ACRA
ACCOUNTING AND CORPORATE REGULATORY AUTHORITY

CONSULTATION ON
THE REGULATORY FRAMEWORK
FOR FOREIGN ENTITIES IN SINGAPORE

June 2011

The Accounting and Corporate Regulatory Authority (ACRA) is the national regulator of business entities and public accountants in Singapore. ACRA also plays the role of a facilitator for the development of business entities and the public accountancy profession. The mission of ACRA is to provide a responsive and trusted regulatory environment for businesses and public accountants.

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CONTENTS

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The definition of "foreign entity" should follow the current definition of "foreign company" under the Companies Act and would cover the following types of entities:

(a) a company, corporation, society, association or other body incorporated outside Singapore; or

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Singapore.

Recommendation 2

The ambit of ACRA's registration and disclosure regime for foreign entities will cover all foreign entities that establish a place of business or commence to carry on business in Singapore, or intend to do so.

Recommendation 3

The definition of "carrying on business" should be retained with the following modifications:

(a) The definition should be clarified to include coverage of non-profit making activities;

(b) The Minister should have power by subsidiary legislation to exclude certain activities from being covered within the definition; and

(c) The activities by representative offices should be excluded from the definition.

Recommendation 4

ACRA can issue non-binding guidelines to facilitate the interpretation, clarification and understanding of the definition.

Recommendation 5

The provision in section 367 of the Companies Act, which provides that a foreign company has the power to hold immoveable property in Singapore, will be be retained for all registered foreign entities.

Recommendation 6

The following will be required to be submitted upon registration of a foreign entity:

(a) a certified copy of its certificate of incorporation or registration in its place of incorporation or origin;

(b) the registration number indicated in the certificate of incorporation or registration in paragraph (a), or where none is indicated, the number issued upon registration or incorporation by the authority equivalent to the Registrar in its place of registration or incorporation;

(c) a certified copy of its constitutional document;

(d) a list of directors;

(e) the name, address, nationality and identification particulars of the foreign company's agent;

(f) notice of the situation of its registered office in Singapore, and information regarding the office's accessibility;

(g) its legal form;

(h) the nature of business carried on;

(i) a list of members (if the members' names are required to be disclosed by the foreign company's original place of incorporation); and

(j) the latest copy of its head office's financial statement if it is required by the law of the place of incorporation or origin to prepare such statements.

Recommendation 7

There should be no change to the current process under regulation 21(1) & (2) of the Companies (Filing of Document) Regulations in respect of certification of certificates of incorporation or registration.

Recommendation 8

Where the registration of a foreign entity is handled by person who is not a prescribed person, the constitutional documents of the foreign entity lodged will need to be notarised or otherwise authenticated in accordance with the current procedures under regulation 21 (3) of Companies (Filing of Documents) Regulations.

Recommendation 9

Where the registration of a foreign entity is handled by a person who is a prescribed person, the prescribed person has an option to verify any documents relating to the foreign entity and confirm the authenticity of the documents, instead of relying on the notarisation or authentication procedures currently under regulation 21 (3) of Companies (Filing of Documents) Regulations.

Recommendation 10

The time frame for certification of documents for foreign entities should be up to 4 months prior to submission of registration documents.

Recommendation 11

The minimum number of agents required to be appointed by a foreign entity should be one.

Recommendation 12

There must be a replacement agent before the existing agent can resign to ensure accountability. The obligation to appoint a replacement agent should rest with the foreign entity.

Recommendation 13

Foreign entities need not lodge evidence of appointment of the agent, and only need to lodge the particulars of their appointed agents with ACRA.

Recommendation 14

Foreign entities should make available for inspection evidence of appointment of the agent at their registered offices in Singapore.

Recommendation 15

The consent of the local agent must be clearly indicated in the registration with the Registrar and documented by the foreign entity.

Recommendation 16

The provision in section 372(1) of the Companies Act will be retained but clarified to require foreign entities to inform ACRA if there are any changes to the registered particulars of the directors and agents, and where a list of members has been provided

at registration, any changes to the list of members.[Note: Feedback on any other types of changes which may be useful to be required to be reported is also welcome.]

Recommendation 17

A fee will be chargeable for the application in respect of a foreign entity for extension of time for notification of change or liquidation.

Recommendation 18

The reporting of any change in the authorised share capital of the foreign entity (outside of information reported in the financial statements) should be abolished.

Recommendation 19

The reporting of any changes in the number of members of the foreign entity should be abolished.

Recommendation 20

The notification timelines for foreign entities will be standardised to 30 days, with the exception of –

(a) the notice of cessation of business, which will be 7 days; and

(b) the notice of liquidation by an agent, which will be shortened to 14 days after the commencement of liquidation.

Recommendation 21

Foreign entities should lodge similar components of their Head Office financial statements under section 373(1) of the Companies Act as those expected of locally-incorporated companies.

Recommendation 22

The current requirements under section 373(5) of the Companies Act relating to the preparation and lodgment of Singapore branch accounts should be retained for foreign entities.

Recommendation 23

Dormant foreign entities should continue to file Singapore branch accounts with the Registrar, but these accounts need not be audited.

Recommendation 24

Foreign entities should be allowed to apply, upon payment of a fee, for an extension of time to prepare and file their Singapore branch accounts.

Recommendation 25

The current exemption power under section 373(7) of the Companies Act in respect of Head Office financial statements will not be widened, but section 373(5) of the Companies Act can be modified to allow a waiver of the requirements of the Singapore branch accounts, through a class order or on a case-by-case basis, where a foreign entity is exempted from disclosure of financial requirements in its home jurisdiction.

Recommendation 26

Every director or person of similar responsibility of a foreign entity who knowingly or wilfully permitted the default should be liable for failure to comply with the requirement to lodge Head Office financial statements, and the penalties imposed should be aligned with those for local companies.

Recommendation 27

An agent who knowingly and wilfully authorises or permits the default should also be liable for failure to comply with the requirements in relation to the Head Office financial statements under the Proposed Act.

Recommendation 28

Every director or person of similar responsibility of a foreign entity who knowingly or wilfully permitted the default should be liable for failure to comply with the requirement to file branch accounts (including compliance with the SFRS), and that the penalties imposed should be aligned with those for local companies.

Recommendation 29

A local agent who knowingly and wilfully authorises or permits the default should also be liable for failure to comply with the requirements in respect of the branch accounts (including compliance with the SFRS).

Recommendation 30

There should be no requirement for a foreign entity to maintain a branch register in Singapore, unless it is required by another regulation to do so.

Recommendation 31

The provision in section 385 of the Companies Act relating to the certificate of shareholding should be retained for foreign entities.

Recommendation 32

Agents should be responsible for acts to be performed by the foreign entity and be personally liable for all penalties imposed on the foreign entity for breaches of the Proposed Act, unless the agents satisfy the courts otherwise.

Recommendation 33

The designation "agent" should be changed to "authorised representative" in the Proposed Act to reflect the accountability and responsibility expected of the person.

Recommendation 34

There should be no need for a foreign entity to display the name and place of origin outside its registered office and every place of business.

Recommendation 35

A foreign entity should be required to state its Unique Entity Number (namely the ACRA registration number) in its documents.

Recommendation 36

The existing provision which allows the service of a document on a foreign company at its registered address at the place of its incorporation, in a case of a foreign company which has ceased to maintain a place of business in Singapore under section 376(c) of the Companies Act should be retained for foreign entities.

Recommendation 37

The time frame within which the Registrar indicates on the register the cessation of business of a foreign entity should be 3 months from the notification of cessation by the agent.

Recommendation 38

In addition to the grounds already existing in section 377(6) & section 377(8) of the Companies Act, there should be provisions to empower the Registrar to strike-off a foreign entity from the register where –

(a) an agent wishes to resign but is unable to do so because there is no replacement agent, and the agent can show that the foreign entity has failed to respond or act within a period of 12 months; or

(b) the agent of a dormant foreign entity has received no instructions from that entity within a period of 12 months of a request being made by the agent regarding whether the foreign entity intends to continue its registration in Singapore.

Recommendation 39

There should be provisions to empower the Registrar to reject the registration of a name where the name of the foreign entity is identical to the name of any other business vehicle already registered in Singapore, or to direct a change of name in such a case, or where that name is identical to any other corporation or business name.

Recommendation 40

A framework for transfer of incorporation of foreign entities will not be introduced at this time.

REGULATORY FRAMEWORK FOR FOREIGN ENTITIES IN SINGAPORE

1. BACKGROUND OF THIS PAPER

1.1 The Companies Act ("CA") has been reviewed by the Companies Act Review Steering Committee appointed by the Minister for Finance in October 2007. The public consultation on the "Report of the Steering Committee for Review of the Companies Act" is being concurrently launched[1].

1.2 The Steering Committee chaired by Professor Walter Woon had, owing to the wide-ranging areas to be covered, appointed five Working Groups to study the various aspects of the Act. Working Group 5 ("WG 5"), chaired by Chief Executive, ACRA, was tasked to study the area of "Company Administration", including the regulation of foreign companies in Singapore. WG 5 members were drawn from the legal and accounting profession, and industry.

1.3 On conclusion of the review on the regulation of foreign companies by WG 5, the Steering Committee took the view that the laws relating to the registration and regulation of foreign companies should be placed in standalone legislation (the "Proposed Act"), so that the Companies Act would solely contain the law relating to locally-incorporated companies. The scope of the Proposed Act, is based on the existing framework under the Companies Act regulating foreign companies, but will be clarified to refer to "foreign entities" rather than "foreign companies", as even under the current definition of "foreign company" in the Companies Act, some of the entities which fall within the definition may not be "companies". Transitional provisions will provide that foreign companies which are already registered under the Companies Act will be deemed to be registered under the Proposed Act and a reasonable and adequate timeframe will be given for compliance with new requirements, where appropriate.

1.4 The Steering Committee proposed that ACRA separately consult relevant parties on the various recommendations relating to foreign entities. This paper presents the recommendations by WG 5 on the proposed regulatory framework of foreign entities in Singapore, and includes consideration of the responses to an earlier Consultation Paper on foreign companies issued by ACRA in October 2007[2] ("the previous consultation"). ACRA also initiated a review of some other areas in respect of the regulation of the foreign entities, based on the current registration regime for foreign companies under the Companies Act, and these have also been included in the paper.

[1] A copy of the report is available at MOF's website (www.mof.gov.sg), ACRA's website (www.acra.gov.sg) and the REACH consultation portal (www.reach.gov.sg).

[2] Available at http://www.acra.gov.sg/Publications/Review+of+the+Registration+and+Regulatory+Regime+for+Foreign+Companies+under+the+Companies+Act+CAP+5.htm.

1.5 This paper therefore sets out:

(a) the recommendations of WG 5 vis-à-vis ACRA's proposals in the previous consultation;

(b) the recommendations by WG 5 on further related issues explored by its members as part of the Companies Act Review; and

(c) other recommendations which resulted from a review by ACRA of the provisions relating to the regulation of the foreign companies under the Companies Act.

1.6 We invite all interested persons to comment on the issues highlighted and recommendations in this Consultation Paper. Respondents are also welcome to surface any other related issues pertaining to the subject matter.

2. SCOPE OF LEGISLATION

2.1 DEFINITION OF "FOREIGN ENTITY"

2.1.1 Currently, the Companies Act defines "foreign company" to mean a body corporate[3] formed outside Singapore, as well as an unincorporated body that can sue or be sued or is capable of holding property in the name of certain officials, provided the body does not have its head office or principal place of business in Singapore[4]. This definition which has been in existing legislation since the Companies Act was first enacted in 1967 is wider than the equivalent provisions in the United Kingdom (UK), Hong Kong and New Zealand[5] which only include foreign companies or bodies corporate.

2.1.2 In the previous consultation, ACRA had recommended the retention of the current definition because it had served us well, and also to avoid regulatory complications that would occur if any of the business structures within the current definition are excluded. There was a general consensus amongst the respondents to the previous consultation to retain the definition[6]. Going forward, however, ACRA recommends that the reference be changed from "foreign companies" to "foreign entities" to recognise that the scope of the definition includes more than what is commonly understood as "foreign companies".

2.1.3 WG 5 noted that the existing definition may not be wide enough to include foreign partnerships. There may be well-established overseas partnerships which are registered in their home jurisdictions that engage in major business transactions in various other countries. Such a partnership may prefer registering its existing partnership as a foreign entity, instead of re-registering afresh as a general partnership in Singapore under the Business Registration Act (Cap. 32) or as a limited partnership under the Limited Partnerships Act (Act 37 of 2008)

[3] This refers to a company, corporation, society, association and other forms of bodies corporate (e.g. limited liability partnerships).
[4] Section 4 CA.
[5] The UK Companies Act 2006 defines an overseas company to be a company incorporated outside the UK, and Hong Kong also adopts a similar definition for non-Hong Kong companies. New Zealand defines an overseas company as a body corporate that is incorporated outside New Zealand.
[6] One respondent, however, highlighted the fact that the current wide definition of "foreign company" may have an impact on defining the scope of provisions in other legislation which rely on the meaning of "foreign company" in the Companies Act.

(where that partnership is a limited partnership). From a regulatory standpoint, registration under the Proposed Act, rather than the Business Registration Act or Limited Partnerships Act, would result in more disclosure obligations and higher responsibilities, but would accord recognition as a foreign entity as opposed to a Singapore business or partnership.

2.1.4 However, ACRA is of the view that registration in Singapore should not purport to change the nature of the foreign partnership. Including foreign partnerships which cannot sue or be sued or cannot hold property may not sit well with the rest of the regulatory framework, which pins certain responsibilities on the foreign entity. Moreover, there have thus far been no known problems with the current mode of registering foreign partnerships under the Business Registration Act or the Limited Partnerships Act. The Companies Act Review Steering Committee also did not support the inclusion of foreign partnerships (other than those which would already be captured by the current definition of "foreign company" in the Companies Act) in the definition of "foreign entity".

2.1.5 As such, ACRA takes the view that the definition of "foreign entity" under the Proposed Act should follow the current definition of "foreign company" under the Companies Act, and that there is no need to change the scope of the regulatory framework. In particular, foreign general partnerships or limited partnerships, which currently fall outside the definition of "foreign company" in the Companies Act, should not be included in the definition of "foreign entity" for the purposes of the proposed Act.

Recommendation 1

The definition of "foreign entity" should follow the current definition of "foreign company" under the Companies Act and would cover the following types of entities:

(a) a company, corporation, society, association or other body incorporated outside Singapore; or

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Singapore.

2.2 APPLICABILITY TO ALL FOREIGN ENTITIES

2.2.1 Currently, section 365 of the Companies Act specifies that Part XI, Division 2 on "Foreign Companies" applies to "a foreign company which, before it establishes a place of business or commences to carry on business in Singapore, complies with section 368 and is registered under this Division". This may cause some confusion, and may appear circuitous because the registration requirement in section 368 CA itself is also within Part XI, Division 2. The provision which sets out the scope of the Proposed Act should be drafted to refer to all foreign entities which establish a place of business or commence to carry on business in Singapore, or intend to do so, to clarify that such foreign entities should register. The continuing registration and other regulatory requirements will, however, only be drafted to apply to foreign entities which are registered under the Proposed Act.

Recommendation 2

The ambit of ACRA's registration and disclosure regime for foreign entities will cover all foreign entities that establish a place of business or commence to carry on business in Singapore, or intend to do so.

2.3 DEFINITION OF "CARRYING ON BUSINESS"

2.3.1 The Companies Act currently requires a foreign company to register before it establishes a place of business or commences to carry on business in Singapore. The phrase "carrying on business" is defined widely under section 366(1) CA[7] and practitioners have encountered difficulty in interpreting the inclusionary and not exhaustive drafting of the definition[8]. A clearer definition of "carrying on business" would facilitate ACRA's focus as regulator on administering the provisions of the Proposed Act.

2.3.2 However, there are limitations of having an exhaustive definition for "carrying on business", namely, that such an approach would not readily cater to new and emerging business scenarios that evolve quickly and frequently in today's rapidly-changing business environment. It would also be a tedious process to constantly amend the Proposed Act to cater for new scenarios. Furthermore, thus far, no major jurisdiction reviewed has crafted an exhaustive definition. Moreover, all the respondents during the previous consultation appreciated the difficulty of creating an exhaustive definition and expressed support for the retention of the current definition. ACRA is therefore of the view that the current non-exhaustive structure of the definition should be retained for the Proposed Act.

2.3.3 WG 5 also considered whether it would be useful to restrict the definition to business activities conducted only for "gain" or "profit" (like in the definition of "business" under the Business Registration Act[9]). However, it was noted that there is an increasing number of non-profit making organisations which use Singapore as an administrative base to carry out

[7] Under section 366(1) CA, "carrying on business" includes administering, managing or otherwise dealing with property situated in Singapore as an agent, legal personal representative, or trustee, whether by employees or agents or otherwise, and "to carry on business" has a corresponding meaning.

[8] Some examples which have been brought to ACRA's attention where it was arguable as to whether a foreign company was carrying on business in Singapore or not, and thus whether such a company was required to register with ACRA are as follows:

(i) Foreign companies engaged in time-share agreements outside of Singapore;

(ii) Foreign companies whose main activity is putting up advertisements in Singapore for their products;

(iii) Foreign companies that use the premises of a management consultant in Singapore to obtain orders from customers and conduct meetings with clients;

(iv) Foreign companies that have their operations and employees in Singapore but conduct their business transactions outside of Singapore. However, it could be argued that this would then be like operating a cost centre in Singapore.

[9] The definition of "business" in section 2(1) of the Business Registration Act includes every form of trade, commerce, craftsmanship, calling, profession and any activity carried on for the purposes of gain but does not include any office, employment or occupation, or any of the businesses specified in the First Schedule.

charitable activities and which have been registering with ACRA. It is proposed therefore that the definition of "carrying on business" should not be limited to activities for "gain" or "profit", and that the definition should be clarified to expressly include non-profit making activities in the concept of "carrying on business"[10].

2.3.4 WG 5 also suggested the inclusion of a power for the Minister to exclude certain activities from the definition of "carrying on business". This would allow greater flexibility when ACRA encounters activities which are justified to be excluded from the concept of carrying on business, without having to amend the Proposed Act.

2.3.5 To summarise, WG 5's recommendations are to:

(a) retain generally the current structure of the definition of "carrying on business";
(b) clarify the inclusion of non-profit making activities; and
(c) introduce a provision to provide the Minister with the power, by subsidiary legislation, to exclude certain activities from being covered within the definition.

2.3.6 WG 5 also highlighted that the activities carried on by "representative offices" should specifically be excluded from the definition of "carrying on business". Typically, such offices do not and should not conduct activities that fall within the meaning of "carrying on business", but an express exclusion would make this clearer.

2.3.7 WG 5 added that ACRA could issue non-binding guidelines (in the form of Practice Directions) to facilitate the interpretation, clarification and understanding of the definition.

Recommendation 3

The definition of "carrying on business" should be retained with the following modifications:

(a) The definition should be clarified to include coverage of non-profit making activities;
(b) The Minister should have power by subsidiary legislation to exclude certain activities from being covered within the definition; and
(c) The activities by representative offices should be excluded from the definition.

Recommendation 4

ACRA can issue non-binding guidelines to facilitate the interpretation, clarification and understanding of the definition.

[10] An example of this would be the definition of "carrying on business" in section 18 of the Australian Corporations Act.

3. FOREIGN ENTITIES' ABILITY TO HOLD IMMOVABLE PROPERTY

3.1 Under section 367 CA, a foreign company currently has the power to hold immovable property in Singapore. This would be regardless of whether the foreign company is or is not in fact a separate legal entity under the law of the place of its establishment.

3.2 The significance of section 367 CA is that it clarifies the capacity of a foreign company to own immovable property in Singapore, irrespective of its structures in its country of origin. In the event of insolvency, the ownership of the foreign company's assets in Singapore will not be disputed, and this would facilitate the distribution of assets that are ring-fenced in Singapore by virtue of section 377(3) CA[11], ensuring that these assets can be sold and used to pay off creditors, employees etc. It is noted that in Australia, a registered body (including foreign companies) also has power to hold land in that jurisdiction[12].

3.3 ACRA is of the view that there is value in retaining this provision in the Proposed Act.

Recommendation 5

The provision in section 367 of the Companies Act, which provides that a foreign company has the power to hold immoveable property in Singapore, should be retained for all registered foreign entities.

4. PARTICULARS REQUIRED TO BE LODGED UPON REGISTRATION

4.1 Currently, section 368 of the Companies Act lists the particulars that a foreign company is required to lodge upon registration with ACRA. WG 5 suggested that these be streamlined as follows:

(a) a certified copy of its certificate of incorporation or registration in its place of incorporation or origin (currently required under section 368(1)(a) CA);

(b) the registration number indicated in the certificate of incorporation or registration in paragraph (a), or where none is indicated, the number issued upon registration or incorporation by the authority equivalent to the Registrar in its place of registration or incorporation;

(c) a certified copy of its constitutional document (currently under section 368(1)(b) CA);

(d) a list of directors (currently under section 368(1)(c) CA);

[11] Under section 377(3) CA, a liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator must, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in Singapore and pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated, after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company.

[12] Australian Corporations Act 2001, section 601CY.

(e) the name and address the foreign company's agent (who must be a natural person resident in Singapore) (currently under section 368(1)(e) CA) , their nationality and the identification particulars of the agent; and

(f) notice of the situation of its registered office in Singapore, and information regarding the office's accessibility (currently under 368(1)(f) CA).

4.2 Some other requirements which are required as part of the registration requirements in other jurisdictions were considered. However, WG 5 agreed that there would be no need to include the following:

(a) Details of the foreign entity's company secretary (unlike the registration requirements in the UK[13] and Hong Kong[14]).

(b) Information on existing charges on property held by the foreign entity (unlike the registration requirement in Australia[15]) as the reporting of such charges are covered under section 133 of the Companies Act. Going forward, Division 8 of Part IV (Shares, Debentures and Charges) on Registration of Charges will be duplicated in the Proposed Act in respect of registered foreign entities.

4.3 WG 5 also suggested that the foreign entity should specify the following additional information:

(a) its legal form (i.e., whether it is a company, an LLP etc);

(b) the nature of business carried on (based on the Singapore Standard Industrial Classification (SSIC) Code);

(c) a list of members (if the members' names are required to be disclosed by the foreign company's original place of incorporation); and

(d) the latest copy of its head office's financial statements if it is required by the law of the place of incorporation or origin to prepare such statements.

<u>Recommendation 6</u>

The following will be required to be submitted upon registration of a foreign entity:

(a) a certified copy of its certificate of incorporation or registration in its place of incorporation or origin;

(b) the registration number indicated in the certificate of incorporation or registration in paragraph (a), or where none is indicated, the number issued upon registration or incorporation by the authority equivalent to the Registrar in its place of registration or incorporation;

[13] UK Overseas Companies Regulations 2009, regulation 6.
[14] Hong Kong Companies Ordinance, section 333(2).
[15] Australia Corporations Act 2001, section 601CE(e).

(c) a certified copy of its constitutional document;

(d) a list of directors;

(e) the name, address, nationality and identification particulars of the foreign company's agent;

(f) notice of the situation of its registered office in Singapore, and information regarding the office's accessibility;

(g) its legal form;

(h) the nature of business carried on;

(i) a list of members (if the members' names are required to be disclosed by the foreign company's original place of incorporation); and

(j) the latest copy of its head office's financial statement if it is required by the law of the place of incorporation or origin to prepare such statements.

5. AUTHENTICATION OF DOCUMENTS LODGED WITH REGISTRAR

5.1 Currently, under section 368(1)(a) & (b) CA, where a foreign company registers with ACRA, it is required to lodge with the Registrar a copy of its certificate of incorporation or registration, its charter, statute or memorandum and articles or other instrument constituting or defining a foreign company, which must be certified or authenticated according to the provisions of the Companies (Filing of Documents) Regulations. The certificate of incorporation must be certified to be a true copy by an official holding or purporting to hold an office corresponding to that of the Registrar in the place in which the foreign company concerned is formed or incorporated.[16] The memorandum and articles of association or other instrument constituting or defining a foreign company's constitution need to be certified to be a true copy —

(a) by an official holding or purporting to hold an office corresponding to that of the Registrar in the place in which the foreign company concerned is formed or incorporated;

(b) by a notary public; or

(c) by a director, manager or secretary of the foreign company by affidavit or, in the case of a foreign company formed or incorporated within the Commonwealth, by statutory declaration made by a director, manager or secretary of the foreign company.[17]

5.2 WG 5 recognised that there is no foolproof manner to authenticate documents, e.g. it is difficult to prove that a document notarised overseas is indeed a genuinely notarised

[16] Under regulation 21(1) & (2) of the Companies (Filing of Documents) Regulations.
[17] Regulation 21 (3) of Companies (Filing of Documents) Regulations.

document. In this regard, alternatives solutions to the current method of authentication were considered, e.g. authentication of a foreign company's documents could be carried out by an agent based in Singapore or by specially appointed officers who are engaged in the registration process with ACRA. WG 5 also considered the possibility of recommending that the person who lodges the documents with the Registrar ought to have the duty to acknowledge that, to the best of his knowledge, the documents are genuine. However, WG 5 acknowledged that this approach would shift the burden of responsibility regarding the authenticity of documents to the person who lodges the documents, who may face difficulties in confirming the authenticity of the documents lodged with ACRA for registration. WG 5 was also wary about the risks of permitting authentication to be based on a mere confirmation by directors of the foreign company (as opposed to an affidavit or a statutory declaration), because ACRA may have no knowledge of the reliability or trustworthiness of that person.

5.3 When it comes to the certificate of incorporation or registration, whilst the simplification of certification or authentication processes would streamline the registration process of foreign companies, the only way that ACRA is able to verify the existence of a foreign company would be through the reliance on the relevant documents it is required to submit. ACRA therefore takes the view that there should be no change to the current process under regulation 21(1) & (2) of the Companies (Filing of Document) Regulations in respect of certification of certificates of incorporation or registration.

5.4 As to the requirement for notarisation or authentication of the constitutional documents of a foreign entity under section 368(1)(b) CA, WG 5 recommended that where the documents for registration are lodged with the Registrar by agents who are not prescribed persons[18], the current procedures should be retained. This would provide some assurance to the Registrar as to the contents of the documents, as well as to the public which may deal with the foreign entity.

5.5 However, where prescribed persons are involved in the registration process of the foreign entity, they can choose to continue to submit duly notarised or authenticated constitutional documents of the foreign entity in accordance with current procedures under regulation 21 (3) of Companies (Filing of Documents) Regulations, or in the alternative, they can confirm that they have verified and authenticated the documents prior to registration of the foreign entity. The latter would shift the responsibility for verification and authentication onto the prescribed person.

Extension of time

5.6 Currently, under regulation 21(1) & (3) of the Companies (Filing of Documents) Regulations, a copy of a certificate of incorporation or registration, charter, statute or memorandum and articles or other instrument constituting or defining a foreign company's constitution must be certified within a period of 3 months prior to submission. In response to feedback received, the time frame for certification of documents under regulation 21(1) & (3) will be extended from 3 months to 4 months to allow a longer period for the authentication process in respect of foreign entities without compromising the need for recency.

[18] As defined in regulation 6 of the Companies (Filing of Documents) Regulations. An equivalent provision will be drafted under the Proposed Act.

Recommendation 7

There should be no change to the current process under regulation 21(1) & (2) of the Companies (Filing of Document) Regulations in respect of certification of certificates of incorporation or registration.

Recommendation 8

Where the registration of a foreign entity is handled by person who is not a prescribed person, the constitutional documents of the foreign entity lodged will need to be notarised or otherwise authenticated in accordance with the current procedures under regulation 21 (3) of Companies (Filing of Documents) Regulations.

Recommendation 9

Where the registration of a foreign entity is handled by a person who is a prescribed person, the prescribed person has an option to verify any documents relating to the foreign entity and confirm the authenticity of the documents, instead of relying on the notarisation or authentication procedures currently under regulation 21 (3) of Companies (Filing of Documents) Regulations.

Recommendation 10

The time frame for certification of documents for foreign entities should be up to 4 months prior to submission of registration documents.

6. REDUCING THE MINIMUM NUMBER OF AGENTS

6.1 The existing section 368(1)(e) CA requires a foreign company to appoint at least 2 authorised locally-resident agents. ACRA, in the previous consultation, recommended reducing this to one, in alignment with the requirement adopted in the UK, Hong Kong, Australia and New Zealand.

6.2 The majority of the respondents to the previous consultation agreed with ACRA's recommendation. One respondent from a professional body noted differing views amongst its members: those who disagreed with ACRA's proposal noted that such agents (unlike directors) did not have fiduciary duties imposed on them, and that therefore it would be safer to have 2 agents. Another point raised during the previous consultation was that there must be a replacement agent before the existing agent can resign.

6.3 WG 5 took into consideration the respondents' comments, and supported ACRA's recommendation as well as the suggestion that there should be a replacement agent before the existing agent is permitted to resign. The obligation to appoint a replacement agent should rest with the foreign entity.

Recommendation 11

The minimum number of agents required to be appointed by a foreign entity should be one.

Recommendation 12

There must be a replacement agent before the existing agent can resign to ensure accountability. The obligation to appoint a replacement agent should rest with the foreign entity.

7. SIMPLIFYING FILING REQUIREMENT FOR APPOINTMENT OF AUTHORISED AGENTS AND OTHERS

7.1 Under the current regime, a foreign company is required to lodge evidence of the appointment of its agents resident in Singapore by the foreign entity[19] whose role is to receive notices served on that company, as well as ensure that the company complies with the regulatory requirements of the Companies Act. ACRA had, in the previous consultation, recommended that this be done away with in order to simplify the filing requirement for such appointment. ACRA proposed that foreign companies only need to lodge the particulars of the appointed agents with ACRA. It was noted that most jurisdictions reviewed did not have a requirement to lodge evidence of the appointment of agents, except for Australia[20]. Most of the respondents agreed with ACRA's proposal.

7.2 ACRA recommended that foreign companies be required to make accessible for inspection the memorandum of appointment or power of attorney under the seal of the company or executed on its behalf in a binding manner of such an appointment at the registered office of its branch in Singapore. Most of the respondents to the previous consultation agreed with ACRA that it would be prudent and good practice to make available for inspection the evidence of appointment of authorised agents as these agents are responsible for ensuring compliance with the Companies Act. One respondent in the previous consultation, however, felt otherwise, noting that none of the other major common law jurisdictions have this requirement[21], although they deferred to ACRA for the final decision.

[19] Section 368(1)(e) CA.
[20] Australian Corporations Act, section 601CG.
[21] In UK, an overseas company needs only to lodge the name (and any former name), service address and usual residential address of every person authorized to represent the company as a permanent representative of the company. (UK Overseas Companies Regulations 2009, regulation 7)

Also, in view of the accountability and personal liability of agents (please see Recommendation 32), WG 5 agreed with the majority views of the respondents and supports ACRA's recommendations. WG 5 also took the view that the consent of the agent must be clearly indicated in the registration with the Registrar and documented by the foreign entity.

Recommendation 13

Foreign entities need not lodge evidence of appointment of the agent, and only need to lodge the particulars of their appointed agents with ACRA.

Recommendation 14

Foreign entities should make available for inspection evidence of appointment of the agent at their registered offices in Singapore.

Recommendation 15

The consent of the local agent must be clearly indicated in the registration with the Registrar and documented by the foreign entity.

8. FILING OBLIGATIONS

8.1 CHANGES IN FILED DOCUMENTS OR INFORMATION

8.1.1 Under section 372(1) CA, a registered foreign company must lodge a return where there is any change or alteration made in certain specified information or documents which have been lodged with the Registrar.

8.1.2 ACRA considered changing the reporting requirement to a general obligation requiring change reporting in respect of any particulars registered in respect of a foreign company (along the lines of section 28 of the Limited Liability Partnership Act (Cap. 163A)). However, there may be concerns that this may be too onerous and unnecessary, and may lead to uncertainty as to the obligations of the directors and local agents with respect to change reporting.

8.1.3 ACRA's recommendation is therefore to keep the list in section 372(1) CA, but to clarify the requirement to inform ACRA of any changes to the registered particulars (e.g.

In Hong Kong, an overseas company needs only to lodge the particulars of the authorized representative. (HK Companies Ordinance, sections 333, 333A)

In New Zealand, an oversea company's application must state the full name and address of one or more persons resident or incorporated in New Zealand who are authorized to accept service in New Zealand of documents on behalf of the overseas company. (NZ Companies Act 1993, section 336(2)(f)).

identification number, identification type, name, nationality or address) of the directors and agents of the foreign entity, and where a list of members has been provided at registration (please see Recommendation 6), any changes to the list of members. Any feedback on whether there are any other types of changes which may be useful to be required to be reported is also welcome.

Recommendation 16

The provision in section 372(1) of the Companies Act will be retained but clarified to require foreign entities to inform ACRA if there are any changes to the registered particulars of the directors and agents, and where a list of members has been provided at registration, any changes to the list of members.

[Note: Feedback on any other types of changes which may be useful to be required to be reported is also welcome.]

8.2 FEE CHARGEABLE FOR APPLICATION OF EXTENSION OF TIME FOR NOTIFICATION OF CHANGE

8.2.1 Section 372(1) CA provides an extension of period of filing the documents for notification of change. This provision was reviewed and it was considered useful to retain for foreign entities as the provision allows flexibility on a case-by-case basis. However, it is suggested that a fee be chargeable for the application for an extension of time. This is similar to the position under section 18(1) of the Limited Partnerships Act. A similar fee is suggested for an extension of time of notification of liquidation of a foreign company under section 377(2) CA. The fee would be to cover the administrative costs involved in reviewing the application for extension of time.

Recommendation 17

A fee will be chargeable for the application in respect of a foreign entity for extension of time for notification of change or liquidation.

8.3 REPORTING ON INCREASE IN AUTHORISED CAPITAL

8.3.1 Section 372(2) CA requires a foreign company to report any increase in the authorised share capital of the company.

8.3.2 For companies incorporated in Singapore, the concept of authorised capital has been abolished. Australia and New Zealand also have abandoned the par value and authorised capital concepts. The UK Companies Act 2006 dispensed with the term "authorised capital", although the concept of par value is still retained. The concept of authorised share capital is also proposed to be removed from the Hong Kong Companies Ordinance with the proposed

move to abolish the concept of par value of shares[22]. ACRA therefore proposes not to have a requirement for a foreign entity to report a change in its authorised share capital. However, views on whether the current reporting requirement under section 372(2) CA is useful, or if indeed the reporting of any information regarding capital (including in respect of issued capital, but outside of what information is reported in the financial statements) in respect of the foreign entity is useful, would be welcome.

Recommendation 18

The reporting of any change in the authorised share capital of the foreign entity (outside of information reported in the financial statements) should be abolished.

8.4 REPORTING ON NUMBER OF MEMBERS

8.4.1 Section 372(3) CA requires a foreign company not having share capital to report any changes to the number of its members.

8.4.2 As information regarding number of members is not required in any other jurisdictions reviewed, and the information does not appear to be particularly useful, we propose that this requirement be abolished. However, views on whether the current reporting requirement under section 372(3) CA is useful would be welcome.

Recommendation 19

The reporting of any changes in the number of members of the foreign entity should be abolished.

8.5 STANDARDISED TIMELINES FOR LODGMENT OF DOCUMENTS

8.5.1 The current timelines within which lodgments made by foreign companies of documents with ACRA is 30 days, with the exception of the lodgment of -

(a) the situation of the branch register of members or a change thereof (which is currently 14 days)[23]; and

(b) notice of cessation of business (which is currently 7 days)[24].

[22] Please refer to the Second Phase Consultation of the draft Companies Bill – Consultation Paper Highlights (issued on 7 May 2010) at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2nd_Consolidated.Explantory.Notes.Part4_e.pdf.

[23] Section 379(6) & (7) CA.
[24] Section 377(1) CA.

8.5.2 A standardisation of the timelines for the lodgment of documents was considered by WG 5 for ease of administration. While there is a recommendation to abolish the need to maintain a branch register (please see Recommendation 30), in the event that a register is kept, the Registrar should be notified of the situation of that register or any change thereof. An extension of the timeline for lodgment of the situation of the branch register of members or any change thereof was therefore considered. Whilst it could be argued that the timeline need not be extended to 30 days as it does not involve submissions of documents from an overseas office, increasing it to 30 days would not cause any prejudice.

Notification of cessation of business

8.5.3 As for the timeline for notice of cessation of business, WG 5 noted that, as interests of creditors would need to be protected, the timeline for notification should not be extended and should be retained at 7 days for foreign entities.

Notification of liquidation

8.5.4 WG 5 also considered the current time frame for the lodgment of notice of a foreign company's liquidation. Currently, under section 377(2)(a) CA, the agent is permitted to lodge a notice of a foreign company's liquidation within 1 month after commencement of the liquidation. WG 5 took the view that one month was too long, as by comparison, the timeline in the UK and HK is only 14 days[25]. WG 5 suggested that 14 days would be a more appropriate timeframe.

Recommendation 20

The notification timelines for foreign entities will be standardised to 30 days, with the exception of –

(a) the notice of cessation of business, which will be 7 days; and

(b) the notice of liquidation by an agent, which will be shortened to 14 days after the commencement of liquidation.

9 FINANCIAL DISCLOSURE

9.1 ALIGNMENT OF COMPONENTS OF FOREIGN ENTITY'S HEAD OFFICE FINANCIAL STATEMENTS WITH THOSE OF LOCALLY-INCORPORATED COMPANY

9.1.1 Currently, a foreign company is required under section 373(1) CA to lodge with the Registrar a copy of its balance-sheet and any documents as required to be prepared in the place of its registration together with the audited statement of its assets and liabilities, and audited profit and loss account in relation to its operations in Singapore. Where the foreign company is not legally required under its place of registration to prepare a balance-sheet, it must file its balance-sheet prepared as if it were a Singapore-incorporated public company under section 373(4) CA.

[25] UK Overseas Companies Regulations, regulation 69(2); HK Companies Ordinance, section 377A.

9.1.2 The balance sheet of a company merely provides an overview of a company's financial condition but does not provide details of the company's financial transactions over an interval of time. ACRA would prefer a more comprehensive disclosure requirement and recommended, in the previous consultation, that the filing of the full set of foreign company's head office's financial statements and other reports akin to those required of local companies[26]. There were mixed responses to this issue from the previous consultation. In particular, it was noted that some countries do not require all companies to prepare financial information, and in that in some cases, the requirements for Singapore branch accounts could result in them being even more detailed than the head office financial statements.

9.1.3 WG 5 agreed with ACRA's recommendation that foreign entities should lodge similar components of their financial statements with ACRA as those expected of locally incorporated companies. This would mean expanding the list to include not only the balance sheet, but also the income statement, statement of changes in equity, statement of cash flows, notes to the accounts, directors' report, auditors' report (where applicable) etc.. WG 5 supported this proposal, noting that this ensures more comprehensive disclosure that would help investors make informed business decisions, and enhance investor protection. ACRA therefore recommends that foreign entities should, under the Proposed Act, lodge similar components of their Head Office financial statements with ACRA as those expected of locally-incorporated companies.

Recommendation 21

Foreign entities should lodge similar components of their Head Office financial statements under section 373(1) of the Companies Act as those expected of locally-incorporated companies.

9.2 RETAINING REQUIREMENT FOR FOREIGN ENTITY TO LODGE FINANCIAL STATEMENTS FOR SINGAPORE OPERATIONS

9.2.1 Under section 373(5) CA, a foreign company is required to prepare and lodge with the Registrar a duly audited statement showing its assets used in and liabilities arising out of its operations in Singapore as at the date to which its balance-sheet was made up and a duly audited profit and loss account which, in so far as is practicable, complies with the requirements of the Singapore Financial Reporting Standards (the "SFRS") and which gives a true and fair view of the profit or loss arising out of the company's operation in Singapore for the last preceding financial year of the company (the "Singapore branch accounts"). Most of the respondents to the previous consultation agreed with ACRA's view that the existing requirement for foreign companies to file Singapore branch accounts should be retained.

[26] As part of the Companies Act review, the Companies Act Review Steering Committee has recommended that local companies be required to prepare and file a set of financial statements as required under the Singapore Financial Reporting Standards applicable to local companies, instead of just the profit and loss account and balance sheet currently required under section 201 CA. (Recommendation 4.35 of the Report of the Steering Committee for Review of the Companies Act.)

9.2.2 WG 5 also supported the proposal to retain the current requirement for foreign companies to lodge Singapore branch accounts. Singapore branch accounts provide accountability of the foreign company's Singapore operations to its investors and other stakeholders in Singapore. Singapore branch accounts also provide information on assets of the foreign company in Singapore, which is important in the event of insolvency as the assets in Singapore may be ring-fenced to protect the interests of creditors in Singapore[27]. ACRA therefore recommends that the current requirements under section 373(5) CA relating to the preparation and lodgment of Singapore branch accounts be applicable to foreign entities.

Recommendation 22

The current requirements under section 373(5) of the Companies Act relating to the preparation and lodgment of Singapore branch accounts should be retained for foreign entities.

9.3 EXEMPTION OF DORMANT FOREIGN ENTITIES FROM AUDIT REQUIREMENT FOR SINGAPORE BRANCH ACCOUNTS

9.3.1 Dormant companies exist in Singapore, with many directors or shareholders of such companies citing sentimental reasons or future business opportunities as the main reasons for not winding up such companies. Currently, dormant companies that are locally-incorporated are exempt from the audit requirements under the Companies Act.

9.3.2 The lack of consistency in treatment between locally-incorporated companies and foreign companies was considered by WG 5. It was noted that in the case of a dormant foreign company, its stakeholders may find it difficult to tell if the dormant foreign entity has resumed conducting regular transactions, except through evidence in the financial information filed with the Registrar.

9.3.3 A point to note is that the Companies Act Review Steering Committee has recommended exempting a dormant local non-listed company from financial reporting requirements entirely, subject to certain safeguards[28]. If this proposed recommendation is accepted, this would make the difference between the treatment of a dormant locally-incorporated non-listed company and a dormant registered foreign entity even more stark.

9.3.4 However, to help reduce the cost that a dormant foreign entity would incur for continuing to be registered in Singapore, ACRA recommends that the branch accounts of a dormant foreign entity filed with the Registrar need not be audited, even though it will still be required to file Singapore branch accounts with the Registrar. This would be more in line with the approach in respect of a dormant locally-incorporated listed company under the Companies Act Review Steering Committee's recommendation[29], if accepted. The criteria for determining "dormancy" for foreign entities will be aligned with those for locally-incorporated companies.

[27] Under section 377(3) CA.
[28] Recommendation 4.6 of the Report of the Steering Committee for Review of the Companies Act.
[29] Recommendation 4.8 of the Report of the Steering Committee for Review of the Companies Act.

9.3.5 There will be no exemption for a dormant foreign entity from the requirements to file its Head Office financial statements, but such a foreign entity may still apply to the Registrar to relieve the foreign entity from any requirement of section 373 CA relating to the form and content of the financial statements, under the current section 373(7) CA.

Recommendation 23

Dormant foreign entities should continue to file Singapore branch accounts with the Registrar, but these accounts need not be audited.

9.4 EXTENSION OF TIME FOR PREPARATION AND FILING OF SINGAPORE BRANCH ACCOUNTS

9.4.1 Currently, a foreign company is required, under section 373 (5) CA to prepare and file Singapore branch accounts together with the balance sheet and other documents required to be filed with the Registrar under section 373(1) to (4) CA.

9.4.2 Under section 201(1) CA, the directors of a company must lay, before the company at its annual general meeting, a profit and loss account which is made up to a date not more than 6 months before the date of the meeting (or not more than 4 months before the date of the meeting in the case of a publicly-listed company). ACRA is empowered, under section 201(2) CA, to extend the period between the date to which the profit and loss account is made up and the date on which it is laid at the annual general meeting, which indirectly can give the company a longer period of time in which to prepare its accounts for the purposes of laying the accounts before the company. ACRA can, on application by the locally-incorporated company, grant the extension upon payment of an application fee. There is no equivalent of this extension of time in respect of Singapore branch accounts of foreign companies.

9.4.3 In this regard, ACRA recommends that registered foreign entities be allowed to apply, upon payment of a fee, for an extension of time to prepare and file their branch accounts.

Recommendation 24

Foreign entities should be allowed to apply, upon payment of a fee, for an extension of time to prepare and file their Singapore branch accounts.

9.5 CLARIFYING REGISTRAR'S POWERS TO ISSUE EXEMPTIONS FROM FINANCIAL REPORTING REQUIREMENTS

9.5.1 ACRA recognises that there is already a power of exemption under section 373(5) & (7) CA which gives the Registrar the power to waive compliance with the requirement for branch accounts and any requirement relating to the form and content of the accounts or reports required under section 373 CA respectively.

9.5.2 A wider general exemption was considered by ACRA, which could allow the Registrar to waive all the requirements for financial information in respect of the Head Office financial statements. However, ACRA noted that a requirement for a foreign entity to file at least basic financial information with the Registrar was important, as this would allow the public to access at least some information, and would allow them to assess the financial position of the foreign entity. ACRA therefore proposes that the existing exemption under 373(7) CA in respect of Head Office financial statements should be retained in respect of foreign entities and should not be widened, so as to safeguard the interests of stakeholders in Singapore.

9.5.3 ACRA had, however, in its previous consultation, acknowledged that there was some room to consider the possibility of providing a power to grant exemptions in respect of Singapore branch accounts in cases where the foreign entity would have exemptions from disclosure of financial requirements in its home jurisdiction. This received support from the majority of the consultation respondents. ACRA's recommendation is therefore that the power to grant an exemption in respect of Singapore branch accounts under section 373(5) CA can be clarified to allow an exemption, through a class order or on a case-by-case basis, where the foreign entity is exempted from disclosure of financial requirements in its home jurisdiction.

Recommendation 25

The current exemption power under section 373(7) of the Companies Act in respect of Head Office financial statements will not be widened, but section 373(5) of the Companies Act can be modified to allow a waiver of the requirements of the Singapore branch accounts, through a class order or on a case-by-case basis, where a foreign entity is exempted from disclosure of financial requirements in its home jurisdiction.

9.6 LIABILITY AND PENALTY FOR FOREIGN ENTITIES FOR HEAD OFFICE FINANCIAL STATEMENTS

9.6.1 Currently, the Companies Act does not impose a specific penalty when foreign companies fail to lodge a balance sheet and other documents with the Registrar, as required under section 373(1), (2) and (4) CA. However, a breach of those provisions would attract penalties under section 386 CA, which provides for the penalties for default by any foreign company in complying with any provision of Division 2, Part XI, and every officer of the company who is in default and every agent of the company who knowingly and wilfully authorises or permits the default. The penalty is a fine not exceeding $1,000 and a default penalty is also imposed.

9.6.2 ACRA had, in the previous consultation, proposed:

(a) imposing specific liability provisions in the Companies Act for foreign companies that fail to lodge financial statements and other required reports; and

(b) that the foreign company in default and every of its directors will be liable for failure to lodge financial statements and other required reports.

It was highlighted that the current low penalty was inconsistent with the approach for local companies, and the suggestion was to achieve greater consistency in treatment between foreign and local companies.

9.6.3 Most of the respondents agreed that the penalty imposed on a foreign company and its directors for failure to lodge financial statements and other required reports should be the same as that for local companies. One respondent felt that holding a director personally responsible would make it too onerous to register a foreign company in Singapore, suggesting instead that the director only be held responsible if he "knowingly and wilfully authorized or permitted" the default. WG 5 agreed with the respondents' views, including the introduction of a mens rea requirement.

9.6.4 In addition, WG 5 noted that as agents deal with the financial statements of a foreign company in Singapore, they must be in a position to be accountable for the contents and lodgment of those statements. Agents should therefore also be responsible for the lodgment of financial statements with the Registrar.

9.6.5 ACRA's recommendation is therefore that –

(a) every director or person of a similar responsibility[30] of the foreign entity who knowingly or wilfully permits the default; and

(b) the agent of the foreign entity who knowingly and wilfully authorises or permits the default,

should be liable for failure to comply with the requirements to file its Head Office financial statements, and that specific penalties imposed should be aligned with those for the local companies.

9.6.6 The liability in respect of an agent would include compliance with the filing requirements, timelines and in the case of the equivalent provision of section 373(4) CA, where the foreign entity has to prepare financial statements which it would have to prepare as if it were a public company incorporated in Singapore, the contents of those financial statements.

9.6.7 A practical problem that is noted is that the Proposed Act should not purport to have extraterritorial effect and in practice, the proposed liability provisions on foreign directors may have no impact, unless there is a director is in Singapore. However, similar issues already exist under section 386 CA in respect of officers of the foreign company who are in default.

Recommendation 26

Every director or person of similar responsibility of a foreign entity who knowingly or wilfully permitted the default should be liable for failure to comply with the requirement to lodge Head Office financial statements, and the penalties imposed should be aligned

[30] The inclusion of a "person of a similar responsibility" recognises that not all foreign entities would have a "director".

with those for local companies.

Recommendation 27

An agent who knowingly and wilfully authorises or permits the default should also be liable for failure to comply with the requirements in relation to the Head Office financial statements under the Proposed Act.

9.7 LIABILITY AND PENALTY FOR FOREIGN ENTITIES FOR SINGAPORE BRANCH ACCOUNTS

9.7.1 In addition to the balance sheet and other documents, foreign companies are currently required to lodge Singapore branch accounts which comply with the SFRS[31]. Business transactions of a foreign company in Singapore would therefore be presented in a familiar form, which would provide a level of assurance to the local business community. Foreign companies which cannot comply with this requirement may seek a waiver from the Registrar[32].

9.7.2 Like with section 373(1), (2) and (4) CA discussed above, the Companies Act imposes no specific penalty in section 373(5) CA for failure to comply, although non-compliance with this section would attract penalties under section 386 CA.

9.7.3 ACRA took the view, in the previous consultation, that in addition to the foreign company, every director of the foreign company be held liable for non-compliance with the SFRS and the penalties for such breaches should be aligned with those for local companies. The responses from the consultation respondents on this issue was similar to that for section 373(1), (2) and (4) CA.

9.7.4 Additionally, WG 5 agreed an agent of the foreign company should also be held accountable for the branch accounts of the foreign company, including ensuring compliance with SFRS. WG 5 also emphasised that the agent's responsibility must be clearly explained to that agent in order that he be fully aware of it.

Recommendation 28

Every director or person of similar responsibility of a foreign entity who knowingly or wilfully permitted the default should be liable for failure to comply with the requirement to file branch accounts (including compliance with the SFRS), and that the penalties imposed should be aligned with those for local companies.

[31] Section 373(5) CA.
[32] Section 373(5)(b) CA.

Recommendation 29

A local agent who knowingly and wilfully authorises or permits the default should also be liable for failure to comply with the requirements in respect of the branch accounts (including compliance with the SFRS).

10. REMOVAL OF NEED FOR BRANCH REGISTERS

10.1 Foreign companies are currently required under section 379 CA to maintain branch registers. The branch register contains information about shares of members resident in Singapore who apply to have the shares registered therein[33]. WG 5 noted that the requirement for branch registers was instituted in the past where it was difficult for the Registrar and other relevant agencies to obtain information about the foreign company in Singapore. However, critical information is now readily available to the public on ACRA's Bizfile system as such details are usually provided at the point of the foreign company's registration with ACRA.

10.2 WG 5 was of the view that, generally, branch registers do not provide holistic information about the foreign company and that there are limitations to the usefulness of branch registers. WG 5 noted that there is no means of verifying whether those who are listed as shareholders in the branch register are in fact the shareholders, and if any information was not disclosed, it would be difficult for ACRA or any other person to ascertain any missing information. Moreover, with the enhanced registration requirements for foreign entities, a foreign entity would be required to provide a list of its members (if the members' names are required to be disclosed by the foreign company's original place of incorporation) upon registration (please see Recommendation 6), which would have to be updated (please see Recommendation 16).

10.3 Having considered the pros and cons of maintaining a branch register, WG 5 took the view that the current requirement for branch registers is unnecessary as the information is incomplete and not very useful. WG 5 noted that local agents of the foreign companies would keep relevant documents of the companies and therefore it may be unnecessary to require foreign companies to keep branch registers with duplicate information.

10.4 WG 5 was of the opinion that foreign companies should disclose information that is required of them to be disclosed in their original jurisdiction of incorporation, and not otherwise. As long as the information is available in the foreign company's original jurisdiction of incorporation, there would be no need to replicate that information in Singapore. Instead, the local agent in Singapore should be responsible for disclosing such information if required to do so.

10.5 Hence, WG 5 was of the view that, going forward, there should be no requirement for a foreign entity to maintain a branch register in Singapore, unless it is required by another regulation to do so.

[33] Section 379(1) CA.

Recommendation 30

There should be no requirement for a foreign entity to maintain a branch register in Singapore, unless it is required by another regulation to do so.

11. PROVISIONS RELATING TO CERTIFICATE OF SHAREHOLDING

11.1 Following the recommendation to abolish the requirement for a foreign entity to maintain a branch register above (please see Recommendation 30), ACRA also considered whether section 385 CA, which relates to the certificate of shares held by any member of a foreign company and registered in the branch register, would also similarly need to be abolished.

11.2 ACRA noted, however, that a foreign entity may still choose to maintain a branch register in Singapore, even though there may be no legislative requirement to do so. If so, the provision in section 385 CA would be useful to clarify that a certificate of shareholding issued by the foreign entity can be taken as prima facie evidence of the title of its member to the shares in the foreign entity as stated therein. As such, ACRA's recommendation is that the provision in section 385 CA be retained in the Proposed Act for foreign entities, but the necessary changes to the drafting of that section be made.

Recommendation 31

The provision in section 385 of the Companies Act relating to the certificate of shareholding should be retained for foreign entities.

12. GENERAL ACCOUNTABILITY AND PERSONAL LIABILITY OF AGENTS

12.1 Section 370(2) CA provides that agents are responsible for the doing of all such acts, matters and things required to be done by a registered foreign company under the Companies Act and are personally liable if the foreign company breaches any provision in the Act. ACRA recommended, in the previous consultation, that this personal liability of agents be retained.

12.2 Most of the respondents agreed with retaining the personal liability of the agent for all penalties imposed on the foreign company for breaches of the Companies Act, unless the agent satisfies the court otherwise. One of the respondents, however, disagreed, noting that the agent usually works for a service provider and should therefore not be held personally liable. WG 5 agreed with the views of the majority of respondents.

12.3 Going forward, ACRA's recommendation is that agents should be responsible for acts to be done by the foreign entity and be personally liable for all penalties imposed on the foreign entity for breaches of the Proposed Act, unless the agents satisfy the courts otherwise.

Designation of "agent"

12.4 WG 5 also recommended that the reference in the Companies Act to "agent" be changed to "local representative" in the Proposed Act, which is a term that would better reflect the accountability and responsibility expected of the person. ACRA agrees with WG 5 in principal but notes that there may be confusion between the "local representative" of a foreign entity and a "local representative" of a Singapore representative office. ACRA therefore suggests that the "agent" of a foreign entity be referred to as an "authorised representative" in the Proposed Act, which is similar to the position in Hong Kong[34].

Recommendation 32

Agents should be responsible for acts to be performed by the foreign entity and be personally liable for all penalties imposed on the foreign entity for breaches of the Proposed Act, unless the agents satisfy the courts otherwise.

Recommendation 33

The designation "agent" should be changed to "authorised representative" in the Proposed Act to reflect the accountability and responsibility expected of the person.

13. REMOVING REQUIREMENT TO DISPLAY NAMES AND PLACE OF ORIGIN OUTSIDE REGISTERED OFFICE AND EVERY PLACE OF BUSINESS

13.1 Currently, a foreign company is required under section 375 CA to exhibit its name and place of formation outside its registered office and every place of business it establishes in Singapore. ACRA suggested, in its previous consultation, that this be done away with as such information about the existence of the foreign company is available through a free directory search on ACRA's website, and all other information reported to ACRA is available to the public for a nominal fee. In 2004, a similar requirement for local companies to display their names outside every office or place in which its business is carried on was also abolished. All of the respondents agreed with ACRA's suggestion, which was also supported by WG 5.

13.2 Going forward, ACRA recommends that there should be no need for a foreign entity to display the name and place of origin outside its registered office and every place of business.

[34] See section 341 of the Hong Kong Companies Ordinance.

Recommendation 34

There should be no need for a foreign entity to display the name and place of origin outside its registered office and every place of business.

14. REQUIRING A FOREIGN ENTITY TO INCLUDE REGISTRATION NUMBER IN DOCUMENTS

14.1 A foreign company's registration number serves as a unique identifier for that company in Singapore. Currently, a locally-incorporated company is required to include its registration number (in addition to its registered name) on all its business letters, statements of account, invoices, official notices and publications[35], but a foreign company is not. ACRA proposed, in its previous consultation, that the registered foreign company should also be required to do the same, in addition to the current requirement for it to state its name and place of incorporation[36]. All of the respondents agreed with ACRA's proposal, which was also supported by WG 5.

14.2 Going forward, ACRA recommends that a foreign entity should be required to state its Unique Entity Number ("UEN"), namely the ACRA registration number, in its documents.

Recommendation 35

A foreign entity should be required to state its Unique Entity Number (namely the ACRA registration number) in its documents.

15. SERVICE OF DOCUMENTS ON FOREIGN ENTITY AT REGISTERED ADDRESS AT PLACE OF INCORPORTION

15.1 Under section 376(c) CA, the service of a document on a foreign company may be effected at its registered address at the place of its incorporation, in a case of a foreign company which has ceased to maintain a place of business in Singapore. Some concerns raised with this provision include that the address on ACRA's registers, which could be used for service, may not be up-to-date, and that there are no equivalent legislative provisions in UK and Australia. Moreover, there is no time limit on when the section may be applicable – this means that even if a foreign company had ceased to maintain a place of business years ago, this provision could still be applicable to effect service on the foreign company.

15.2 However, on balance, ACRA recommends retaining this as it would be advantageous to the local creditors of foreign entities to effect service under the equivalent of section 376(c) CA instead of having to obtain service in accordance with the Supreme Court of Judicature Act or the Subordinate Courts Act.

[35] Section 144(1A) CA.
[36] Section 375(1)(b) CA.

Recommendation 36

The existing provision which allows the service of a document on a foreign company at its registered address at the place of its incorporation, in a case of a foreign company which has ceased to maintain a place of business in Singapore under section 376(c) of the Companies Act should be retained for foreign entities.

16 CLOSURE OF FOREIGN ENTITIES IN SINGAPORE

16.1 SHORTENING OF TIME FRAME FOR REMOVAL OF FOREIGN ENTITY'S NAME FROM REGISTER

16.1.1 Currently, under section 377(1) CA, where a foreign company ceases to have a place of business in Singapore, the foreign company needs to lodge a notice of that fact with the Registrar within 7 days of the cessation. However, the Registrar will only remove the name of the foreign company from the register after 12 months from the lodgment of the notice.

16.1.2 WG 5 noted, however, that during the 12-month period, there is no legislative provision which allows a "re-activation" of the foreign company's operations in Singapore, and that thus there is no real purpose served by leaving the company's name on the register. WG 5 took the view that the 12-month period was too long and noted that in the UK, Australia and Hong Kong, the requirement is only 3 months[37]. WG 5 suggested that the existing time frame under section 377(1) CA for the Registrar to remove the name of a foreign company from the register should be shortened to 3 months in the Proposed Act.

16.1.3 ACRA also noted that in practice, the name of a foreign company is not strictly removed from its electronic register but there is a change in the registration status of the foreign company. The provision for foreign entities would therefore be drafted accordingly.

Recommendation 37

The time frame within which the Registrar indicates on the register the cessation of business of a foreign entity should be 3 months from the notification of cessation by the agent.

16.2 EXPANDING THE GROUNDS FOR STRIKING-OFF

16.2.1 Section 377(6) & (8) CA provides for the situations where the Registrar may strike-off the name of a foreign company, i.e. where the Registrar has reasonable cause to believe that it has ceased to carry on business or to have a place of business in Singapore, or where

[37] UK Companies Act 2006, section 1000; Australia Corporations Act, section 601CL; HK Companies Ordinance, section 339A & section 291.

the Registrar is satisfied that that the foreign company is being used for an unlawful purpose or a purpose prejudicial to peace, welfare or good order in Singapore or against the national security or interest.

Resignation of agent

16.2.2 In connection with the recommendation that the minimum number of agents of a foreign company be reduced from two to one (please see Recommendation 11), WG 5 also considered the implications of that recommendation with regard to the resignation of the agent. The agent will be personally liable for the actions of the foreign entity in Singapore. However, it may be unfair to compel an agent of a foreign entity to remain as an agent if he wishes to sever ties with that entity, particularly where he is uncomfortable with the business dealings of that foreign entity. It was noted that there have been instances of agents of foreign companies who have been held at ransom in this manner.

16.2.3 Difficulties can arise where the agent wishes to resign but is unable to do so because the foreign company does not respond to the agent's request for resignation. WG 5 therefore suggested that where an agent has notified the foreign entity of his intention to resign but is unable to do so because there is no replacement, and the foreign entity does not respond or act within a period of 12 months, the agent should be able to take steps to apply to the Registrar to commence striking-off proceedings.

Dormant foreign entity

16.2.4 WG 5 also considered the situation of a dormant foreign entity, where the agent has received no instructions from that entity regarding whether it intends to continue its registration in Singapore. ACRA recommends that if an agent, after making a request for confirmation by a foreign entity, does not receive any instructions from that entity regarding whether it intends to continue its registration in Singapore within a period of 12 months, he should be able to initiate an application for striking-off the foreign company.

16.2.5 Again, like with the situation where an agent is unable to resign because the foreign entity does not appoint a replacement agent, the agent of a dormant foreign entity would have no recourse and would have to continue to be responsible for the foreign entity in Singapore under the Proposed Act. A ground for application to strike-off the foreign entity from the register would allow the agent to take some form of action against an unresponsive or uncooperative foreign entity.

16.2.6 The striking-off of the foreign entity, unlike in the case of striking-off of a locally-incorporated company, would not affect the foreign entity's liabilities nor prevent the company from being sued by creditors, since the foreign entity is established under the laws of its home jurisdiction and not in Singapore. However, striking-off would prevent the foreign entity from continuing to carry on business in Singapore or risk contravening the Proposed Act.

Recommendation 38

In addition to the grounds already existing in section 377(6) & section 377(8) of the Companies Act, there should be provisions to empower the Registrar to strike-off a

foreign entity from the register where –

(a) an agent wishes to resign but is unable to do so because there is no replacement agent, and the agent can show that the foreign entity has failed to respond or act within a period of 12 months; or

(b) the agent of a dormant foreign entity has received no instructions from that entity within a period of 12 months of a request being made by the agent regarding whether the foreign entity intends to continue its registration in Singapore.

17. RESTRICTION ON NAMES OF FOREIGN ENTITIES

17.1 Under section 378 CA, there is a restriction on a foreign company being registered by a name which in the opinion of the Registrar is undesirable or is one which the Minister has directed the Registrar not to accept. There is currently no power to reject identical names or direct name change for similar names, unlike in the case of local companies under sections 27 and 28 CA.

17.2 ACRA reviewed the grounds for rejection of registration of a name of a foreign entity and considered whether the power of the Registrar to direct a change of name should be extended to registered foreign entities.

17.3 ACRA's proposal is to empower the Registrar to reject the registration of a name of a foreign entity which is identical to any other name on ACRA's register. However, ACRA would consider the inclusion of "(Singapore branch)" in a foreign entity's name as distinguishing. This approach would put persons who deal with the foreign entity on notice that the entity is foreign and not locally-incorporated, so as to avoid any potential confusion. One concern is whether even this approach may be unduly restrictive as it prohibits or discourages foreign entities with identical names to business vehicles which are already registered in Singapore from carrying on business in Singapore.

17.4 ACRA also proposes to introduce a power to direct a registered foreign entity to change its name on the ground of identical names, similar to that for locally-incorporated companies (i.e. the Registrar would also have the power to consider any complaint where the name of a registered foreign entity is identical to any other corporation or business name). The inclusion of "(Singapore branch)" in a foreign entity's name as a distinguishing term will also be applicable in respect of a change of name.

17.5 ACRA further considered the idea of a power to direct a change of name on grounds of similar names, like that for locally-incorporated companies, but decided not to include the power to reject a name or direct a change of name on the grounds of similar names, as this may be unduly prejudicial to a foreign entity established with that name in another country.

<u>Recommendation 39</u>

There should be provisions to empower the Registrar to reject the registration of a name where the name of the foreign entity is identical to the name of any other business vehicle already registered in Singapore, or to direct a change of name in such a case, or where

that name is identical to any other corporation or business name.

18 TRANSFER OF INCORPORATION

18.1 ACRA had, in its previous consultation, considered the possibility of introducing a system for cross registration or transfer of incorporation for foreign companies. These issues have been re-evaluated and ACRA has not observed a noticeable demand for this. Both Malaysia and Hong Kong, which have recently issued their final reports on their respective corporate legislation, also do not mention any review or changes to be made in this area. Moreover, a legislative framework to allow a transfer of registration from another country into Singapore is likely to be complex and safeguards must balance the ease of allowing such transfers. ACRA therefore does not intend to introduce provisions relating to transfer of incorporation of foreign entities, but will continue to monitor developments in this area.

Recommendation 40

A framework for transfer of incorporation of foreign entities will not be introduced at this time.

19. HOW TO RESPOND

19.1 ACRA invites comments and feedback on the recommendations in this consultation paper, as well as views on other issues related to the registration and regulatory requirements of foreign entities. To assist us in giving due consideration to your feedback, please provide us with explanations for your opinions and comments. All your submissions will be regarded as public documents unless indicated otherwise.

19.2 Please send your comments and feedback, either in hardcopy or email (preferred mode), by 16 September 2011 to:

Accounting and Corporate Regulatory Authority
Legal Services Division
10 Anson Road
#05-01/15 International Plaza
Singapore 079903

Email: acra_FEconsultation@acra.gov.sg

Fax: 62251676

19.3 For general information about ACRA, please visit our website at http://www.acra.gov.sg/.

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