Annex 2

SUMMARY OF FEEDBACK AND MOF/ ACRA'S RESPONSES ON PROPOSED AMENDMENTS TO INTRODUCE AN INWARD RE-DOMICILIATION REGIME IN SINGAPORE

Definition of "*foreign entity*"

1. Feedback: Two respondents agreed with the definition of "*foreign entity*" as a body corporate incorporated outside Singapore. Some respondents asked: (i) whether the definition would only apply under the inward re-domiciliation regime and whether the current definition of "*foreign company*[1]" in the Companies Act could be used instead; and (ii) whether a narrower term such as "*foreign corporate entity*" should be used since inward re-domiciliation would apply only to incorporated foreign entities.

2. There were suggestions to:

(a) define "*body corporate*" such that the foreign entity would be required to have/ adopt the same composition/ structure of a company limited by shares in Singapore; and

(b) enact regulations or some other official confirmation to specify the types of foreign bodies corporate that would not be allowed to re-domicile into Singapore (i.e. foreign trade unions, foreign governments, foreign statutory corporations, foreign co-operatives, foreign social societies and foreign limited liability partnerships).

3. MOF's and ACRA's response: We agree with the suggestion to use the term "*foreign corporate entity*". This better conveys that the new inward re-domiciliation regime will apply only to incorporated foreign entities. On suggestion 2(a), foreign corporate entities that do not have the same structure as a Singapore company limited by shares may apply for transfer of registration. However, they will have to adopt such a structure for registration. On suggestion 2(b), regulations will set out the minimum requirements that applicants must meet, and the situations for which the Registrar will not approve a transfer of registration. We do not think it is necessary to list the specific types of foreign corporate entities that will not be allowed to transfer their registration.

Requirements for transfer of registration

Prescribed requirements for transfer of registration to Singapore

4. Feedback: Respondents generally agreed with the following proposed requirements[2] in the draft Bill for transfer of registration to Singapore, which were geared towards foreign

[1] Section 4 of the Companies Act defines a foreign company as: (a) a company, corporation, society, association or other body incorporated outside Singapore; (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] The proposed requirements were:

(a) the foreign entity to be of a certain minimum size before transfer of registration;
(b) the laws of the original jurisdiction permitted transfer of registration;
(c) the foreign entity complied with all relevant requirements of the original jurisdiction;
(d) application for registration not intended to defraud existing creditors of the foreign entity;
(e) the foreign entity to provide a solvency statement (or proof of a genuine intent to restructure for distressed foreign entities);

entities with likely prospects for a positive commercial contribution. Some respondents suggested prescribing additional requirements:

(a) The foreign entity should be an active entity and should submit its financial statements (where available) for the past five years and documentary evidence of compliance. This would avoid instances where the foreign entity subsequently becomes a dormant/ shell company;
(b) The foreign entity should state the intention behind the application for transfer of registration to Singapore;
(c) The foreign entity should ensure that all consents (including shareholders' consent[3])/ waivers were obtained in its original jurisdiction in connection with the transfer of registration[4];
(d) The foreign entity should give notice to all existing stakeholders/ contract parties regarding their transfer of registration;
(e) The foreign entity was not subject to any pending civil or criminal litigation; and
(f) All filings and other statutory obligations were fully met and up to date.

5. Some respondents asked:

(a) what form of solvency statement would be required;
(b) what evidence would be considered as meeting the requirement that the application was not intended to defraud existing creditors of the foreign entity;
(c) whether there would be any further requirements/ documents to be submitted to the Registrar for foreign entities seeking to list on Singapore's stock exchange (SGX); and
(d) whether directors' declarations or certificates of good standing from the Registrar in the original jurisdiction would suffice as evidence that all relevant requirements of the original jurisdiction have been complied with.

6. In addition, there were suggestions to:

(a) require the provision of a solvency declaration instead of a solvency statement and to define/ describe what would constitute acceptable "*proof of a genuine interest to restructure for distressed foreign entities*";
(b) refine the requirement that the application was not intended to defraud existing creditors of the foreign entity so that emphasis would be on the effect of defrauding creditors instead; and
(c) include relevant foreign jurisdictions in the subsidiary legislation and enact the relevant subsidiary legislation to require the foreign entity to:

    (i) engage a Singapore advocate and solicitor, and/ or filing agent or qualified individual for its application for re-domiciliation; and
    (ii) state the relevant industry classification code.

7. MOF's and ACRA's response: On suggestion 4(a), it is unlikely that a foreign corporate entity will transfer its registration if it is a dormant shell company. In any event, the proposed minimum size requirement will reduce the prospects of such applications. In addition, as

(f) the foreign entity not to be in judicial management or liquidation and no application was made to any court to put the foreign entity into judicial management or liquidation;
(g) the foreign entity not to have entered into a scheme of arrangement or compromise; and
(h) the foreign entity not to be externally administered (e.g. by a receiver) and no application was made to any court to externally administer the foreign entity.

[3] New Zealand requires the foreign company to obtain the consent of 75% of its shareholders to the re-domiciliation.
[4] For example, the foreign entity should ensure that all agreements were reviewed to ensure that transfer of registration would not constitute a breach of contract or trigger an event of default or other termination event that would impact its operations in Singapore after registration.

applications will be assessed based on the situation of applicants at the time of application, it will not be useful to require submission of financial statements for the past five years. On suggestion 4(b), we are unlikely to consider an applicant's commercial reasons for transferring its registration when determining whether the transfer should be approved. Hence, we do not think it is necessary to require in law that a statement of the intention behind the application be furnished.

8. Suggestions 4(c), (d) and (f) pertain to matters which are normally dealt with in the outward re-domiciliation regime of the original jurisdiction from which the applicant seeks to transfer registration. One of the minimum requirements that an applicant must satisfy will be that the foreign corporate entity is allowed by the law of its original jurisdiction to transfer its registration and that it has complied with the requirements of those laws. The stakeholders of the foreign corporate entity will know that their rights, in the event of an application for transfer of registration, are safeguarded primarily by those laws of the original jurisdiction. Thus, these issues should not be dealt with by the proposed inward re-domiciliation regime. Specifically, on the possibility of transfer of registration constituting a breach of contract or triggering an event of default or other termination event, it is in the interests of the foreign corporate entity to avoid this. Ultimately, such contractual rights would be for parties to enforce as appropriate. On suggestion 4(e), applicants should not be excluded simply because they are involved in pending litigation as it is not unusual for large corporations to be involved in litigation.

9. The feedback in paragraphs 5 and 6 generally deal with matters that will be addressed in subsidiary legislation. On paragraph 5(c), transfer of registration and listing are two separate transactions and the latter does not involve submitting documents to ACRA. On suggestion 6(c), the intended determining factor is that the laws of the original jurisdiction should allow for outward re-domiciliation. Thus, it is not necessary to list the relevant foreign jurisdictions. It is also not necessary to require a Singapore advocate and solicitor, filing agent or qualified individual to be involved in every application for transfer of registration. There is no such requirement for the incorporation of a local company. Moreover, the company and its officers can be held accountable (where necessary) under the Companies Act. We agree with suggestion 6(c)(ii).

Minimum size requirement

10. Feedback: There were mixed responses on the use of the small company/ group criteria[5] as an entry requirement for foreign entities seeking to re-domicile into Singapore. Some respondents asked whether:

(a) an overseas company would be eligible for re-domiciliation if it satisfied none or only one of the criteria for small company; and

(b) whether the proposed criterion relating to the revenue of the company not exceeding $10 million for each financial year should be amended such that public companies would automatically fulfil the minimum size requirement. Public companies already have to meet minimum listing requirements on market capitalisation.

11. There were other comments on the use and/ or suitability of the small company/ group criteria as a minimum size requirement for re-domiciliation:

(a) Some jurisdictions did not impose similar threshold criteria for re-domiciliation;

[5] A company is a small company if it is a private company throughout the financial year and satisfies any 2 of the following criteria for each of the prior 2 financial years:
(a) the revenue of the company for each financial year does not exceed $10 million;
(b) the value of the company's total assets at the end of each financial year does not exceed $10 million;
(c) it has at the end of each financial year not more than 50 employees.

(b) It would not be appropriate to use the small company/ group criteria, which was introduced for audit exemption;

(c) There was no minimum size requirement to incorporate a company or establish a branch in Singapore. Imposing a minimum size requirement would be prohibitive and might prevent start-ups that were able to contribute to Singapore's economy from transferring their operations to Singapore; and

(d) Group holding companies should not be prevented from re-domiciliation. It should be sufficient for a company to exceed the small company criteria on a consolidated basis.

12. A respondent suggested adopting income tax statutory definitions of companies of substance. The respondent suggested replacing the minimum size requirement with a "*minimum spend*" test[6] used in international tax treaties as a more appropriate gauge of foreign entities with likely prospects for a positive commercial contribution. Another respondent asked whether the Registrar's approval of the re-domiciliation application would be cancelled if the company ceased to meet the criteria after re-domiciliation.

13. MOF's and ACRA's response: The purpose of imposing a minimum size requirement is to limit transfers of registration to foreign corporate entities which are likely to make a positive commercial contribution to Singapore. We have decided to adopt a more conservative approach than that for incorporation of a Singapore company or registration of a foreign company, as this will be a new regime. The minimum size requirement will be prescribed in the regulations and can be modified easily if necessary. The Minister will also be empowered to waive or modify the minimum requirements.

14. On paragraph 10(a), the minimum size requirement would be satisfied if the applicant does not satisfy more than one of the three criteria in the Thirteenth Schedule i.e. it is not a small company as defined in the Thirteenth Schedule. The same applies on a small group level. On paragraph 12, the tax concept of an expenditure test, applied in certain treaties, is framed to achieve specific tax objectives to prevent the use of shell companies (be it for tax avoidance or any other illicit purposes). Hence, it may not meet the same objective of ensuring that re-domiciliation results in the likely prospects of a positive commercial contribution to Singapore, which is driven mainly by economic development considerations, rather than tax compliance and revenue concerns. If the application for transfer of registration is approved, the foreign corporate entity will be registered as a company. Like any Singapore company, its registration will not be cancelled even if it subsequently becomes a small company (as defined in the Thirteenth Schedule).

Names of companies to be registered

15. Feedback: Respondents generally agree that the existing rules on names for locally incorporated companies should similarly apply to re-domiciled companies. Some respondents suggested: (i) reflecting the name of the foreign entity (prior to its de-registration for re-domiciliation) in the certificate of incorporation issued by the Registrar, for consistency with the regime for locally-incorporated companies; and (ii) issuing a Unique Entity Number (UEN) to the re-domiciled companies.

[6] The Base Erosion and Profiting Shifting (BEPS) plan suggests that an expenditure-based "substantial activity" requirement be used to address the potential abuse of preferential regimes. Similarly, an expenditure-based test can be applied to prevent abuse of the inward re-domiciliation regime i.e. where entities that do not have a commercial purposes other than tax planning (also known as entities with insufficient substance) can easily re-domicile into Singapore.

16. MOF's and ACRA's response: We agree and will adopt the two suggestions.

Application for transfer of registration

17. Feedback: Respondents had mixed responses on the proposed declaration that the identities of certain persons (e.g. subscribers to the constitution) have been verified. A respondent highlighted potential logistical problems to effect the process for foreign-resident individuals and asked whether/ what other modes of verification would be acceptable. Two respondents indicated that there was no need to provide for the verification of subscribers' identity since the foreign entity and its register of members would have existed in the foreign jurisdiction. There was also feedback to reconsider the need to identify current members and officers of the foreign entity, instead of the members and officers referred to in the constitution.

18. Some respondents suggested:

(a) introducing regulations to require registered filing agents to conduct customer due diligence and inquire about the beneficial owners with controlling interests in the foreign entity;

(b) ascertaining the identity of the directors and requiring directors to agree to the statutory duties imposed on them under the Companies Act; and

(c) reconsidering the use of the term "*constitution*", since re-domiciliation would not constitute a new legal entity.

19. A respondent asked whether the requirements on the constitution of the re-domiciled company to be registered would be identical to those under section 22 of the Companies Act.

20. MOF's and ACRA's response: We will remove the requirement for declaration. Unlike the incorporation of a new company, each application for transfer of registration will be assessed manually to ensure compliance with all requirements. Even without the declaration, applicants are obliged to provide accurate information in their applications. Furthermore, a foreign corporate entity applying for transfer of registration will have been in operation for some period of time and its corporate history may be a gauge of its reliability, unlike for new incorporations. On suggestion 18(a), the Companies (Amendment) Bill will introduce new obligations for companies to maintain registers of controllers. These obligations will also apply to companies registered by transfer. On suggestion 18(b), there is no need for directors to agree to statutory duties under the Companies Act as such duties will automatically apply to the directors. On suggestion 18(c), although no new entity is constituted by a transfer of registration, a company registered this way must have a constitution as it is part of the structure of a Singapore company limited by shares. The requirements under section 22 may be modified for companies registered by transfer. This will be addressed in the regulations.

Transfer of registration

Whether the Registrar should have the discretion to refuse transfer of registration of a foreign entity even if the application is in order

21. Feedback: Responses were mixed. A respondent agreed with the need for Registrar's discretion but suggested providing certainty in the assessment criteria. Two respondents were of the view that such a discretion would introduce an element of uncertainty and erode the attractiveness of the new regime. Foreign entities would not be willing to undertake the cost of transferring their registration to Singapore if successful application could not be ascertained. A respondent asked whether the Registrar would issue in-principle or conditional approval before the application.

22. MOF's and ACRA's response: We will retain a discretion of the Registrar to refuse transfer of registration. As applicants for transfer of registration to Singapore may potentially come from many jurisdictions, it is difficult to anticipate the nature of the entities which may apply to transfer and to craft exhaustive provisions setting out which of these should be allowed to transfer. While we acknowledge the importance of certainty in such commercial matters, on balance, we think it is appropriate to retain a residual discretion of the Registrar to refuse transfer of registration where appropriate. There will be no provision for in-principle or conditional approval before the application as that it is no assurance that an application will be successful.

Whether the Registrar should have the discretion to approve the application subject to conditions

23. Feedback: Responses were mixed. A respondent was of the view that although the Registrar's discretion might be an important safeguard, a foreign entity that had met all thresholds for transfer of registration should be treated in the same manner as all other locally incorporated companies. Another respondent indicated that imposing further conditions would affect the foreign entity's corporate existence i.e. if it could not meet the conditions, it would lose its registration in Singapore even though it had de-registered from its original place of incorporation.

24. MOF's and ACRA's response: We will retain a discretion of the Registrar to impose conditions. This follows from the Registrar having a discretion to refuse transfer of registration even if an application is in order.

Whether to introduce a power to strike off newly re-domiciled companies in breach of any conditions of the application

25. Feedback: Respondents were mixed. Two suggested that: (i) power be given to the Registrar to suspend or strike off newly re-domiciled companies in breach of the conditions imposed, with a range of calibrated powers in case of unintentional/ negligent/ wilful misrepresentation on the part of the company or its directors; and (ii) the Registrar consider the harm to Singapore creditors and subscribers if the foreign entity had been re-domiciled into Singapore for a length of time. A respondent who supported the proposed power asked that a due process for appeal be instituted. The respondent also asked: (i) how a person would make claims against a re-domiciled company whose name was struck off the register; and (ii) whether there would be provisions to allow for any rights or claims arising prior to the striking off to be commenced, and possibly served at the registered office existing before striking off. Two respondents who did not support the proposed power cited the uncertainty surrounding the re-domiciled company's corporate existence especially since an outward re-domiciliation regime would not be introduced in Singapore for now.

26. MOF's and ACRA's response: We will modify the approach such that where there is a breach of any condition imposed, that will be grounds for winding up by the Court rather than striking off. This will be more appropriate given that other persons may have claims against the company.

Effect of transfer of registration

27. Feedback: A respondent suggested that the records of the foreign entity existing before transfer of registration be maintained and updated according to the Companies Act. Two respondents also suggested setting out in law or regulations to empower:

(a) the Minister to provide for other effects of transfer of registration; and

(b) the Registrar to issue guidelines and practice directions guiding the business community on transfer of registration.

28. MOF's and ACRA's response: After transfer of registration, the company will have to comply with the Companies Act, like any other company incorporated under the Companies Act. However, this will not apply to records and minutes existing before transfer of registration. It would be unduly onerous and may even be impossible for companies to comply with such obligations in respect of all records including those prior to transfer of registration. On suggestion 27(a), the Minister will have the power to make regulations in respect of applications for transfer and registration of a foreign corporate entity as a company. On suggestion 27(b), guidelines and practice directions on transfers can be issued by the Registrar without specific provision being made for this.

Revocation of transfer of registration

29. Feedback: Respondents generally agreed with the proposed power for the Registrar to revoke the registration of a company under certain circumstances. One respondent suggested setting out the consequences and processes (e.g. appointment of liquidator, distribution of assets according to section 328 of the Companies Act etc.) of any revocation through subsidiary legislation. Another respondent suggested that the Registrar consider the effect on the Singapore creditors and subscribers who would suffer losses, with appropriate penalties imposed on relevant directors/ individuals who committed the wrongdoing.

30. MOF's and ACRA's response: We agree with the suggestions. Revocation of transfer of registration will apply only upon failure to submit to the Registrar proof of deregistration in the original jurisdiction. The consequences and processes will be more fully set out. Despite the revocation, the liability of every officer and member and the right to enforce any right or claim against the company will be preserved.

Duties of company with respect of issue of certificates

Whether share warrants issued before the date of transfer should be rendered void

31. Feedback: A respondent suggested that any pre-existing share warrant issued should be redeemed by the foreign entity before any application to avoid future disputes. Two respondents were of the view that there should be a condition for the foreign entity to cancel such share warrants. If it would not be possible to do so without the consent of the warrant holders, the warrant holders should agree to such cancellation prior to and not later than the point of re-domiciliation. Some respondents asked about the information required to update ACRA's electronic register of members relating to share capital if the re-domiciled company was registered in Singapore as a private limited company.

32. MOF's and ACRA's response: Our focus is to ensure that the company registered by transfer does not have any valid share warrants in issue rather than obliging the foreign corporate entity to cancel share warrants before applying for transfer of registration. Requiring that pre-existing share warrants be redeemed or that consent of warrant holders should be obtained will not exclude the possibility of a foreign corporate entity applying for transfer of registration with outstanding share warrants. Separately, a private company registered by transfer will have to update the electronic register of members like any private company incorporated under the Companies Act.

Whether the 60-day period for the newly registered company to complete and have ready for delivery all share or debenture certificates is appropriate

33. Feedback: The draft Bill provided a 60-day period. Respondents supported the 60-day period for the newly registered company to complete and have ready for delivery all share or debenture certificates. This is similar to the period provided under section 130AE of the Companies Act for allotted shares. A respondent asked whether re-domiciling entities would be given a longer period of time to understand what was required of them and to provide the necessary particulars.

34. MOF's and ACRA's response: We will maintain the 60-day period. There is no compelling reason for a longer period of time.

Other issues

Foreign corporate entities for transfer of registration to Singapore

35. Feedback: A respondent suggested laying out the basic criteria for a re-domiciling foreign entity to adapt to the structure of a company limited by shares under the Companies Act, especially if the foreign entity did not have the concept of a share capital. The respondent also asked whether re-domiciliation meant that the foreign entity would automatically be converted into a branch of the Singapore registered company if the operations remained in the foreign jurisdictions. There were other questions on:

(a) whether a foreign entity could register as either a public company or a private company, and whether there would be specific conditions for registration as either type of company; and
(b) whether investment vehicles/ funds would qualify for re-domiciliation to Singapore.

36. MOF's and ACRA's response: As all the criteria is in the main legislation, it is not necessary to separately lay out in the Act the basic criteria. Matters pertaining to operations in a foreign jurisdiction and registration as a branch there will depend on the laws of that foreign jurisdiction. A foreign corporate entity that applies to transfer its registration will be registered as either a public or private company limited by shares. The conditions for registration as each type of company are stated in the Companies Act. On paragraph 35(b), a public consultation will be conducted soon to invite feedback on proposed new legislation to introduce a new vehicle for funds. This will include consideration on whether that legislation should include a re-domiciliation regime.

Tax treatment for re-domiciled companies

37. Feedback: A respondent asked about the Singapore tax treatment for the re-domiciled entity and its shareholders.

38. MOF's and ACRA's response: The Government is currently reviewing the tax framework for companies registered by transfer and will provide clarity on the tax treatment in due course. Any legislative changes to the Income Tax Act to effect the tax framework for companies registered by transfer will be put out for public consultation.

Evidence of de-registration from the original jurisdiction

39. Feedback: A respondent asked if the timeframe for submitting evidence of de-registration could be lengthened from 30 days to 3 months, in cases where the de-registration process exceeded 30 days.

40. MOF's and ACRA's response: We will revise the timeframe for submitting evidence of de-registration from 30 days to 60 days. Applicants can seek a further extension of time from the Registrar.

Registration of pre-existing charges and duties with respect to issue of certificates

41. Feedback: Respondents commented that the re-registration of charges should be part of the application process such that the register of charges of the re-domiciled company would reflect the charges. This would protect the security interest of the foreign entity's secured creditors.

42. MOF's and ACRA's response: We do not accept the suggestion. Companies need not register charges before confirmation of their successful transfer. In any event, the security interest of the foreign entity's secured creditors will not be affected either way as the legislation will provide that a failure to register pre-existing charges does not affect the continuity of status, operation or effect of any security, right, priority or obligation of the charge.