

QUESTIONS AND ANSWERS

Regarding China's New Franchise Regulation

as presented by Members of the
State Council Legislative Affairs Office and the Ministry of Commerce

On February 16, 2007

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Readers should be aware that both legally and linguistically the only authoritative text of this document 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 document. 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 document readers should consult the Chinese text and a lawyer familiar with the two languages and the two systems of law. We have added the footnotes to assist readers unfamiliar with Chinese law.

国务院法制办、商务部负责人就《商业特许经营管理条例》有关问题答中国政府网问

Questions and Answers Regarding the “Commercial Franchise Administration Regulation” as presented by Members of the State Council Legislative Affairs Office and the Ministry of Commerce

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《商业特许经营管理条例》（以下简称《条例》）将于2007年5月1日开始实施。为便于公众更好地理解《条例》的主要内容和精神，日前国务院法制办、商务部负责人接受了中国政府网的采访。

The “Commercial Franchise Administration Regulation” (hereinafter referred to as the “Regulation”) will come into effect on May 1, 2007. In order for the public to better understand this Regulation, members of the Legislative Office of the State Council and of the Ministry of Commerce were interviewed by China Government Web.

问：目前，社会公众对商业特许经营的概念还比较陌生，您能不能介绍一下什么是商业特许经营？

Question: Currently the concept of a franchise is quite new to the public. Could you please first introduce us to the concept?

答：商业特许经营，一般简称为特许经营，有时也叫特许加盟。作为一种营销方式，它是指拥有注册商标、企业标志、专利、专有技术等经营资源的企业也就是特许人，通过订立合同，将其拥有的这些经营资源许可其他经营者也就是被特许人使用，被特许人按照合同约定在统一的经营模式下开展经营，并向特许人支付相应费用的经营活动。从特许经营的概念可以看出，特许经营有四个基本要素：

一是特许人必须是拥有注册商标、企业标志、专利、专有技术等经营资源的企业。特许人如果不具备上述条件，特许经营也就无从谈起。

二是特许人和被特许人之间是一种合同关系。特许人和被特许人是相互独立的市场主体，双方通过订立特许经营合同，确定各自的权利和义务。因此，特许经营本质上是一种民事行为。

三是被特许人应当在统一的经营模式下开展经营。特许经营是一种高度系统化、组织化的营销方式，统一的经营模式是其核心要求之一，也是保证服务的规范性、一致性以及维护品牌形象的需要。这种统一的经营模式体现在各个方面，大到管理、促销、质量控制等，小到店铺的装潢设计甚至标牌的设置等。

四是被特许人应当向特许人支付相应的费用。特许人拥有的经营资源一般都经过了较长时间的开发、积累，具有较高的商业价值。被特许人经许可使用这些经营资源也是为了开展经营活动，因此需要支付相应的费用。支付费用的种类、数额以及支付方式，由双方当事人在合同中约定。

Answer: A commercial franchise is also known as a franchise. It refers to an arrangement whereby an enterprise through an agreement or contract grants other operators the right to use its business operating resources, including its registered trademarks, logos, patents and proprietary technologies, and the franchisees undertake to conduct their business under a uniform mode of operation and to pay the franchise fees according to the agreement. As can be seen from the concept of a franchise a franchise has four essential components.

First of all a franchisor must be an enterprise with one or more registered trademarks or logos, patents or proprietary technologies. If a franchisor does not meet these requirements you do not have a franchise.

Secondly the franchisor and the franchisee must have a contractual relationship. The franchisor and the franchisee are separate legal entities that specify the terms of their relationship in the franchise agreement, and determine their respective rights and obligations. Accordingly franchising is a type of civil conduct.

Thirdly franchisees must conduct their business operations according to a uniform model. A franchise is a highly systematized, highly organized marketing method and a uniform management is one of its core requirements to guarantee the uniform service standard and to maintain the brand image. This kind of uniform management is applied to each aspect of the franchise, such as management, promotion, quality control, style and decoration of the store and even the placement of the trademarks and logos.

Fourthly the franchisees must pay fees to the franchisor. The franchisor owned operating system has accumulated a higher commercial value if the franchise system has been developed over a longer period of time. A franchisee is authorized to use the franchise system to develop its business and therefore the franchisee must pay a related fee. The types of fees and the amount of each as well as the method of payment are mutually agreed upon by the parties in the franchise agreement.

问：如您所指出的，特许经营本质上是一种民事行为。针对这一特点，《条例》在总体思路上有什么考虑？

Question: As you pointed out, franchising is essentially a type of private civil conduct. In view of this characteristic, what are the general issues in the Regulation?

答：特许经营在性质上属于合同行为，适用合同法和其他有关民事法律，从事特许经营活动是当事人的民事权利。如何通过行政法规对特许经营活动进行规范和管理，是制定《条例》时首先要考虑的问题。为此，我们确立了两方面的总体思路：

Answer: Franchising is a type of contractual behavior, so parties should comply with the provisions of the Contract Law and other laws regarding civil¹ matters. They have the right to engage in franchising as part of their civil rights. When formulating the Regulation the primary consideration is how to maintain franchise standards and to manage franchise activities through administrative rules and regulations. Therefore we have followed two general lines of thought.

一是必须把握好行政权力介入民事法律关系的程度，处理好当事人意思自治与行政干预的关系。相关制度设计既要切实加强对特许经营活动的规范和管理，促进特许经营健康、有序发展，维护市场秩序，又要符合当事人意思自治的基本民事法律原则，不限制当事人从事特许经营活动的民事权利，避免因行政干预过度而妨碍特许经营的发展。

Firstly one needs to consider the degree of intervention by the administrative authorities in the private relationships; to balance the relationship between the free will of the parties and administrative regulation. The relevant system of regulation must both strengthen franchise management and standards in a practical manner, thus promoting healthy franchise management, future development and maintain market order, and yet conform to the expectations of the parties regarding their basic civil rights such as free will and self management; yet not limit the right of the parties to be involved in franchising nor excessively hinder the development of franchising because of the administrative intervention.

二是根据国外的有益经验和我国的实际情况，只要特许人的行为规范了，基本上可以达到维护市场秩序的目的。因此，规范特许经营活动，关键在于规范特许人的行为。

按照上述总体思路，《条例》主要规定了规范和管理特许经营活动所必需的具有管理性质的一些制度、措施和要求，并通过严格、明确的法律责任保证其落实；

¹ In this context “civil matters” means non-criminal matters.

对属于民事法律关系，可以由当事人通过合同约定或者事后协商解决的问题，仅作了必要的重申、强调。同时，《条例》所规定的制度、措施和要求，主要是针对特许人的行为所作出的规范。

Secondly based on experiences in other countries and the current situation in China, the goal of market order may be generally achieved by normalizing the conduct of the franchisor. Therefore the key to regulating franchising is to normalizing the franchisor's conduct.

Based on these general considerations, the Regulation has mainly stipulated some necessary rules, measures and requirements that are basic to the normalization and administration of franchising standards and activities, and some explicit legal liabilities to ensure the implementation of these standards. The regulation has only emphasized the essential elements of the standards and left the parties to resolve other issues through contractual agreement as part of their private legal relationship. At the same time the Regulation stipulates measures and requirements primarily to regulate the conduct of franchisors.

问：当前，特许经营活动中存在什么问题？《条例》提出了哪些有针对性的制度和措施？

Question: What are the current problems in franchising? Specifically what is the Regulation supposed to do?

答：由于特许经营的核心是无形资产的输出，一个特许人往往有为数较多的被特许人，特许人和被特许人之间信息不对称，潜藏着较大的风险，容易成为欺诈等违法犯罪活动的手段，加上我国市场发育尚不成熟，社会公众对特许经营的了解不够充分，特许经营在快速发展中也存在一些突出问题。比如，一些从事特许经营活动的特许人不具备相应的条件；特许经营活动不规范，市场秩序较为混乱；特许经营活动当事人特别是被特许人的合法权益得不到有效保障；以特许经营名义进行欺诈等违法犯罪活动时时有发生等。针对这些问题，借鉴国外的做法，《条例》主要确立了五个方面的制度：

Answer: Because the essential element in a franchise system is the benefit of its intangible assets, and a franchisor may often have many franchisees, the franchisor and the franchisee have asymmetrical information and significant risks may be hidden. This inequality makes it easy to conduct illegal or criminal activities in the name of franchising. In addition the market economy in our country has still not matured and the public understanding of franchising is not sufficiently developed, and rapid development of franchising has created some significant problems. For example some franchisors are not qualified to be franchisors, and do not have uniform standards. The market order is chaotic. Franchisors' and especially franchisees' legal rights are not effectively protected and sometimes illegal or criminal activities are conducted in the name of franchising. To

resolve these we observed the experience of other countries, and have established five primary aspects as described below:

一是明确了特许人从事特许经营活动应当具备的条件。具体包括三个方面：第一，只有企业可以作为特许人从事特许经营活动，其他单位和个人不得作为特许人从事特许经营活动；第二，要求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；第三，规定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。第三方面的条件，也就是通常所说的“两店一年”要求，主要目的是为了以防一些企业利用特许经营进行欺诈。同时，直营店具有一定的示范作用，便于其他经营者从直营店的经营中较为直观地了解特许人的品牌、经营模式、经营状况等。

Firstly we specified the requirements for engaging in franchise activities. They include three items:

1. Only an enterprise is allowed to be engaged in franchising activities as a franchisor. No other entities or individuals are allowed.
2. A franchisor must own a well-developed business model, and must be able to provide continuous operational guidance and technical support, business training and other services to the franchisee.
3. A franchisor engaged in franchising activities is required to have owned two locations and directly operated them for more than one year. This third aspect is also known as “two locations for one year.” The main purpose of this requirement is to prevent some enterprises from defrauding others using the franchise concept. At the same time a company-owned location can be a model for prospective purchasers that they can view to better understand the franchisor’s brand, business model and operating status.

二是规定了特许人的信息披露制度。特许人的信息披露，对于保证被特许人及时、全面、准确地了解、掌握有关情况，在充分占有信息的基础上作出适当的投资决策，防止上当受骗，非常关键。因此，有特许经营立法的国家，都把信息披露作为核心制度。《条例》借鉴国际通行作法，专设“信息披露”一章，明确规定特许人应当建立并实行完备的信息披露制度，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有关信息和特许经营合同文本，并明确规定了特许人应当提供的信息内容。《条例》还对特许人提供的信息应当真实、完整、准确，不得遗漏有关信息或者提供虚假信息作出了明确规定。

Secondly we formulated rules regarding the information to be disclosed by the franchisor. The information disclosure by the franchisor is very important for ensuring that a franchisee understands the relevant information promptly, fully and precisely in order to make an appropriate investment decision and to not be deceived. Thus countries that have franchise laws all regard the disclosure provisions as being core items. The Regulation benefits from this international experience, and we included a separate chapter on the information to be disclosed. It requires that the franchisor establish and implement a

system to disclose all relevant information at least 30 days before signing the franchise agreement. It specifies that the information must be disclosed in writing together with a copy of the franchise agreement and stipulates the information that the Franchisor has to provide. The Regulation also clearly requires that the information disclosed by the franchisor be true, complete and accurate, and not omit relevant information or provide false information.

三是确立了特许人备案制度。由于从事特许经营活动是当事人的民事权利，政府不宜对其实行行政许可，但又需要对其经营活动进行监督管理，以维护市场秩序。为了便于商务主管部门及时了解、掌握特许人的数量等有关情况，有针对性地对特许经营活动进行规范、监督，也为了有助于潜在的投资者了解特许人的基本情况，作出恰当的投资决策，同时有利于形成对特许人的社会监督，《条例》确立了特许人备案制度。明确规定特许人应当自首次订立特许经营合同之日起15日内，向商务主管部门备案，并规定了备案的程序以及备案时应当提交的文件、资料。商务主管部门收到特许人提交的符合规定的文件、资料后，应当予以备案，通知特许人，并将备案的特许人名单在政府网站上公布和及时更新。

Thirdly we have established a franchisor registration system.² Because engaging in franchising is a civil right of the parties, it is not appropriate for the government to require that franchisors have the government grant them a license to conduct franchising, but it is necessary for the government to supervise the management practices in order to maintain market order. The Regulation has established the registration system in order for the relevant department of the Ministry of Commerce to know the number of franchisees and other related information promptly; to exercise its regulatory powers effectively; to assist prospective investors in knowing the franchisor's basic information and thus making an appropriate investment decision; and to facilitate to surveillance of franchisors. Franchisors are required to register at the relevant Commerce Department within 15 days of the signing their initial franchise agreement, and the registration process and the documents that are required are set out in the Regulation. The relevant Commerce Department shall register the franchisor after it receives all of the required documents. It will then notify the franchisor and post the name of the franchisor on the list of franchisors on its web site, and keep the information updated in a timely manner.

四是对规范特许经营合同作出了规定。特许经营合同，是明确特许人和被特许人之间权利义务的依据。特许经营活动在实践中出现的不少问题和纠纷，与特许经营合同不够规范有直接关系。为此，《条例》从三个方面作了规定：第一，特许人和被特许人应当采用书面形式订立特许经营合同，并明确了特许经营合同应当包括的主要内容；第二，借鉴其他国家的做法，规定特许人和被特许人应当在特许经营合同中约定，被特许人在合同订立后一定期限内，可以单方解除合同；第三，除被特许人同意的情况外，特许经营合同约定的特许经营期限应当不少于3年。

² The Chinese text literally translates as “established a set up a file system.” We have chosen to use the word “registration” system here to better reflect the nature of the requirement as a whole.

Fourthly we have set out the required provisions for a franchise agreement. A franchise agreement is the basis for defining the rights and obligations of the franchisor and the franchisee. In practice many problems and disputes arise from insufficiently prepared franchise agreements. Accordingly the Regulation has three requirements:

1. The franchisor and the franchisee must use a written form of franchise agreement. The Regulation also sets out the main items in a franchise agreement.
2. Having learned from the procedures in other countries, the franchisor and the franchisee must make provision in the franchise agreement that the franchisee may unilaterally terminate the franchise agreement for a certain period of time after signing it.
3. Unless the franchisee agrees otherwise the franchise agreement shall have a term of not less than three years.

五是规定了特许人和被特许人的行为规范。《条例》针对特许经营活动本身的特点以及实践中存在的主要问题，重点对特许人的行为规范作了规定。比如，特许人应当向被特许人提供特许经营操作手册；特许人应当按照合同约定的用途使用向被特许人收取的推广、宣传费用；特许人在推广、宣传活动中不得有欺骗、误导的行为等。对被特许人的行为规范，《条例》也作了相应规定，主要是被特许人未经特许人同意，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。

Fifthly we have set out a code of conduct for franchisors and franchisees. Taking into consideration the nature of franchising and the main issues that arise in franchise activities, we have focused on establishing standards for the conduct of the franchisor. For example, a franchisor is required to provide an operating manual to a franchisee; any promotion and marketing fee collected by the franchisor from the franchisee shall be applied to the purposes specified in the agreement; a franchisor shall not conduct advertising and promotional activities in a fraudulent or misleading manner etc. The Regulation also specifies certain conduct for franchisees, mainly that a franchisee cannot transfer its franchise rights to others and that a franchisee may not disclose or permit others to use the commercial secrets of the franchisor that it has learned.

问：明确、严格的法律责任是法律制度得以遵守的重要保证，《条例》在这方面作了哪些规定？

Question: Clear and strict liability is important for assuring the implementation of a law or regulation. What are the provisions in the Regulation in this respect?

答：为了保证各项制度切实得以落实，《条例》对特许人不具备相应条件从事特许经营活动、特许人未依照规定向商务主管部门备案、特许人违反有关行为规范以及违反信息披露要求等违法行为，均规定了明确、严格的法律责任。从《条例》

规定的法律责任的种类看，除没收违法所得、罚款等行政处罚外，对构成犯罪的，还要依法追究刑事责任。特别值得注意的是，《条例》针对特许经营活动的特点，规定对特许人的违法行为可以予以公告，通过社会舆论和市场的压力，促使特许人依法办事，改正违法行为。

此外，特许经营活动经常会涉及违约责任或者侵权责任等民事责任，而《条例》所规定的法律责任则主要是违反管理性要求所应当承担的行政责任。这主要是考虑到，民法通则、合同法等有关民事法律对民事责任的承担都有规定，特许经营活动中的民事责任问题应当通过民事法律来解决。因此，《条例》作为行政法规，对于当事人应当承担的民事责任没有作出规定。

Answer: In order to ensure that each provision of the Regulation is implemented, the Regulation has prescribed clear and strict legal liability for unqualified franchisors who engage in franchising; for franchisors who fail to register with the relevant Commerce Department as required by the Regulation; for franchisors who breach the specified norms; and for franchisors who do not comply with the information disclosure requirements.³ The Regulation requires that legal responsibility must be investigated and determined and there are two main types of legal liabilities. There are administrative penalties such as confiscation of the illegal income and the imposition of a fine etc.; and there are criminal liabilities where a criminal offense is committed. Especially worth

³ While the Chinese word “要求” (yaoqiu) is usually translated as “requirements” it can also be translated as “request.” The previous Measures provided in Article 19(9) that “特许人应被特许人**要求**披露的其他信息资料。” This was commonly translated as “the franchisor shall provide other information disclosure materials **requested** by the franchisee” or other variations using the word “request.” In civil law the duty to disclose (as discussed in the Note at the beginning of our translation of the Regulations) is qualified by the duty of the receiving party to ask for the information. In *Les Investissements Stanislas et Patricia Bricka Inc. c. Groupe CDREM Inc.* (Cour d’appel du Québec, 23 juillet 2001) a franchisee brought an action for failing to disclose certain aspects with respect to the financial statements of a corporately-owned location that was being sold to the franchisee. However the evidence was clear that the franchisee had chosen not to ask for the information. He had asked for other information, and it had been properly provided to him. The court said:

La lecture des témoignages me confirme cependant que l’absence de divulgation ne relève pas du dol mais du choix qu’ont fait appelants. Ils n’ont posé la question, estimant que les informations qu’ils avaient en main leur suffisaient. De fait, toutes les données étaient disponibles dès avant à conclusion des contrats.

(Reading the testimony confirmed to me however that the absence of disclosure does not arise out of willful misrepresentation but from the choice made by the appellants. They did not ask the question, thinking that the information that they had in hand was sufficient for them. In effect, they had all the data available before the conclusion of the agreement.

Translation by Paul Jones)

Accordingly this phrase could be referring either to the specifically items that are required to be disclosed pursuant to Article 22 of the Regulation, or to the general duty to disclose based on Article 42 of the Contract Law and set out in Article 23 of the Regulation. It should be noted that in Chapter 4 of the Regulation regarding legal liabilities and penalties for non-compliance the only reference to failing to disclose an item (as opposed to timing and form) is to Article 23.

noting is the fact that the Regulation, in view of the particular nature of franchising, specifies that a public announcement shall be made of the illegal actions of a franchisor so that the franchisor will be encouraged to act in accordance with the law and to cease its illegal activities through public opinion and market pressure.

In addition while franchising activities usually involve both liability for breach of contract and in tort and other civil liabilities, the liabilities in the Regulation are mainly administrative liabilities for the violation of administrative provisions. This mainly because liabilities arising under the General Principles of the Civil Law,⁴ Contract Law⁵ and other civil laws, and civil liabilities arising from franchising activities should be dealt with and resolved under the general civil law. Therefore as an administrative regulation the Regulation does not deal with these civil liabilities.

问：在《条例》施行前有不少特许人已经在从事特许经营活动，对这部分特许人，《条例》的规定是否适用？

Question: Many franchisors have already been engaged in franchising before the effective date of this Regulation. Does the Regulation apply to these franchisors?

答：这个问题的答案是肯定的。无论是《条例》施行前已经从事特许经营活动的特许人，还是《条例》施行后从事特许经营活动的特许人，均适用本《条例》的规定。考虑到实际情况，对于《条例》施行前已经从事特许经营活动的特许人的备案问题，《条例》作出了特殊规定，即特许人应当自本《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。同时，规定对上述特许人不适用《条例》第七条第二款关于“两店一年”的规定。这样处理，比较符合实际情况，也尽量减少了对企业经营活动的限制和影响。

Answer: The answer is definitely yes. The Regulation applies to all franchisors no matter whether they started franchising before or after the effective date. In consideration of the actual situation the Regulation has special provisions for the registration of franchisors who were franchising before the implementation of the Regulation; namely that such franchisors must register in accordance with the Regulation with the relevant Commerce Department within 1 year of the effective date of this Regulation. In addition these franchisors are not required to comply with the second paragraph of Article 7 of the Regulation regarding the “two stores one year” requirement. Such provisions reflect actual circumstances and thus minimize the restrictive effect of the Regulation on business operations.

⁴中华人民共和国民法通则 (Zhonghua Renmin Gongheguo Minfa Tongze – General Principles of the Civil Law of the People’s Republic of China) adopted at the Fourth Session of the Sixth National People’s Congress on April 12, 1986. This law is a sort of Civil Code put in place while China proceeds through the long process of drafting a full civil code.

⁵合同法 (Hetong Fa - Contract Law) adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999 and came into force on October 1, 1999.

来源:政府网

Source: Chinese Government Web