

商务部令 2011 年第 5 号

商业特许经营备案管理办法

Ministry of Commerce 2011 Decree No. 5

Commercial Franchise Registration Administrative Measures

Annotated Version

(Additions high-lighted in yellow;
Comments on all changes including deletions in bold)

Translation and notes by

Paul Jones and 徐鑫 (Leo Xu)

©Jones & Co., 2011

pjones@jonesco-law.ca

Readers should be aware that both legally and linguistically the only authoritative text of the Measures 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 these Measures. For this reason we have included the original Chinese text. The translated text has been provided as a guide only. For more complete answers with regard to the interpretation of these Measures

readers should consult the Chinese text and a lawyer familiar with the two languages and the two systems of law.

商务部令 2011 年第 5 号
商业特许经营备案管理办法

Ministry of Commerce 2011
Decree No. 5

**Commercial Franchise Registration¹
Administrative Measures**

《商业特许经营备案管理办法》已于 2011 年 11 月 7 日经中华人民共和国商务部第 56 次部务会讨论通过，现予以公布，自 2012 年 2 月 1 日起施行。《商业特许经营备案管理办法》（商务部 2007 年第 15 号令）同时废止。

The “Commercial Franchise Registration Administrative Measures,” which were adopted at the 56th Inter-Departmental Meeting² of the Ministry of Commerce of the People’s Republic of China (MOFCOM) on November 7, 2011, are hereby promulgated and come into force as of February 1, 2012. The “Commercial Franchise Registration Administrative Measures,” (Ministry of Commerce 2007 Decree No.15) will be annulled at the same time.

部长：陈德铭
Minister: Chen Deming

2011 年 12 月 12 日
December 12, 2011

¹ The Chinese phrase “备案” (bei an) literally means to “set up a file” and accordingly these Measures are often translated as the “Commercial Franchise Filing Administrative Measures.” However we feel that in this context, and for a non-Chinese audience, the word “register” better conveys the meaning.

² The Chinese phrase “部务会” (bu wu hui) is a common and somewhat vague phrase and indicates a regular meeting within the particular Ministry.

商业特许经营备案管理办法

Commercial Franchise Registration Administrative Measures

第一条 为加强对商业特许经营活动的管理，规范特许经营市场秩序，根据《商业特许经营管理条例》（以下简称《条例》）的有关规定，制定本办法。

Article 1 These Measures are formulated in accordance with the Commercial Franchise Administration Regulation (hereinafter referred to as the “Regulation”) for the purpose of strengthening the administration of commercial franchise operations and regulating the market order of franchise operations.

第二条 在中华人民共和国境内（以下简称中国境内）从事商业特许经营活动，适用本办法。

Article 2 These Measures apply to commercial franchise activities conducted within the People’s Republic of China.³

第三条 商务部及省、自治区、直辖市人民政府商务主管部门是商业特许经营的备案机关。在省、自治区、直辖市范围内从事商业特许经营活动的，向特许人所在地省、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，向商务部备案。

商业特许经营实行全国联网备案。符合《条例》规定的特许人，依据本办法规定通过商务部设立的商业特许经营信息管理系统进行备案。

Article 3 MOFCOM and the Commerce Departments of each province, autonomous region and municipality directly under the central government⁴ are the relevant

³ 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 boundaries of the People’s Republic of China. Article 5 of the basic laws of the two regions state that “The socialist system and policies shall not be practised 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 these Measures do not apply in Hong Kong SAR and Macau SAR. Also see Article 17 of these Measures.

⁴ 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

administrative authorities for the registration of commercial franchises. Where a franchisor engages in commercial franchise operations within the territorial scope of a province, autonomous region or municipality directly under the central government, the franchisor shall register with the Commerce Department of the respective province, autonomous region or municipality directly under the central government where it is located. Where a franchisor engages in commercial franchise operations across the territorial boundaries of a province, autonomous region or municipality under the central government, the franchisor shall register with MOFCOM.

A national network shall be used for commercial franchise registrations. Franchisors who meet the requirements of the provisions of the Commercial Franchise Administrative Regulation shall register through the franchise business information management system set up by MOFCOM.

第四条 商务部可以根据有关规定，将跨省、自治区、直辖市范围从事商业特许经营的备案工作委托有关省、自治区、直辖市人民政府商务主管部门完成。受委托的省、自治区、直辖市人民政府商务主管部门应当自行完成备案工作，不得再委托其他任何组织和个人备案。

受委托的省、自治区、直辖市人民政府商务主管部门未依法行使备案职责的，商务部可以直接受理特许人的备案申请

Article 4 Where a franchisor engages in commercial franchise operations across the territorial boundaries of a province, autonomous region or municipality under the central government, according to relevant regulations, MOFCOM has discretion to delegate the registration applications to the commercial departments of a province, autonomous region or municipality directly under the central government. The above-mentioned departments shall complete the registration themselves and are not allowed to further delegate the registration to any other individuals or entities.

If the above-mentioned entities fail to fulfill their obligations with respect to franchise registrations, MOFCOM may deal with the registration applications directly.

Comment: This is a completely new article, which implements the intent of MOFCOM to delegate some of its powers with respect to franchise registrations to corresponding local government agencies.⁵

the United States. Each subordinate level of government can exercise the same powers as the national level government (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.

⁵ See footnote 4 above for an explanation of how this works under China's Constitution.

第五条 任何单位或者个人对违反本办法规定的行为，有权向商务主管部门举报，商务主管部门应当依法处理。

Article 5 Any entity or individual may report a breach of these Measures to the relevant commerce departments. Relevant commerce departments shall deal with such reports according to relevant laws and regulations.

Comment: The part highlighted in yellow has been added in the new version of the Measure. It requires the relevant government agencies to take such reports seriously. The commitment of resources to enforcement has been a problem to date.

第六条 申请备案的特许人应当向备案机关提交以下材料：

（一）商业特许经营基本情况。

（二）中国境内全部被特许人的店铺分布情况。

（三）特许人的市场计划书。

（四）企业法人营业执照或其他主体资格证明。

（五）与特许经营活动相关的商标权、专利权及其它经营资源的注册证书。

（六）符合《条例》第七条第二款规定的证明文件。

在 2007 年 5 月 1 日前已经从事特许经营活动的特许人在提交申请商业特许经营备案材料时不适用于上款的规定。

（七）与中国境内的被特许人订立的第一份特许经营合同。

（八）特许经营合同样本。

（九）特许经营操作手册的目录（须注明每一章节的页数和手册的总页数，对于在特许系统内部网络上提供此类手册的，须提供估计的打印页数）。

（十）国家法律法规规定经批准方可开展特许经营的产品和服务，须提交相关主管部门的批准文件。

外商投资企业应当提交《外商投资企业批准证书》，《外商投资企业批准证书》经营范围中应当包括“以特许经营方式从事商业活动”项目。

（十一）经法定代表人签字盖章的特许人承诺。

（十二）备案机关认为应当提交的其他资料。

以上文件在中华人民共和国境外形成的，需经所在国公证机关公证（附中文译本），并经中华人民共和国驻所在国使领馆认证，或者履行中华人民共和国与所在国订立的有关条约中规定的证明手续。在香港、澳门、台湾地区形成的，应当履行相关的证明手续。

Article 6 Franchisors applying for registration shall submit the following items to the relevant registration authority:

- (1) The basic information about the commercial franchise system.
- (2) The location of all of the franchisee stores within China.
- (3) The franchisor's marketing plan.
- (4) Business license of the legal entity⁶ or any other entity qualification certificate.
- (5) Registration certificates of the trademarks, patents and operational resources relating to the franchise system.
- (6) Evidentiary documents that satisfy the requirements of Article 7, second paragraph, of the Regulation.⁷

The preceding paragraph does not apply to franchisors who had already engaged in franchise operations prior to May 1, 2007.
- (7) The first franchise agreement concluded between the franchisor and a franchisee in China.
- (8) A sample franchise agreement.
- (9) The table of contents of the franchise operations manual (the number of pages of each chapter and the total number of pages in the manual shall be indicated. Where such manual is provided on an internal web site of the franchise system, an estimate of the number of pages in a print-out shall be indicated).
- (10) Where national laws and regulations require prior approval to offer the product or service to be franchised, the franchisor shall submit an approval document from the relevant administrative authority.

⁶ This may also be translated as "juristic person."

⁷ This refers to the requirements to have operated two company-owned locations for one year.

Foreign investment enterprises shall also submit <Approval Certificate of Establishment of Foreign Investment Enterprises>, which shall include “engage in business activities in the form of franchise” into its business scope

(11) The franchisor shall provide an undertaking⁸ signed by its legal representative⁹ and stamped with the franchisor’s corporate seal.

(12) Other documents deemed necessary by the registration government agencies.

If the above documents are issued or produced overseas, such documents (together with a Chinese translation) shall be notarized by a local notary public and authenticated by the Chinese Embassy or Consulate, or follow the procedures in the agreements between China and the above foreign countries. For cases in Hong Kong, Macau and Taiwan, relevant procedures should be followed.

Comment: There are changes to Sub-articles 4 and 5. In the previous Measure there was the word “photocopy,” which implied that a photocopy of the required documents would suffice. However, in the new version the word “复印件” or “photocopy” has been deleted. Thus now it appears that only an original copy or a notarized and legalized copy will meet the requirements. These are stricter standards for these documents.

The submission of the original of the first franchise agreement signed was not in the previous measure but was in a drop down window on the MOFCOM Franchise Unit’s web site. It was previously was only required for franchisors who had already engaged in franchise operations prior to May 1, 2007. Sub-Article 7 will apply to all franchisors.

The changes to Sub-articles 10 and 12 provide further details with respect to the documents that should be submitted by foreign investment enterprises in China as compared with the previous Measure.

第七条 特许人应当在中国境内的被特许人首次订立特许经营合同之日起的 15 天内向备案机关申请备案。

⁸ This is an undertaking to comply with the law. A sample form as prepared by the Shanghai Chain Management Association is provided in Annex 1.

⁹ 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>.

Article 7 Franchisors shall apply for registration to the relevant Commerce Department within 15 days of concluding their first franchise agreement in China.

Comments: The sentence “Franchisors that have engaged in franchise activities prior to May 1, 2007 shall apply to the relevant Commerce Department for registration in accordance with these Measures within one year after the implementation of the Regulation” that was in the previous version of the Measure has been deleted.

第八条 特许人的以下备案信息有变化的，应当自变化之日起 30 日内向备案机关申请变更：

(一) 特许人的工商登记信息。

(二) 经营资源信息。

(三) 中国境内全部被特许人的店铺分布情况。

Article 8 Where there is a change in the registration information of a franchisor, the franchisor shall within 30 days of the change apply to the registration authority to have the registration amended.

(1) Franchisor’s registration information with relevant industry and commerce departments;

(2) Information of business resources;

(3) The distribution of all franchisees’ stores in China.

Comments: The new version of the Measure provides details about the changes that franchisors are obliged to report to relevant registration authority. In effect this limits the reporting obligation.

第九条 特许人应当在每年 3 月 31 日前将其上一年度订立、撤销、终止、续签的特许经营合同情况向备案机关报告。

Article 9 Franchisors shall, prior to March 31 in each year, submit to the registration authority the information about franchise agreements concluded, revoked, terminated and renewed during the previous year.

Comments: The Previous Measure contained the phrase “变更” meaning “changed or modified.” This phrase has been deleted and thus the reporting obligations have been lessened.

第十条 特许人应认真填写所有备案事项的信息，并确保所填写内容真实、准确和完整。

Article 10 Franchisors shall faithfully complete all items required for registration and ensure that the information submitted is truthful, accurate and complete.

第十一条 备案机关应当自收到特许人提交的符合本办法第六条规定的文件、资料之日起 10 日内予以备案，并在商业特许经营信息管理系统予以公告。

特许人提交的文件、资料不完备的，备案机关可以要求其在 7 日内补充提交文件、资料。备案机关在特许人材料补充齐全之日起 10 日内予以备案。

Article 11 The registration authority shall, within 10 days after receiving the documents and materials prescribed in Article 6 of these Measures, complete the registration formalities and publicly announce the registration in the Business Franchise Information Management System of MOFCOM.

Where the documents or materials submitted by the franchisor are incomplete, the registration authority may require supplemental submissions within 7 days. On receipt from the franchisor of all of the supplemental documents and materials that it required it shall complete the registration within 10 days.

第十二条 已完成备案的特许人有下列行为之一的，备案机关可以撤销备案，并在商业特许经营信息管理系统予以公告：

(一) 特许人注销工商登记，或因特许人违法经营，被主管登记机关吊销营业执照的。

(二) 备案机关收到司法机关因为特许人违法经营而作出的关于撤销备案的司法建议书。

(三) 特许人隐瞒有关信息或者提供虚假信息，造成重大影响的。

(四) 特许人申请撤销备案并经备案机关同意的。

(五) 其他需要撤销备案的情形。

Article 12 Where any of the following circumstances apply to a franchisor who has completed the registration procedures, the relevant Commerce Department may cancel the registration and make a public announcement of the same in the Business Franchise Information Management System of MOFCOM.

(1) The franchisor revokes its registration with relevant industry and commerce departments on its own initiative or the franchisor's business license is

revoked by the relevant registration authority due to its illegal business operations.

(2) The registration authority receives advice from a judicial authority proposing a revocation of the registration because of the franchisor's illegal business operations.

(3) It is found upon investigation that the franchisor concealed relevant information or provided false information, which has caused significant influence.

(4) The franchisor cancels the registration on its own initiative.

(5) Other circumstances where the revocation of the registration is required.

Comments: These additions broaden the scope for the revocation of the registration as a franchisor, although the change to Sub-article 3 lessens the penalty for submitting information in error.

第十三条 各省、自治区、直辖市人民政府商务主管部门应当将备案及撤销备案的情况在 10 日内反馈商务部。

Article 13 The relevant commerce departments of the provinces, autonomous regions and municipalities directly under the central government shall report all registrations and cancellations of registrations to the Ministry of Commerce within 10 days.

第十四条 备案机关应当完整准确地记录和保存特许人的备案信息材料，依法为特许人保守商业秘密。

特许人所在地的（省、自治区、直辖市或设区的市级）人民政府商务主管部门可以向通过备案的特许人出具备案证明。

Article 14 The registration authority shall completely and accurately record and maintain the franchisor's submissions, and shall maintain the confidentiality of the franchisor's commercial secrets in accordance with the law.

Commercial departments of each province, autonomous region and municipality directly under the central government or cities with districts, where franchisors are located, may issue Franchise Registration Certificate to franchisors.

Comments: The phrase “在完成备案手续的同时” (when registration authority has completed the registration) that was in the first sentence of the equivalent article in the previous Measures has been deleted. We interpret this to mean that the registration authority has the obligations, including confidentiality, in Article 14

from the moment the first application materials are filed, and even if the application is rejected.

The second paragraph is new.

第十五条公众可通过商业特许经营信息管理系统查询以下信息：

- （一）特许人的企业名称及特许经营业务使用的注册商标、企业标志、专利、专有技术等经营资源。
- （二）特许人的备案时间。
- （三）特许人的法定经营场所地址与联系方式、法定代表人姓名。
- （四）中国境内全部被特许人的店铺分布情况。

Article 15 The general public shall have access to the following information in the Business Franchise Information Management System of MOFCOM.:

- (1) the franchisor’s business name, registered trademarks, business logo, patents, technical know how and operational resources relating to the franchise system.
- (2) the franchisor’s registration date.
- (3) the franchisor’s legal address, contact information, and the name of the legal representative¹⁰ of the franchisor.
- (4) the business address and distribution of all the franchisees in China.

第十六条 特许人未按照《条例》和本办法的规定办理备案的，由设区的市级以上商务主管部门责令限期备案，并处 1 万元以上 5 万元以下罚款；逾期仍不备案的，处 5 万元以上 10 万元以下罚款，并予以公告。

Comment: The addition of the word “全部” meaning “all, whole, entire or complete” emphasis the breadth of the reporting requirement.

Article 16 Where the franchisor does not comply and fails to register as required by the Regulation and these Measures, the commercial administration authority of the State Council and the relevant Commerce Department of the People’s Government of each province, autonomous region, or municipality directly under the administration of the central government or cities with districts shall order registration within a specified period of time, and that a fine of not less than 10,000 RMB and not more than 50,000 RMB.¹¹ Where the franchisor fails to register within such specified period of time, a fine

¹⁰ See *supra* note 9.

¹¹ From about \$1,582.76 USD to about \$7,913.81 USD at the December 29, 2011 conversion rate.

of not less than 50,000 RMB and not more than 100,000 RMB¹² shall be imposed and a public announcement shall be made.

第十七条 特许人违反本办法第九条规定的，由设区的市级以上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 17 Where the franchisor breaches Article 9 of these Measures,¹³ the registration authority shall order compliance and may impose a fine of not more than 10,000 RMB.¹⁴ If the circumstances are serious it may impose a fine of not less than 10,000 RMB and not more than 50,000 RMB¹⁵ and a public announcement shall be made.

第十八条 国外特许人在中国境内从事特许经营活动，按照本办法执行。香港、澳门特别行政区及台湾地区特许人参照本办法执行。

Article 18 Franchisors from outside China engaging in franchise operations in China shall be governed by these Measures. Franchisors from Hong Kong SAR, Macau SAR, and Taiwan Region shall be governed by these Measures by analogy.

第十九条 相关协会组织应当依照本办法规定，加强行业自律，指导特许人依法备案。

Article 19 The national trade association¹⁶ shall assist the relevant administrative units of the government with the registrations. It shall also completely fulfill its co-ordination function and strengthen self discipline in the franchise industry.

第二十条 本办法由商务部负责解释。

Article 20 The Ministry of Commerce of the People's Republic of China is responsible for the interpretation of these Measures.

¹² From about \$7,913.81 USD to about \$15,827.62 USD at the December 29, 2011 conversion rate.

¹³ This refers to the requirement for a franchisor to annually update its registration.

¹⁴ About \$1,582.76 USD at the December 29, 2011 conversion rate.

¹⁵ From about \$1,582.76 USD to about \$7,913.81 USD at the December 29, 2011 conversion rate.

¹⁶ The 中国连锁经营协会 – zhongguo liansuo jingying xiehui or China Chain Store & Franchise Association (“CCFA”).

第二十一条 本办法自 2012 年 2 月 1 日起施行。2007 年 5 月 1 日施行的《商业特许经营备案管理办法》（商务部 2007 年第 15 号令）同时废止。

Article 21 This regulation comes into force as of February 1, 2012. The “Commercial Franchise Registration Administrative Measures,” (Ministry of Commerce 2007 Decree No.15) will be annulled at the same time.