

中华人民共和国国务院令

第 485 号

People's Republic of China State Council

Ordinance No. 485

《商业特许经营管理条例》

已经 2007 年 1 月 31 日国务院第 167 次常务会议通过，现予公布，自 2007 年 5 月 1 日起施行。

"Commercial Franchise Administration Regulation"

adopted on January 31, 2007 at 167th Regular Meeting of the State Council, in effect from May 1, 2007.

Translation and notes by

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Readers should be aware that both legally and linguistically the only authoritative text of the Regulation is the Chinese version. A translator is often required to make imperfect choices in preparing a translation. A translation is thus also an interpretation of the Regulation. For this reason we have included the original Chinese text. This translated text has been provided as a guide only. For more complete answers with regard to the interpretation of this Regulation readers should consult the Chinese text and a lawyer familiar with the two languages and the two systems of law. Thanks are due to 王之琼 (June Wang) of the University of New South Wales, Australia; 吴小燕 (Helen Wu) of the University of Toronto; 黎红涛 (Tony Li) of Beijing and Toronto; 蒋五四 (Peter Jiang) of Beijing; 汤艾菲 (Margaret Tang) of Guangzhou and 姚军 (Brian Yao) of Beijing Normal University at Zhuhai for their assistance with this translation. The errors however are ours.

Note Regarding Interpretation in General and the Disclosure Requirements in Particular

Paul Jones

The People's Republic of China is a civil law jurisdiction, as are several other Asian countries such as Japan and Thailand. In 1902, following the coming into force of Germany's Bürgerliches Gesetzbuch (BGB or Civil Code) in 1900, officials of the Qing Dynasty started work on a new civil code patterned after the German model.¹ A draft was presented to the Emperor on October 26, 1911 just before the end of the dynasty, but it was never adopted. It was not until 1929-30 that a similar form of civil code was promulgated under the 国民党 (Guomindang) administration in Nanjing.

There are a number of ways in which civil law differs from common law. One of the primary differences is that in civil law systems law is developed from broad general principles using deductive reasoning. In common law systems law is developed primarily from decided cases to form more general principles. China has been slowly developing the general principles of its new legal system, and to date has adopted general laws on obligations and contracts, and on property rights.

In China regulations, including Tiaoli (regulations such as this one) emanating from the State Council, must be interpreted in accordance with the relevant laws stating the general principles for all contracts and obligations. In this regard Article 42 of the 合同法 (Hetong Fa or Contract Law)² that came into force on October 1, 1999 provides as follows:

第四十二条 当事人在订立合同过程中有下列情形之一，给对方造成损失的，应当承担损害赔偿责任：（一）假借订立合同，恶意进行磋商；（二）故意隐瞒与订立合同有关的重要事实或者提供虚假情况；（三）有其他违背诚实信用原则的行为。（“Article 42 In the making of a contract, the party that falls under any of the following circumstances, causing thus loss to the other party, shall hold the liability for the loss. (1) engaging in consultation with malicious intention in name of making a contract; (2) concealing intentionally key facts related to the making of a contract; (3) taking any other act contrary to the principle of good faith.”³)

¹ Philip C.C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001) at 16.

² Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999.

³ Translation from the bilingual edition of *Contract Law of the People's Republic of China (Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999)* published by Law Press, Beijing, China, 1999.

The phrase “重要事实” (zhongyao shishi) is here translated as “key facts,” but is more commonly translated as “material facts”.

This provision is based on the civil law doctrine of *culpa in contrahendo* (or “fault in negotiating”) as first developed by Rudolf von Jhering⁴ and that was later added to Germany’s BGB in 2002 by amendments to Articles 241(2) and 311.⁵ In China this doctrine first appeared in the 中华人民共和国合同法 (Zhonghua Renmin Gongheguo Jingji Hetong Fa – People’s Republic of China Economic Contract Law)⁶ that was repealed on the adoption of the Contract Law in 1999.

This principle is the opposite of the common law doctrine for contract formation of *caveat emptor* or “buyer beware.” The differences in the legal systems can be illustrated by decisions on this issue from Canada’s Supreme Court. In a case⁷ arising from a common law province the court said:

In many if not most commercial negotiations, an advantageous bargaining position is derived from the industrious generation of information not possessed by the opposite party as opposed to its market position as here. Helpful information is often a by-product of one party expending resources on due diligence, research or other information gathering activities. It is apparent that successful negotiating is the product of that kind of industry.

It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party’s failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive

⁴韩世远 (Han Shiyuan), “我国合同法中的缔约上过失问题研究 (Wo Guo Hetong Fa Zhongde Diyue Shang Guo Shi Wenti Yanjiu – Study of Liability for Fault in Negotiating in Our Country’s Contract Law), 3 法学家 (Faxue Jia – Jurist) 2004.,

⁵ The doctrine was first expounded in “Culpa in Contrahendo, oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen” (Culpa in Contrahendo or Damages for Void or Unperfected Contracts), in 4 *Jahrbücher Für Die Dogmatik Des Heutigen Römaischen Und Deutschen Privatrechts* [Yearbooks of the Dogmatics of the Modern Roman and German Private Law] 1(1861). Friedrich Kessler and Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom to Contract: A Comparative Study*, 77 *Harvard Law Review* 401, at pp. 401-9 (1964) as cited in E. Allen Farnsworth, *Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws*, Universität Köln, available online at http://fdb.uni-koeln.de/php/pub_show_document.php?pubdocid=122100.

⁶ Adopted at the 4th Session of the Fifth National People’s Congress on December 13, 1981. See Article 16(1).

⁷ *Martel Building Ltd. v. Canada*, 2000 SCC 60; [2000] 2 S.C.R. 860; (2000), 193 D.L.R. (4th) 1; (2000), 186 F.T.R. 231.

advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining....⁸

We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may well be a set of circumstances in which a duty of care may be found, it has not yet arisen.

As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law.⁹

However in an earlier contract case¹⁰ governed by Québec's Civil Code the court said that "The obligation to inform is now well established in Quebec law." Further it stated that:

The advent of the obligation to inform is related to a certain shift that has been taking place in the civil law. While previously it was acceptable to leave it to the individual to obtain information before acting, the civil law is now more attentive to inequalities in terms of information, and imposes a positive obligation to provide information in cases where one party is in a vulnerable position as regards information, from which damages may result. The obligation to inform and the duty not to give false information may be seen as two sides of the same coin. As I noted in *Laferrière v. Lawson, supra*, both acts and omissions may amount to fault, and the civil law does not make a distinction between them. Like P. Le Tourneau, "De l'allègement de l'obligation de renseignements ou de conseil", D. 1987. Chron., p. 101, however, I would add that the obligation to inform must not be defined so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs.¹¹

Some common law jurisdictions have used concerns about inequalities in terms of information where one party is a vulnerable position as regards information, as cited above in the civil law decision, to adopt laws protecting purchasers from the full effect of the *caveat emptor* doctrine. Laws regarding the sale of investment securities are one example of this phenomenon. Franchise disclosure legislation is another example. In common law jurisdictions such franchise disclosure legislation can be read narrowly as an exception to the general rule of *caveat emptor* regarding negotiation of a contract, and because common law rules are generally read in such manner.

⁸ *Ibid.*, paragraphs 66 and 67.

⁹ *Id.*, paragraphs 72 and 73.

¹⁰ *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554; (1992), 93 D.L.R. (4th) 490.

¹¹ *Ibid.*, p. 44.

However such narrow interpretations of disclosure requirements in particular are not appropriate in civil law in general, and in Chinese law in particular, as is illustrated by the cases below.

German courts have applied the doctrine of *culpa in contrahendo* to impose an obligation to disclose all material facts on franchisors. See for example the decision of the Landgericht Kaiserslauten in Aktenzeichen 4 O 607/00, 26 Mai 2004:

Die Klägerin hat aus dem Gesichtspunkt der *culpa in contrahendo* wegen Verletzung vorvertraglicher Aufklärungs- und Informationspflichten einen Anspruch gegen die Beklagte auf Schadensersatz. Der Franchisegeber hat bei Verhandlungen über den Abschluss eines Vertrages die Verpflichtung, den anderen Teil über Umstände aufzuklären, die zur Vereitelung des Vertrages zweckgeeignet sind und für die Entschließung des anderen Teils von wesentlicher Bedeutung sind (vgl. OLG Rostock 1996, 13 ff. m. w. N.). Zu solchen Umständen gehören, ohne dass es weiterer Begründung bedarf, insbesondere Angaben über die Gewinnerwartung und Rentabilitätsberechnung.

(The Plaintiff has a claim against the Defendant based on the doctrine of *culpa in contrahendo* because of its breach of its pre-contractual duty to provide education and information, which breach gives rise to compensation. Before concluding a contract the Franchisor has an obligation to explain to the other party facts that would thwart the purpose of the contract and that are of substantial importance to the other party in the resolution of the negotiations (see Rostock 1996, ff. m.w.N.). Such circumstances include particularly, without further justification, information regarding expected profits and financial feasibility.
Translation by Paul Jones).

Québec has updated its Code civil (*Code civil du Québec*, L.Q., 1991, c. 64) and now requires that all contracts be negotiated in good faith:

6. Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi.

7. Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi.

1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

(6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished. *Translation from the bilingual version of the Civil Code.*)

And in Québec the courts have applied this doctrine in a manner similar to the courts in Germany. For example the decision in *Cadieux c. St-A. PhotoCorporation*, Cour supérieure, 9 avril 1997 the court said:

La bonne foi est le fondement de toute relation contractuelle. Elle doit gouverner la conduite des parties...La réticence ou l'omission de lui révéler la réalité entourant le studio a vicié le consentement donné: ce motif justifie l'annulation du contract de franchise et le remboursement des sommes versées.

(Good faith is the basis of all contractual relations. It should govern the conduct of the parties...The hesitation or omission of the defendant [franchisor] to reveal the reality regarding the studio vitiated the consent given: this justifies the annulment of the franchise agreement and the reimbursement of payments made. *Translation by Paul Jones*)

Neither Germany nor Québec have adopted franchise disclosure legislation. In the case of Québec the government has considered this option but decided that the provisions of the *Code Civil* offer sufficient protection.

Finally in a Chinese case under the previous Franchise Measures, 黄海燕 (Huang Haiyan) v. 北京汉森美容有限公司 (Beijing Hansen Cosmetology Limited Co.)¹², the Beijing court stated:

该信息披露义务的要旨在于使加盟商能够在掌握了各种信息的程度上作出正确的判断，是决定加盟商能否客观认识特许经营权及能否公平交易的基础。信息披露的目的在于防止欺诈、促进公众的整体利益和促进投资分析。因此，在特许经营中，特许人违反信息披露义务，也构成欺诈。(The essence of the duty to disclose is to enable the prospective franchisee to decide whether it understands the business objectives and its rights, and whether the franchise offer is fair. The goal of such disclosure is to prevent fraud and therefore to promote investment analysis and the general public welfare. Therefore in franchising if a franchisor violates the disclosure requirement, this also constitutes fraud.) (Translation by Paul Jones).

¹²北京朝阳区人民法院 (Beijing Chaoyang District People's Court) (2005) 朝民初字第 24486.

Accordingly franchisors in China should take into account the provisions of Article 42 of the Contract Law and the doctrine of *culpa in contrahendo* when interpreting the disclosure provisions of the Regulation and preparing disclosure documents pursuant to Articles 20-23. The franchise regulations and measures must be interpreted in accordance with the general principles expressed in the law and the doctrine.

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现予公布，自 2007 年 5 月 1 日起施行。

"Commercial Franchise Administration Regulation" adopted on January 31, 2007 at
167th Regular Meeting of the State Council, in effect from May 1, 2007.

总 理 温家宝
Premier Wen Jiabao

二〇〇七年二月六日
On February 6, 2007

商业特许经营管理条例 Commercial Franchise Administration Regulation

第一章 总 则 First Chapter - General Principles

第一条 为规范商业特许经营活动，促进商业特许经营健康、有序发展，维护市场秩序，制定本条例。

Article 1 – This Regulation has been promulgated for the purposes of regulating commercial franchising activities, to promote the healthy and orderly development of commercial franchising, and to maintain market order.

第二条 在中华人民共和国境内从事商业特许经营活动，应当遵守本条例。

Article 2 – Commercial franchising activities conducted within the territory of the People's Republic of China shall comply with this Regulation.¹³

¹³ Under the principle of “one country, two systems” the Hong Kong and Macau Special Administrative Regions have their own separate legal systems, even though they are within the territory of the People’s Republic of China. Article 5 of the basic laws of the two regions state that “The socialist system and

第三条 本条例所称商业特许经营（以下简称特许经营），是指拥有注册商标、企业标志、专利、专有技术等经营资源的企业（以下称特许人），以合同形式将其拥有的经营资源许可其他经营者（以下称被特许人）使用，被特许人按照合同约定在统一的经营模式下开展经营，并向特许人支付特许经营费用的经营活动。

企业以外的其他单位和个人不得作为特许人从事特许经营活动。

Article 3 – In this Regulation a commercial franchise (hereafter referred to as a “franchise”), refers to an arrangement whereby an enterprise¹⁴ (hereafter referred to as a “franchisor”) through an agreement grants other operators (hereafter referred to as the “franchisees”) the right to use its business operating resources, including registered trademarks, logos, patents, and proprietary technologies; whereby the franchisee conducts business under a uniform mode of operation; and whereby the franchisee pay franchise fees according to the agreement.

No entity or individual other than an enterprise may conduct business as a franchisor.

第四条 从事特许经营活动，应当遵循自愿、公平、诚实信用的原则。

Article 4 – Persons engaged in franchising shall follow the principles of voluntariness, fairness, honesty and good faith.

第五条 国务院商务主管部门依照本条例规定，负责对全国范围内的特许经营活动实施监督管理。省、自治区、直辖市人民政府商务主管部门和设区的市级人民政府商务主管部门依照本条例规定，负责对本行政区域内的特许经营活动实施监督管理。

Article 5 –The commercial administrative department under the State Council¹⁵ shall be responsible for the supervision and administration of franchising activities nationwide in accordance with this Regulation. The commercial departments of the governments of provinces, autonomous regions, and municipalities directly under the central

policies shall not be practiced in the [Hong Kong or Macau respectively] Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.” Accordingly this Regulation does not apply in Hong Kong SAR and Macau SAR.

¹⁴ 企业 (qiye) is a general term that can be translated as “enterprise, corporation, establishment or business.” Because in the second paragraph of this Article the draftsman has contrasted it with the word “个人” (geren or “individual”) it is translated in this Regulation as meaning a fictive legal entity such as a corporation or other entity.

¹⁵ Currently also known as the Ministry of Commerce (“MOFCOM”). Its primary office is at No.2 Dong Chang'an Avenue, Beijing 100731. It has a web site at www.mofcom.gov.cn. It is probably referred to in this abstract manner to provide for re-organizations and any ensuing change in name of the relevant ministry. This has occurred previously as China’s government is evolving quickly. For simplicity in this document we have translated this reference as “Commerce Department.”

government¹⁶ shall be responsible for administrative supervision and the management of franchising activities in their respective territories in accordance with this Regulation.

第六条 任何单位或者个人对违反本条例规定的行为，有权向商务主管部门举报。商务主管部门接到举报后应当依法及时处理。

Article 6 - Any legal entity or individual has the right to report violations of this Regulation to a commerce department. Upon receipt of such reports the relevant commerce department shall deal with the report in a timely manner and in accordance with the law.

第二章 特许经营活动 **Second Chapter – Franchising Activities**

第七条 特许人从事特许经营活动应当拥有成熟的经营模式，并具备为被特许人持续提供经营指导、技术支持和业务培训等服务的能力。

特许人从事特许经营活动应当拥有至少 2 个直营店，并且经营时间超过 1 年。

Article 7 - To be engaged in franchising a franchisor shall have¹⁷ a mature business model, and shall be able to provide franchisees with continuous operational guidance, technical support, training and other services.

For a franchisor to be engaged in franchising it must have at least 2 directly-operated company-owned stores and have operated them for at least 1 year.¹⁸

¹⁶ The second level of government in China consists of 22 provinces (Heilongjiang, Jilin, Liaoning, Hebei, Henan, Anhui, Shandong, Jiangsu, Zhejiang, Shanxi, Shaanxi, Hubei, Hunan, Jiangxi, Fujian, Guangdong, Hainan, Sichuan, Yunnan, Guizhou, Gansu and Qinghai); five autonomous regions (Ningxia, Inner Mongolia, Guangxi, Xinjiang and Tibet); and four municipalities directly under the authority of the central government (Beijing, Tianjin, Shanghai and Chongqing). China is a unitary state and there is accordingly only a limited division of powers compared to what is found in federal states such as Canada, Germany and the United States. Each subordinate level of government can exercise the same powers as the national level (with certain exceptions) provided that they do not contradict or conflict with the laws and regulations adopted by a superior level of government. See China's 宪法 (xian fa or Constitution) and in particular Article 100, and the 中华人民共和国立法法 (Zhonghua Renmin Gongheguo Lifa Fa – Legislation Law of the People's Republic of China, adopted at the Third Session of the Ninth National People's Congress on March 15, 2000 that came into force on July 1, 2000, and in particular Chapter 2 of that Law.

¹⁷ The Chinese word “拥有”(yongyou) in this context can mean both “own” and “be able to provide.” Accordingly we have chosen to translate it as “have.”

¹⁸ Chinese does not have verb tenses as do English or French, and concepts of past actions are conveyed through “aspect” and context. But on this wording a native speaker of Chinese would assume that the franchisor is currently required to own and operate the two locations for more than one year. Thus a franchisor that has in the past owned and operated the required locations, but does not now own or operate them, would not be qualified. The term “直营店” (zhi ying dian) is a term developed in China as part of an effort to distinguish different types of chain stores.

第八条 特许人应当自首次订立特许经营合同之日起 15 日内，依照本条例的规定向商务主管部门备案。在省、自治区、直辖市范围内从事特许经营活动的，应当向所在地省、自治区、直辖市人民政府商务主管部门备案；跨省、自治区、直辖市范围从事特许经营活动的，应当向国务院商务主管部门备案。

Article 8 – In accordance with the provisions of this Regulation a franchisor shall register¹⁹ at the relevant commercial department within 15 days after signing its first franchise agreement. In provinces, autonomous regions, and directly-administered municipalities the franchisor shall register at the section of the local department of commerce that is in charge of franchising. Where the franchise is inter-provincial, or engages in franchising in another area such as an autonomous region or directly-administered municipality, the franchisor shall register with the commerce department of the State Council.

特许人向商务主管部门备案，应当提交下列文件、资料：

In order to register the franchisor shall submit to the relevant commerce department the following documents and the materials:

（一）营业执照复印件或者企业登记（注册）证书复印件；

(1) a copy of its business license or a copy of its enterprise registration certificate;²⁰

（二）特许经营合同样本；

(2) a standard form of franchise agreement;

（三）特许经营操作手册；

(3) the franchise operating manual;

（四）市场计划书；

(4) its marketing plan;

（五）表明其符合本条例第七条规定的书面承诺及相关证明材料；

¹⁹ The Chinese phrase “备案” (bei an) literally means to “set up a file” or “set up a record” and this Article is often translated accordingly. However we feel that in this context, and for a non-Chinese audience, the word “register” better conveys the meaning, as there are significant consequences for failing to “set up a file.”

²⁰ In accordance of the regulations of Corporation Law and the provisions of the State Administration for Industry & Commerce, an enterprise shall operate its business strictly in accordance with the business scope stipulated in their articles of incorporation. Before applying for their registration with the local administrations, the enterprises shall obtain the permission or registration first from the authority if there is an approval process or a record requirement when operating a special industry.

(5) a written undertaking that the franchisor complies with the requirements for franchisors as set out in Article 7 of this Regulation and other relevant evidence of compliance;²¹

(六) 国务院商务主管部门规定的其他文件、资料。

(6) other documents and materials prescribed by the commercial administrative department of the State Council.

特许经营的产品或者服务，依法应当经批准方可经营的，特许人还应当提交有关批准文件。

If the products or services of the franchise system are required by law to have other authorizations before they can be sold or provided, the franchisor shall also submit such authorizations or certificates.

第九条 商务主管部门应当自收到特许人提交的符合本条例第八条规定的文件、资料之日起 10 日内予以备案，并通知特许人。特许人提交的文件、资料不完备的，商务主管部门可以要求其在 7 日内补充提交文件、资料。

Article 9 – The relevant commerce department shall register the franchisor within 10 days of the date that they have received all the documents by Article 8, and then notify the franchisor. If the submitted documents and materials are incomplete, the relevant commerce department shall require the franchisor to submit supplementary documents and materials within seven days.

第十条 商务主管部门应当将备案的特许人名单在政府网站上公布，并及时更新。

Article 10 – The relevant commerce department shall post the name of the registered franchisor on the list of franchisors on a government website, and update such information in a timely manner.

第十一条 从事特许经营活动，特许人和被特许人应当采用书面形式订立特许经营合同。

特许经营合同应当包括下列主要内容：

Article 11 –, The franchisor and the franchisee shall use a written form of franchise agreement when engaging in franchising.

²¹ A copy of one form of such undertaking is attached as Annex 1 to our translation of the Commercial Franchise Registration Administrative Measures.

The franchise agreement shall contain the following provisions:

- (一) 特许人、被特许人的基本情况;
- (1) the franchisor's and the franchisee's basic information;
- (二) 特许经营的内容、期限;
- (2) franchising provisions and the term of the agreement;
- (三) 特许经营费用的种类、金额及其支付方式;
- (3) the types of franchise fees, the amounts to be paid and the method of payment;
- (四) 经营指导、技术支持以及业务培训等服务的具体内容和提供方式;
- (4) specific provisions regarding the standards of operation for the franchised business, the technical support to be provided by the franchisor and the training services to be provided and how these will be delivered;
- (五) 产品或者服务的质量、标准要求和保证措施;
- (5) the standards for the quality of the products or services and quality guarantees, and how these will be monitored and maintained;
- (六) 产品或者服务的促销与广告宣传;
- (6) how the promotion and advertising of the products or services will be conducted;
- (七) 特许经营中的消费者权益保护和赔偿责任的承担;
- (7) provisions regarding the protection of consumer rights and interests by the franchisee and franchisor and allocation of responsibilities and liabilities for compensation;
- (八) 特许经营合同的变更、解除和终止;
- (8) provisions regarding amendment, cancellation and termination of the franchise agreement;
- (九) 违约责任;
- (9) default provisions and liability;²²

²² Or more literally "liability for breach of contract."

(十) 争议的解决方式;

(10) dispute settlement mechanisms;

(十一) 特许人与被特许人约定的其他事项。

(11) other provisions which the franchisor and franchisee have agreed upon.

第十二条 特许人和被特许人应当在特许经营合同中约定，被特许人在特许经营合同订立后一定期限内，可以单方解除合同。

Article 12 – The franchisor and the franchisee shall provide in the franchise agreement that for a certain period of time after signing the franchise agreement the franchisee may unilaterally terminate the franchise agreement.

第十三条 特许经营合同约定的特许经营期限应当不少于 3 年。但是，被特许人同意的除外。

特许人和被特许人续签特许经营合同的，不适用前款规定。

Article 13 – The franchise agreement shall have a minimum term of three years. But it may be shorter if the franchisee agrees.

This Article does not apply to the extension or renewal of an agreement between a franchisor and a franchisee.

第十四条 特许人应当向被特许人提供特许经营操作手册，并按照约定的内容和方式为被特许人持续提供经营指导、技术支持、业务培训等服务。

Article 14 – The franchisor shall provide a franchise operating manual to the franchisee, and provide continuing operational guidance, technical support, business training and other services to the franchisee in accordance with the franchise agreement.

第十五条 特许经营的产品或者服务的质量、标准应当符合法律、行政法规和国家有关规定的要求。

Article 15 – The quality and standard of the products and services supplied by the franchise system shall be in accordance with the law, the relevant administrative rules and regulations and other related governmental requirements.

第十六条 特许人要求被特许人在订立特许经营合同前支付费用的，应当以书面形式向被特许人说明该部分费用的用途以及退还的条件、方式。

Article 16 – If a franchisor requires a franchisee to pay any fees before the parties enter into the franchise agreement, the franchisor shall specify in writing the purpose of such fees, and the conditions and methods for the refund of such fees.

第十七条 特许人向被特许人收取的推广、宣传费用，应当按照合同约定的用途使用。推广、宣传费用的使用情况应当及时向被特许人披露。

特许人在推广、宣传活动中，不得有欺骗、误导的行为，其发布的广告中不得含有宣传被特许人从事特许经营活动收益的内容。

Article 17 – Fees for promotion and marketing of the franchise system shall be applied in accordance with the terms of the franchise agreement. Promotional and marketing expenses shall be promptly disclosed to franchisees.

A franchisor shall not engage in deceit or misleading behavior in the promotion or marketing of the franchise. A franchisor shall not make claims in its advertising about franchisee earnings from their franchise operations.²³

第十八条 未经特许人同意，被特许人不得向他人转让特许经营权。

被特许人不得向他人泄露或者允许他人使用其所掌握的特许人的商业秘密。

Article 18 – A franchisee does not have the right to transfer the franchise to a third person without the consent of the franchisor.

A franchisee shall not reveal or permit other persons to access the franchisor's commercial secrets.

第十九条 特许人应当在每年第一季度将其上一年度订立特许经营合同的情况向商务主管部门报告

Article 19 – A franchisor shall in the first quarter of each year submit a report to the relevant commercial department on the status of the franchise agreements signed during the last year.

第三章 信息披露

Third Chapter - Information to be Disclosed

第二十条 特许人应当依照国务院商务主管部门的规定，建立并实行完备的信息披露制度。

²³ This last sentence could be more literally translated as “A franchisor shall not include information about franchisee earnings from their franchise operations in its advertising.”

Article 20 –Franchisors shall establish and implement a complete²⁴ disclosure system in accordance with the rules of the Commerce Department of the State Council.²⁵

第二十一条 特许人应当在订立特许经营合同之日前至少 30 日，以书面形式向被特许人提供本条例第二十二条规定的信息，并提供特许经营合同文本。

Article 21 – A franchisor shall provide a franchisee with all information required pursuant to Article 22, together with a copy of the franchise agreement, not less than 30 days before signing the franchise agreement.

第二十二条 特许人应当向被特许人提供以下信息：

Article 22 - The franchisor shall disclose to the franchisee the information set out below.²⁶

(一) 特许人的名称、住所、法定代表人、注册资本额、经营范围以及从事特许经营活动的基本情况；

(1) the franchisor's name, place of business, legal representative²⁷, registered capital, the scope of its franchise business and basic information about its franchise activities;

(二) 特许人的注册商标、企业标志、专利、专有技术和经营模式的基本情况；

²⁴ The Chinese word 完备 (wan bei) is translated in some dictionaries as “complete, perfect.” The translation of the Regulation by MOFCOM available at

http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=76667 uses the word “perfect.”

²⁵ In China regulations, including Tiaoli (regulations such as this one) emanating from the State Council, must be interpreted in accordance with the relevant laws. See the “Note Regarding Interpretation in General and the Disclosure Requirements in Particular” at the beginning of this translation. Franchisors thus should take into account the provisions of Article 42 of the Contract Law when preparing disclosure documents pursuant to Article 20 of this Regulation.

²⁶ It should be noted that there is no statement in the Regulation that the list of disclosures in Article 22 is exhaustive of the matters that a franchisor is required to disclose. Regard should be had to the Note at the beginning of this translation. In addition MOFCOM has issued 商务部令 2007 年第 16 号 (Ministry of Commerce 2007 Decree No. 16), 商业特许经营信息披露管理办法 (Commercial Franchise Information Disclosure Administrative Measures) in force May 1, 2007 that provide further guidance in this area, particularly in Article 5.

²⁷ Each corporation in China must have a “法定代表人” (fading daibiao ren) a person with broad powers and potentially significant liability as the agent for the corporation. The name of the person should appear on the business license (营业执照 or yingye zhizhao) of the corporation. This individual can sign for the corporation. It does not refer to the lawyers for the franchisor. For further information see Neal Stender, William Soileau & Yan Zeng, “Representative Roulette- Individual and Corporate Risks & Precautions Affected by China Law Changes,” March 2007 *Amcham China Brief*. Available online at <http://www.orrick.com/fileupload/1146.pdf>.

(2) basic information about the franchisor's registered trademarks, business logos, patents, proprietary technology²⁸ and operational or business format model;

(三) 特许经营费用的种类、金额和支付方式（包括是否收取保证金以及保证金的返还条件和返还方式）；

(3) the type, amount and method of payment for franchise fees, (including whether security deposits are required and the conditions and method of refunding a security deposit);

(四) 向被特许人提供产品、服务、设备的价格和条件；

(4) the costs and the terms and conditions for the products, services and equipment provided by the franchisor;

(五) 为被特许人持续提供经营指导、技术支持、业务培训等服务的具体内容、提供方式和实施计划；

(5) detailed content, delivery methods and implementation plan regarding the continuous services to be provided to the franchisee, including operating guidance, technical support, training and other services;

(六) 对被特许人的经营活动进行指导、监督的具体办法；

(6) detailed method of guidance and supervision regarding the franchisees' operations;

(七) 特许经营网点投资预算；

(7) the investment budget for a²⁹ franchise location;

(八) 在中国境内现有的被特许人的数量、分布地域以及经营状况评估；

(8) the number and location of existing franchise outlets within the territory of China, their distribution by region, and an assessment of their business performance;³⁰

²⁸ The Chinese phrase 专有技术 (zhuan you ji shu) can also be translated as “know how.”

²⁹ Chinese does not have definite and indefinite articles. A number of translators, including those at MOFCOM, have translated this sentence using “the,” thereby implying that the investment budget to be provided should be specific to the location proposed to the franchisee. However we have chosen the indefinite article “a” because the literal translation is “franchise outlet investment budget” and the word “网点” (wang dian) here translated as “outlet” also means “a network of commercial establishments.” In other words it does not appear to be location specific.

³⁰ When the Regulation first appeared there was considerable discussion as to the meaning of the phrase regarding “assessment of business performance.” After the issuance of the Information Disclosure Decree (supra note 11) it became clear that what is required is an earnings or financial performance claim, see Article 5 (VIII)(2). This guidance is in line with the application of Article 42(2) of the Contract Law as

(九) 最近 2 年的经会计师事务所审计的财务会计报告摘要和审计报告摘要；

(9) summaries of the financial statements and audit reports, audited by an accounting firm, for the most recent 2 years;³¹

(十) 最近 5 年内与特许经营相关的诉讼和仲裁情况；

(10) franchise related lawsuits and arbitrated matters for the last five years and their status;

(十一) 特许人及其法定代表人是否有重大违法经营记录；

(11) whether the franchisor or its management legal representative³² have been convicted of serious illegal operations;

(十二) 国务院商务主管部门规定的其他信息。

(12) other information specified by the Commerce Department of the State Council.

第二十三条 特许人向被特许人提供的信息应当真实、准确、完整，不得隐瞒有关信息，或者提供虚假信息。

特许人向被特许人提供的信息发生重大变更的，应当及时通知被特许人。

特许人隐瞒有关信息或者提供虚假信息的，被特许人可以解除特许经营合同。

Article 23 – The information provided by the franchisor to the franchisee shall be true, accurate and complete and shall not conceal any relevant information, or provide any false information.³³

If there is a significant change in the information provided by the franchisor to the franchisee, the franchisor shall promptly inform the franchisee.

referred to in the Note at the beginning of this translation, which prohibits the intentional concealment of material facts related to the making of the contract.

³¹ It is not clear from the Chinese text whether these are fiscal years or calendar years.

³² See note 27, *supra*.

³³ Although the English word “conceal” implies an intent not to disclose something, there are some who interpret the Chinese word “隐瞒” (yinman) as simply requiring the failure to disclose a required item and thus translate this “shall not omit any relevant information.” Therefore it is not clear that a franchisee will have the burden of proving intent on the part of the franchisor in the event of a material omission from a disclosure document. See also the Note at the beginning of this translation regarding the requirements of Article 42 of the Contract Law.

If a franchisor conceals relevant information or provides false information, the franchisee may terminate the franchise agreement.

第四章 法律责任 **Fourth Chapter - Legal Liability**

第二十四条 特许人不具备本条例第七条第二款规定的条件，从事特许经营活动的，由商务主管部门责令改正，没收违法所得，处 10 万元以上 50 万元以下的罚款，并予以公告。

企业以外的其他单位和个人作为特许人从事特许经营活动的，由商务主管部门责令停止非法经营活动，没收违法所得，并处 10 万元以上 50 万元以下的罚款。

Article 24 – Where a franchisor that does not meet the qualifications set out in Article 7(2)³⁴ of this Regulation but nonetheless is engaged in franchising, the relevant Commerce Department shall order it to make payments and remedies to correct the situation, confiscate its illegal gains, impose a fine of not less than RMB 100,000 but not more than RMB 500,000,³⁵ and make a public announcement.

If legal entities or individuals other than a franchisor engage in franchising, the relevant Commerce Department shall order a cessation of such illegal business, confiscate all illegal income and impose a fine of not less than RMB 100,000 but not more than RMB 500,000.³⁶

第二十五条 特许人未依照本条例第八条的规定向商务主管部门备案的，由商务主管部门责令限期备案，处 1 万元以上 5 万元以下的罚款；逾期仍不备案的，处 5 万元以上 10 万元以下的罚款，并予以公告。

Article 25 – Where a franchisor has not registered with the relevant Commerce Department according to Article 8³⁷ of this Regulation, the relevant Commerce Department shall order the completion of such registration within a specified time and impose a fine of not less than RMB 10,000 and not more than RMB 50,000.³⁸ If the franchisor has not registered within the time specified a fine of not less than RMB 50,000 and not more than RMB 100,000³⁹ shall be imposed and a public announcement shall be made.

³⁴ This refers to the requirements to have operated two company-owned locations for one year.

³⁵ From about \$13,000.00 USD to about \$65,000.00 USD at the April 5, 2007 conversion rate.

³⁶ See note 35, *supra*.

³⁷ This refers to the requirement for the franchisor to register within 15 days of the signing of the first agreement.

³⁸ From about \$1,300.00 USD to about \$6,500.00 USD at the April 5, 2007 conversion rate.

³⁹ From about \$6,500.00 USD to about \$13,000.00 USD at the April 5, 2007 conversion rate.

第二十六条 特许人违反本条例第十六条、第十九条规定的，由商务主管部门责令改正，可以处 1 万元以下的罚款；情节严重的，处 1 万元以上 5 万元以下的罚款，并予以公告。

Article 26 – Where the franchisor has not complied with Article 16⁴⁰ or Article 19⁴¹ of this Regulation the relevant Commerce Department shall order such compliance and fine the franchisor up to RMB 10,000. However if the circumstances of the breach are serious the fine shall be not less than RMB 10,000 and not more than RMB 50,000⁴² and a public announcement shall be made.

第二十七条 特许人违反本条例第十七条第二款规定的，由工商行政管理部门责令改正，处 3 万元以上 10 万元以下的罚款；情节严重的，处 10 万元以上 30 万元以下的罚款，并予以公告；构成犯罪的，依法追究刑事责任。

特许人利用广告实施欺骗、误导行为的，依照广告法的有关规定予以处罚。

Article 27 – Where the franchisor has violated the provisions of Article 17(2)⁴³ the Administration for Industry and Commerce⁴⁴ shall order it to correct the matter and impose a fine of not less than RMB 30,000 and not more than RMB 100,000.⁴⁵ If the violation is serious the fine shall be not less than RMB 100,000 and not more than RMB 300,000⁴⁶ and a public announcement shall be made. If the violation constitutes a crime, the franchisor shall be held criminally responsible.

Where a franchisor has used misleading advertising or misleading conduct, the franchisor shall be penalized in accordance with the Advertising Law.⁴⁷

第二十八条 特许人违反本条例第二十一条、第二十三条规定，被特许人向商务主管部门举报并经查实的，由商务主管部门责令改正，处 1 万元以上 5 万元以下的罚款；情节严重的，处 5 万元以上 10 万元以下的罚款，并予以公告。

⁴⁰ This applies where the franchisor requires the payment of fees before the franchise agreement is signed.

⁴¹ This refers to the obligation on the franchisor to annually report the franchise agreements signed during the past year.

⁴² From about \$1,300.00 USD to about \$6,500.00 USD at the April 5, 2007 conversion rate.

⁴³ This refers to the prohibitions on misleading advertising, and using ads that contain representations regarding franchisee profits.

⁴⁴ The name of the national level body is the 国家工商行政管理总局 (Guojia Gong Shang Xingzheng Guanli Zongju - State Administration for Industry and Commerce). See www.saic.gov.cn.

⁴⁵ From about \$4,000.00 USD to about \$13,000.00 USD at the April 5, 2007 conversion rate.

⁴⁶ From about \$13,000.00 USD to about \$39,000.00 USD at the April 5, 2007 conversion rate.

⁴⁷ The full name of the statute is the 中华人民共和国广告法 (Zhonghua Renmin Gongheguo Guanggao Fa) or Advertising Law of the People's Republic of China, adopted at the 10th Meeting of the standing Committee of the Eighth National People's Congress on October 27, 1994, and in force on February 1, 1995.

Article 28 – Where the franchisor has violated Article 21⁴⁸ or Article 23⁴⁹ of this Regulation and the violation is reported by a franchisee to the relevant Commerce Department and the violation has been verified, the relevant Commerce Department shall order the correction and fine the franchisor not less than RMB 10,000 and not more than RMB 50,000.⁵⁰ If the circumstances of the violation are serious the fine shall be not less than RMB 50,000 and not more than RMB 100,000⁵¹ and a public announcement shall be made.

第二十九条 以特许经营名义骗取他人财物，构成犯罪的，依法追究刑事责任；尚不构成犯罪的，由公安机关依照《中华人民共和国治安管理处罚法》的规定予以处罚。

以特许经营名义从事传销行为的，依照《禁止传销条例》的有关规定予以处罚。

Article 29 – Where anyone defrauds others of money or property in the name of franchising, if such activity contravenes the Criminal Code such person shall be held criminally liable. If they are not in contravention of the Criminal Code, they may still be punished by the public security authorities in accordance with the "People's Republic of China Public Security Administrative Punishment Law." ⁵²

Where multi-level marketing activities have been carried on under the name of franchising, the punishment will be in accordance with the "Prohibition of Multi-level Marketing Regulations." ⁵³

第三十条 商务主管部门的工作人员滥用职权、玩忽职守、徇私舞弊，构成犯罪的，依法追究刑事责任；尚不构成犯罪的，依法给予处分。

Article 30 – Where a member of the relevant Commerce Department abuses his power, is derelict in his duties, or engages in malpractice for personal gain,⁵⁴ he shall be investigated and if he has contravened the Criminal Code, held criminally responsible. If the activity is not a contravention of the Criminal Code the employee should still be disciplined in accordance with the law.

⁴⁸ This refers to the requirement to provide a disclosure document at least 30 days before the franchise agreement is signed.

⁴⁹ This refers to the requirement that all information provided shall be true, accurate and complete.

⁵⁰ From about \$1,300.00 USD to about \$6,500.00 USD at the April 5, 2007 conversion rate.

⁵¹ From about \$6,500.00 USD to about \$13,000.00 USD at the April 5, 2007 conversion rate.

⁵² 中华人民共和国治安管理处罚法 (Zhonghua Renmin Gongheguo Zhi'an Guanli Chufa Fa - People's Republic of China Public Security Administrative Punishment Law) adopted at the 17th Session of the Standing Committee of the Tenth National People's Congress on August 28, 2005 and effective as of March 1, 2006.

⁵³ 禁止传销条例 (Jin Zhi Chuan Xiao Tiaoli - Regulations for the Administration of Direct Selling), Order of the State Council No. 444, promulgated by the State Council on August 23 2005 and effective as of November 1, 2005.

⁵⁴ This phrase is also used to refer to "playing favoritism."

第五章 附 则 Fifth Chapter - Supplementary Articles

第三十一条 特许经营活动中涉及商标许可、专利许可的，依照有关商标、专利的法律、行政法规的规定办理。

Article 31 – Franchising activities involving trademark licenses or patent licenses shall comply with the related trademark or patent laws and administrative rules and regulations.

第三十二条 有关协会组织在国务院商务主管部门指导下，依照本条例的规定制定特许经营活动规范，加强行业自律，为特许经营活动当事人提供相关服务。

Article 32 – Related associations and organizations shall, under the guidance of the commerce department of the State Council, establish standards for franchise activities, strengthen self-regulation in the franchise industry, and provide services to persons involved in franchising.

第三十三条 本条例施行前已经从事特许经营活动的特许人，应当自本条例施行之日起1年内，依照本条例的规定向商务主管部门备案；逾期不备案的，依照本条例第二十五条的规定处罚。

前款规定的特许人，不适用本条例第七条第二款的规定。

Article 33 – Franchisors already engaged in franchising prior to the effective date of this Regulation shall register in accordance with the provisions of this Regulation with the relevant commerce department within one year of the effective date of this Regulation. If they have not registered within this time period they shall be punished in accordance with Article 25 of this Regulation.

Franchisors who are already engaged in franchising prior to the effective date of this Regulation are not required to comply with the second paragraph of Article 7⁵⁵ of this Regulation.

第三十四条 本条例自2007年5月1日起施行。

Article 34 - This Regulation shall come into effect on May 1, 2007.

来源：国务院办公厅
Origin: State Council Office

⁵⁵ This refers to the required qualifications to be a franchisor, including the requirement that the franchisor have owned and operated at least two locations for at least one year.