic of China* (AUCL). The applicant's information should be protected as long as it constitutes undisclosed information, trade secrets, or confidential business information. Whether the information is or is not a "trade secret" to satisfy the definition under the AUCL should not be the determining factor as to whether such information will be protected. This will also alleviate the burden on the administrative entities to try to ascertain whether an applicant's application materials constitute a "trade secret" according to the AUCL.

Moreover, because Article 1.9 protects "undisclosed information" that does not necessarily rise to the level of "trade secret" under the AUCL or "confidential business information," it is respectfully submitted that the following exclusion in Article 1 is not necessary and should be deleted:

> *Any business information that is available through public channels, of no commercial value, for which no effective confidential measure has been taken shall not be determined as trade secrets or confidential business information.*

In addition, Article 1 provides that an applicant must mark their submissions to indicate that such information must be kept confidential. We note that from time to time

when submitting documents and/or communicating with administrative organs, it may be the case that certain materials such as electronic correspondence or other documents might be inadvertently submitted without being properly marked. This fact might ultimately result in unintended public disclosure of undisclosed information, trade secrets or confidential business information which undermines the rights of the owner, contrary to the intention of the Guiding Opinions Draft. Therefore, we suggest that a provision be added to Article 1 that allows for a reasonable time period (such as 3 months) for an applicant to cure the problem by retroactively marking materials that were inadvertently submitted without proper marking.

IPO therefore recommends revising Article 1 as shown below:

Applicants for administrative licenses shall, when applying to administrative organs for handling administrative licensing matters, expressly clarify ~~their trade secrets as defined in such laws and regulations as the Anti-Unfair Competition Law of the People's Republic of China, and shall~~ ***by*** *mark**ing** their* ***undisclosed information,*** *trade secret,* ***or confidential business information*** *that needs to be kept confidential. ~~Any business information that is available through public channels, of no commercial value, for which no effective confidential measure has been taken shall not be determined as trade secrets or confidential business information.~~*

Where an Applicant fails to mark their undisclosed information, trade secrets, or confidential business information, Applicant shall have a reasonable period to retroactively mark such materials as confidential, and such information shall be protected.

Article 2

We note that Article 2 states that administrative licensing organs should "**try not to** require applicants to submit unrelated materials in order to reliably protect trade secrets and confidential business information." (emphasis in bold).

Since the objective of the Guiding Opinions Draft is to further strengthen the protection of confidential information in the administrative licensing process, we believe this objective is met by not requiring applicants to disclose information irrelevant to the administrative licensing process. Thus, we recommend that stronger language, *i.e.*, "must not require," be used to emphasize this objective. We believe this would better protect against the possibility that an applicant will be required to submit information that is unrelated to the matter at hand. This is consistent with Article 1.9(a) of the Phase One Agreement, which provides that China shall "limit requests for information to no more than necessary for the legitimate exercise of investigative or regulatory authority."

In addition, it would be beneficial to provide for a process of appeal from an administrative licensing organ's requirement for disclosure of subject matter that the applicant believes is unrelated, so that an applicant can have recourse if an administrative organ insists on the disclosure of these materials. We thus suggest that an applicant be allowed to make such an appeal to the appropriate higher entity to ultimately decide the matter. This is consistent with Article 1.9(e) of the Phase One Agreement, which provides

that China shall "establish a process for persons seeking an exemption from disclosure and a mechanism for challenging disclosures to third parties." IPO therefore recommends the following revisions to Article 2:

> *Administrative licensing organs shall identify the scope of materials to be submitted by applicants to the extent necessary as required by law, and ~~try not to~~* ***must not*** *require applicants to submit unrelated materials in order to reliably protect* ***undisclosed information,*** *trade secrets, and confidential business information.* ***Where an applicant objects that the scope of materials requested to be submitted contains unrelated materials, and the administrative licensing organ insists on such a request, then the applicant may apply for an administrative review or file an administrative litigation.***

Article 4

The third sentence in proposed Article 4 pertains to "[a]nyone who, as required by work, needs to borrow, copy or extract" confidential information submitted in the application process. This sentence should be revised to be limited to persons who are permitted access in accordance with the requirements of Article 6 to clarify that the scope of permitted access should be limited to specific persons, and persons unrelated to the performance of corresponding duties or any other third party shall not be allowed to have access. IPO therefore recommends the following revisions to Article 4:

> ***4. Strengthening management of confidential archives.*** *Administrative licensing organs shall establish sound management systems for confidential archives. For paper materials containing trade secrets and confidential business information, the filed archives thereof shall be marked on the front cover; and for electronic information containing trade secrets and confidential business information, documents thereof shall be marked and encrypted. ~~Anyone~~ Any* ***person*** *who, as required by work* ***and as permitted in accordance with Article 6****, needs to borrow, copy or extract any filed materials containing* ***undisclosed information,*** *trade secrets, and confidential business information shall not do so without going through approval procedures and making detailed records, while no one will privately borrow, copy or extract any archive materials containing* ***undisclosed information,*** *trade secrets, and confidential business information. Where any archive materials with* ***undisclosed information,*** *trade secrets, and confidential business information need to be taken out, a special person shall be designated to take charge, and necessary security measures shall be taken.*

Article 5

Article 5 addresses protection of confidential materials that are subject to third-party evaluation (e.g., by appointed experts). Article 5 should more clearly implement Article 1.9(d) of the Phase One Agreement, which provides that China "ensure that no third party experts or advisors who compete with the submitter of the information or have any actual or likely financial interest in the result of the investigative or regulatory process have access to such information." First, we recommend that, in addition to non-disclosure requirements,

there should also be a restriction on the third party's use of the applicant's undisclosed information, trade secrets, or confidential business information. That is, the third-party evaluator can only use applicant's undisclosed information, trade secrets, or confidential business information for the purpose of the evaluation for the particular application, and no other purpose. Second, because applicant's materials often contain competitively sensitive information, the third-party evaluator needs to be a neutral, non-interested party, and not be a competitor to the applicant.

Third, for purposes of transparency, and to allow applicants notice and opportunity to object, the identity of the third-party evaluator should be made known to the applicant, and the applicant should be afforded opportunity to object prior to disclosure to the third-party evaluator. As mentioned in the "General Comments," we also recommend that the same principle and language from Article 7 be incorporated into Article 5 prior to disclosure of confidential information to third-party evaluators. IPO therefore proposes the following revisions to Article 5:

> *Where any submitted materials subject to third-party evaluation contain* ***undisclosed information,*** *trade secrets, or confidential business information, administrative licensing organs shall sign confidentiality agreements with corresponding evaluation bodies, which shall specify the scope, term,* ***use restriction only for the purpose of the evaluation,*** *and obligation of confidentiality, and liability for breach of confidentiality agreement to prevent such evaluation bodies from making public, disclosing,* ***using,*** *or trading any* ***undisclosed information,*** *trade secrets or confidential business information learned by them. Where administrative licensing organs engage relevant experts to participate in demonstration meetings, such organs shall sign confidentiality agreements with said experts to specify corresponding confidentiality obligations and responsibilities.* ***The third-party evaluator shall be a neutral and non-interested entity, and shall not be a competitor to the applicant. Applicant shall be notified of the identity of the third-party evaluator, and will have a reasonable period to object if such third-party evaluator is not a neutral and non-interested entity, or is a competitor of applicant.***
>
> ***Before administrative licensing organs make public or disclose to a third-party evaluator any undisclosed information, trade secrets, or confidential business information according to law, right holders of the undisclosed information, trade secrets, or confidential business information shall be allowed to raise their objections within a reasonable time limit; and where such right holders believe their legitimate rights and interests are violated by the acts of the administrative licensing organs, the right holders may, according to law, apply for an administrative review or file an administrative litigation.***

Article 7

The proposed Article 7 provides that "[w]here any government information subject to an application for government information disclosure contains any trade secret or confidential business information, the administrative licensing organ may refuse to make the disclosure." This article should clarify that government information disclosure also may

contain "undisclosed information" as well as trade secret or confidential business information. Furthermore, this article should clarify the circumstances when the administrative licensing agency can decide to make the disclosure, and should specify the criteria to be used by the administrative licensing organ in making this decision. Also, Article 7 should explain or give examples of what is intended by the "major public interest" situation mentioned in Article 7 in order to make clear that this exception should only be used in limited circumstances.

Article 8

The proposed Article 8 provides that where administrative licensing organs need to share information with other administrative organs, confidential information contained in the shared information "**shall be** processed in such a way to prevent disclosure thereof during information sharing" (emphasis in bold).

IPO believes that it is critical that administrative organs take appropriate action to prevent disclosure of undisclosed information, trade secrets, or confidential business information. This is consistent with the stated objectives of the Guiding Opinions Draft to further strengthen the protection of confidential information submitted during administrative licensing process and effectively safeguard the legitimate rights and interests of market entities. This is also consistent with Article 1.9(b) of the Phase One Agreement, which provides that China shall "limit access to submitted information to only government personnel necessary for the exercise of legitimate investigative or regulatory functions." To this end, we recommend that stronger terminology be used to direct the administrative organs to process trade secret information in such a manner to prevent disclosure. In addition, it should be expressly mandated that the requirements for confidentiality protection under the Guiding Opinions apply across all inter-agency sharing of applicant's confidential information. Therefore, IPO suggests the following revision:

> *Where administrative licensing organs need to share information with other administrative organs in administrative penalty, administrative coercion, administrative inspection and other administrative enforcement acts, the* ***undisclosed information,*** *trade secrets****,*** *and confidential business information contained in the shared information* ~~*shall*~~ ***must*** *be processed in such a way to prevent disclosure thereof during information sharing* ***pursuant to the requirements under these Guidelines****. If such trade secrets and confidential business information cannot be processed, the licensing organs shall explicitly require the other organs to strengthen confidentiality management and assume corresponding confidentiality obligations and responsibilities* ***pursuant to the requirements under these Guidelines****.*

Article 9

The proposed Article 9 provides that "[a]dministrative licensing organs will strengthen confidentiality education and management among the staff to specify their confidentiality obligations and responsibilities." In view of the obligations in Article 1.9 of the Phase One agreement, the education specified in the proposed Article 9 should include periodically educating staff about the civil and criminal penalties that may be imposed for the unauthorized disclosure of undisclosed information, trade secret, or confidential business information by employees of that administrative licensing organ, as well as

periodic updates to staff of any criminal prosecutions and penalties that have been imposed on any employees of administrative licensing organs throughout China. Therefore, IPO suggests the following revision:

> *9.* ***Intensifying confidentiality obligations****. Administrative licensing organs will strengthen confidentiality education and management among the staff to specify their confidentiality obligations and responsibilities. Any administrative licensing organ or staff thereof shall not disclose, use or allow others to use such* ***undisclosed information,*** *trade secrets, and confidential business information in their possession in violation of their confidentiality obligations or requirements of the right holders for keeping* ***undisclosed information,*** *trade secrets, and confidential business information confidential, shall not condition the grant of administrative licenses on transfer of any trade secret or confidential business information, shall not directly or indirectly require any right holder to transfer any* ***undisclosed information,*** *trade secret, or confidential business information in the implementation of administrative licensing, and shall not disclose any* ***undisclosed information,*** *trade secret, or confidential business information to any third-party expert or consultant who competes with the right holders or has financial interests in relevant investigation or supervision results.* ***The education should include periodic reminders of the civil and criminal penalties that may be imposed for the unauthorized disclosure of undisclosed information, trade secret, or confidential business information by employees of the administrative licensing organ, as well as periodic updates on any criminal prosecutions and penalties that have been imposed on any employees of administrative licensing organs throughout China.***

Article 10

The proposed Article 10 provides that violations shall be subject to "punishment in accordance with law and discipline" and shall be subject to criminal prosecutions "where such acts constitute a crime." These statements are valuable, although it is not clear the extent to which they reflect current practice. To better implement Article 1.9(f) of the Phase One Agreement, IPO suggests adding language in the beginning of Article 10 to leverage the experience of the administrative organs in drafting the required legal changes. The criminal, civil, and administrative penalties that are proposed and implemented should be adequate to deter unauthorized disclosure. Therefore, IPO suggests the following revision:

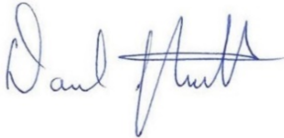
> ***10. Practicing accountability. Administrative organs should provide administrative penalties, including the suspension or termination of employment, for the unauthorized disclosure of undisclosed information, trade secret, or confidential business information. Administrative organs should recommend changes to the criminal and civil laws that would be specifically applicable to the employees of that administrative organ to provide penalties, including monetary fines and imprisonment, for the unauthorized disclosure of undisclosed information, trade secret, or confidential business information****. Where any administrative organs or staff thereof divulge any* ***undisclosed information,*** *trade secret, or confidential business information in their possession in violation of confidential obligations and responsibilities by way of abuse of authority, negligence of duty, or self-seeking misconduct, the administrative organs or staff thereof shall be subject to punishment in accordance with law and discipline; where such acts constitute a crime, persons concerned shall be prosecuted for their*

> *criminal liability according to law. If any other natural person, legal person or unincorporated organization that infringes upon any trade secrets or confidential business information of right holders in violation of the provisions of the Anti-Unfair Competition Law of the People's Republic of China the corresponding responsibility shall be investigated according to law.*

We thank the Ministry of Justice for this opportunity to comment, and we welcome further dialogue and opportunity to provide additional comments.

We have enclosed this letter as translated herewith.

Sincerely,



Daniel J. Staudt
President

Attachment