Monetary Authority of Singapore

SECURITIES AND FUTURES ACT (CAP. 289)

GUIDELINES ON THE APPLICATION OF SECTION 339 (EXTRA-TERRITORIALITY) OF THE SECURITIES AND FUTURES ACT

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GUIDELINES ON THE APPLICATION OF SECTION 339 (EXTRA-TERRITORIALITY) OF THE SECURITIES AND FUTURES ACT (CAP. 289) ["SFA"]

1 INTRODUCTION

1.1 Capital markets are increasingly borderless. This has been made possible by advancements in technology and telecommunications, and further spurred by liberalisation of financial services. Competitive pressures on financial service providers to reduce costs and to satisfy investors' growing sophistication provide a strong basis for sustained, rapid growth in cross-border transactions in securities and futures.

1.2 While such developments are positive for financial sector development and investor choice, regulators need to ensure that regulatory objectives – systemic stability, market integrity and investor protection – are not compromised by the ongoing evolution in business models and the blurring of geographical boundaries.

1.3 To facilitate the regulation of cross-border financial services that target or are made accessible to persons in Singapore, the SFA contains both generic (section 339) and specific provisions (sections 196, 205 and 213) which extend the jurisdiction of the SFA to cross-border activities as well as activities that are wholly outside Singapore but could have a substantial and foreseeable effect in Singapore. This is in line with the practice of major financial centres.

2 OBJECTIVE OF GUIDELINES

2.1 MAS has so far provided guidance on the application of section 339 in respect of Parts II (Markets), III (Clearing Facilities), IV (Capital Markets Services Licence and Representative's Licence) and XIII (Offers of Investments) of the SFA in the form of Guidelines or Regulations[1]. The purpose of this set of Guidelines is to elaborate on the general principles behind MAS' policy stance on the scope and

[1] Guidelines on the Regulation of Markets issued 1 Jul 2005; Guidelines on the Regulation of Clearing Facilities issued 1 Jul 2005; Securities and Futures (Licensing and Conduct of Business) Regulations (Rg 10); Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations (Rg 1); Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations (Rg 2) and Securities and Futures (Offers of Investments) (Business Trusts) Regulations 2005.

[Amended on 1 July 2005]

application of section 339 in relation to cross-border activities that could constitute an offence under Parts II, III, IV, VIII and XIII of the SFA[2].

[Amended on 1 July 2005]

2.2 These Guidelines set out MAS' policies pertaining to the administration of section 339 of the Act. While these Guidelines are not intended to be legally binding interpretation of the law, the failure to comply with the Guidelines may be relied upon to establish or negate any liability in question in relation to any proceeding[3].

2.3 This document[4] is arranged as follows:

i. Background on section 339.
ii. Elaboration of intent and scope of section 339.
iii. General principles on the non-applicability of section 339(2).
iv. Illustrations.

3 BACKGROUND ON SECTION 339

3.1 Under Singapore law, a statute is presumed to apply to acts that take place within Singapore territory. A statute is not intended to have effect outside the territory of Singapore, unless clear and specific words to that effect are provided for in the statute. In this regard, section 339 is enacted to apply to acts taking place outside Singapore which may constitute offences under Parts II, III, IV, VIII, XII, XIII and XV. These Parts of the SFA contain provisions governing activities that could be cross-border in nature.

3.2 The Singapore courts are able to try an offence committed by any person in any place where it has jurisdiction conferred to it by any written law[5]. Section 339 is therefore also enacted to grant the Singapore courts jurisdiction over acts taking place, partly or wholly, outside Singapore.

3.3 Section 339 on its own is not an offence-creating provision, it must be read with the primary offence-creating provision in the relevant Part of the SFA (for example, section 82 in Part IV in respect of licensing requirements for regulated

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[2] For the avoidance of any doubt, the Guidelines are not intended to address issues arising from the application of section 339 to market misconduct offences under Part XII of the Act.

[3] See section 321(5) of the SFA.

[4] For the purposes of this set of Guidelines, unless the context otherwise requires, a reference to a section is to the section in the SFA and a reference to a Part is to the Part in the SFA. A reference to "regulated person" may include an approved exchange, a recognised market operator, an approved holding company, a designated clearing house or a person licensed or exempt from licensing under the relevant provisions in the SFA to carry on one or more of the activities specified in the First Schedule (regulated activities).

[Amended on 1 July 2005]

[5] See section 15 of the Supreme Court of Judicature Act (Cap. 322) and section 50 of the Subordinate Courts Act (Cap. 321).

activities). When an act is conducted partly in and partly outside Singapore, or an act takes place wholly outside Singapore but has a *substantial and reasonably foreseeable effect* in Singapore (the *"effects doctrine"*), such act would be an offence provided that the act when committed in Singapore would be an offence under a primary offence-creating provision.

4 ELABORATION ON INTENT AND SCOPE OF SECTION 339

Section 339(1)

> Where a person does an act partly in and partly outside Singapore which, if done wholly in Singapore, would constitute an offence against any provision of this Act, that person shall be guilty of that offence as if the act were carried out by that person wholly in Singapore, and may be dealt with as if the offence were committed wholly in Singapore.

4.1 On the basis of the first limb of section 339, any act committed in Singapore which contravenes an offence-creating provision in the SFA, even if the act is only partially carried out in Singapore, is triable in Singapore courts. Section 339(1) deems the act to be committed wholly in Singapore.

Section 339(2)

> Where
> (a) a person does an act outside Singapore which has a substantial and reasonably foreseeable effect in Singapore; and
> (b) that act would, if carried out in Singapore, constitute an offence under any provision of Part II, III, IV, VIII, XII, XIII or XV,
> that person shall be guilty of that offence as if the act were carried out by that person in Singapore, and may be dealt with as if the offence were committed in Singapore.

4.2 The *"effects doctrine"* underpinning section 339(2) describes a state's exercise of jurisdiction over an act taking place outside its territory where that act produces or is intended to produce or foreseen as producing effects in that state. In the case of ***PP v Taw Cheng Kong [1998] 2 SLR 410***, the Court of Appeal had exhorted that Parliament adopt the *effects doctrine* as the foundation of Singapore's territorial laws:

> *"88. As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief.…"*

4.3 The Court of Appeal went on to assert that the *effects doctrine* must be clearly legislated by Parliament to give effect to the policy intent:

> *"88. … But we must not lose sight that Parliament, in enacting such laws, may be confronted with other practical constraints or considerations which the courts are in no position to deal with. The matter, ultimately, must remain in the hands of Parliament to legislate according to what it perceives as practicable to meet the needs of our society."*

"Substantial" and "Reasonable Foreseeable"

4.4 For an act to fall within the scope of section 339(2), the effect of the act in Singapore would have to be both substantial and reasonably foreseeable. In considering whether section 339(2) applies to a foreign entity for an act carried out wholly outside Singapore, the factors that MAS would take into consideration include, but are not limited to the following:

4.4.1 ***"Substantial"***

a) The number of persons in Singapore to whom an offer of services or an invitation to engage in any conduct that involves the carrying out of an activity regulated under Part II, III, IV or XIII ("the relevant act") is made; or

b) Whether the act has a significant or adverse impact on the soundness, stability and safety of Singapore's financial system, or on public or investor confidence in the soundness, stability and safety of Singapore's financial system, or is detrimental to the public interest or the protection of investors.

4.4.2 ***"Reasonably foreseeable"***

Whether –

a) the offer of services or the invitation to engage in any conduct that involves the carrying out of the relevant act is made to persons in Singapore;

b) any advertisement or published information about an offer of services or invitation to engage in any conduct that involves the carrying out of the relevant act is directed or targeted at persons in Singapore;

c) the foreign entity accepts or appears willing to accept orders or applications from persons in Singapore to engage in any conduct that involves the carrying out of the relevant act;

d) the foreign entity enters into contractual relationships with persons in Singapore in connection with the carrying out of the relevant act; or

e) the offer is priced in Singapore dollars.

4.5 It is not MAS' policy intent to regulate activities that a foreign entity carries on wholly outside Singapore that involve persons in Singapore where –

a) the foreign entity is responding to unsolicited enquiries or applications from persons in Singapore;

b) the foreign entity is servicing a client previously resident overseas who has subsequently become resident in Singapore, where the business relationship between the client and foreign entity was established overseas and the foreign entity does not actively solicit new types of business (that involve products or services substantially different from those currently supplied by the foreign entity and that involve the carrying on of regulated activities)[6] from the client once he is resident in Singapore; or

c) the foreign entity purchases the services of, or provides services to, a regulated person; for example, a holder of a capital markets services licence for dealing in securities or an approved clearing house provides execution and clearing services to the foreign entity.

4.6 The bona fide sale or purchase of financial services between the foreign entity and a regulated person, as illustrated in paragraph 4.5(c), would not typically attract the application of section 339. One example could be a foreign entity engaging a holder of a capital markets services licence for dealing in securities to execute, clear and settle its proprietary trades in securities listed on the Singapore Exchange.

4.7 In contrast, where the foreign entity carries on activities regulated under Part IV to service Singapore clients ***by means of*** a regulated person or any other Singapore entity, the act could fall within the ambit of section 339. For example, where a foreign entity engages a Singapore entity to act as an introducing broker to refer persons in Singapore to the foreign entity and the foreign entity subsequently carries out activities regulated under Part IV to service these persons in Singapore, the foreign entity would fall within MAS' regulatory scope even though it is operating wholly outside Singapore[7].

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[6] See Illustration 5.

[7] If the foreign entity is related to the Singapore entity and the latter is licensed or exempt from the requirement to hold a capital markets services licence under section 99(1)(a), (b), (c) or (d) of the SFA, the Singapore entity may apply to MAS for approval of the arrangement under paragraph 9 of the Third Schedule to the SFA. See "Guidelines on Applications for Approval of Arrangements under Paragraph 9 of the Third Schedule to the Securities and Futures Act" [Guideline No. SFA 04-G03].

[Amended on 1 July 2005]

5 GENERAL PRINCIPLES ON THE NON-APPLICABILITY OF SECTION 339(2)

5.1 In MAS' view, the following circumstances are relevant in determining that section 339(2) is not likely to apply:

a) The use of prominent disclaimers in all advertisements and published information in relation to the relevant act stating to the effect that the advertisement or published information is directed or targeted at persons outside Singapore;

b) The use of reasonable and effective precautions to ensure that the offer of services or the invitation to engage in any conduct that involves the carrying out of the relevant act may be acted upon only by persons outside Singapore;

c) The absence of any advertisement or published information disseminated by a foreign entity for the purpose of inducing persons in Singapore to engage in any conduct that involves the carrying out of a relevant act by the same entity; or

d) The absence of references to such advertisement or published information described in paragraph 5.1(c) made by that foreign entity in any source which is intended for persons in Singapore.

5.2 Consideration of the circumstances highlighted in paragraph 5.1 is already provided for as relevant in regulation 52 of the Securities and Futures (Licensing and Conduct of Business) Regulations (Rg 10); regulation 29 of the Securities and Futures (Offers of Investments)(Shares and Debentures) Regulations (Rg 1), regulation 35 of the Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations (Rg 2) and regulation 21 of the Securities and Futures (Offers of Investments) (Business Trusts) Regulations 2005.

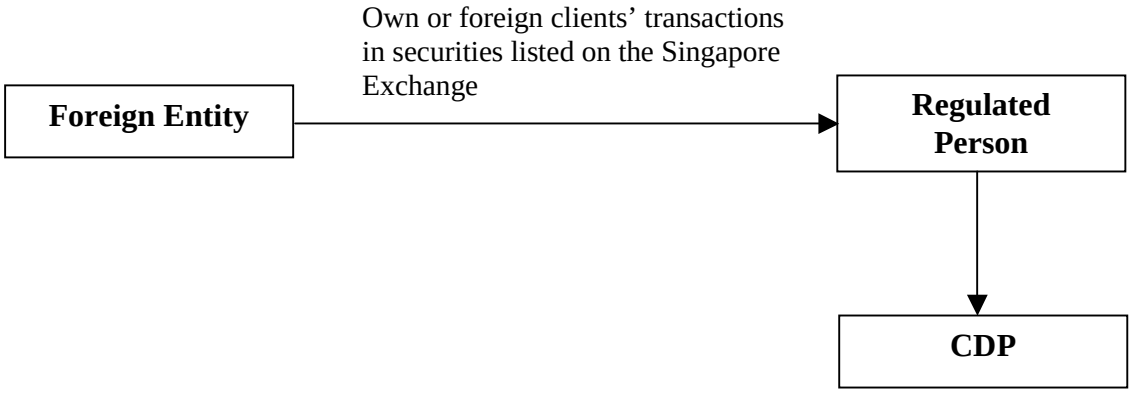
[Amended on 1 July 2005]

6 ILLUSTRATIONS ON THE APPLICABILITY OF SECTION 339

The following illustrations are only intended as a guide; whether or not section 339 applies in a specific case would depend on the facts and circumstances of the case, and with regard to the principles set out in Section 4 of these Guidelines. In response to industry feedback, the following illustrations relate mainly to licensing issues under Part IV but this does not detract from the generality of these Guidelines which apply to all Parts of the SFA to which section 339 imposes extra-territorial jurisdiction, except Part XII (Market Conduct) (see footnote 2).

<u>Illustration 1:</u> Foreign Entity Purchases the Services of a Holder of a Capital Markets Services Licence

A foreign entity routes its or its clients' transactions in securities and futures listed on the Singapore Exchange to a regulated person[8] for execution and clearing. The regulated person is either a holder of a capital markets services licence or an exempt person, and also a clearing member of the Central Depository (Pte) Ltd ("CDP") and the Singapore Exchange Derivatives Clearing Ltd.



6.1.1 The foreign entity is a client of the regulated person. In engaging the latter's execution and clearing services, the foreign entity is not carrying on business in, nor inducing persons in Singapore to engage in, any activity for which the entity needs to be licensed, or exempt from licensing, under the SFA.

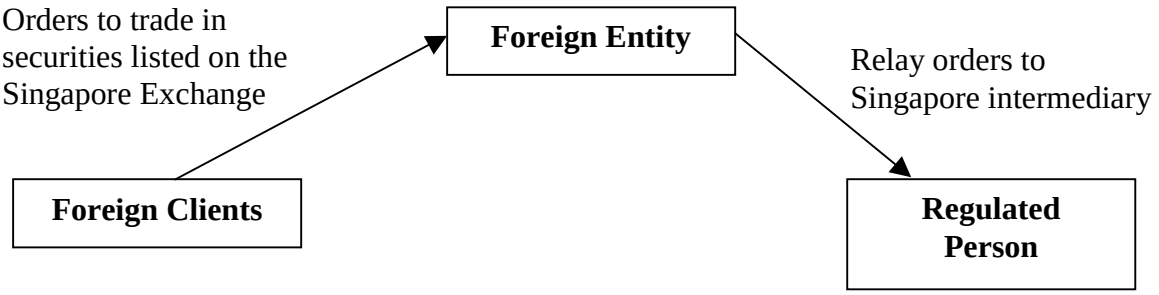
6.1.2 Under this scenario, MAS considers the acts of the foreign entity to be outside the scope of section 82 read together with section 339(2).

6.1.3 In the case where a related foreign entity of a regulated person places its orders for execution through the regulated person in the course of providing fund management services for a Singapore-based client, the arrangement under which the related foreign entity provides fund management services for the client in Singapore would require approval by MAS under paragraph 9 of the Third Schedule to the SFA.

<u>Illustration 2:</u> Regulated Person Services Foreign Entity's Overseas Clients

A regulated person, being a holder of a capital markets services licence or exempt person, accepts orders – either directly or through a foreign entity – from investors overseas to trade in securities and futures in Singapore.

[8] See footnote 4 for the definition of "regulated person".

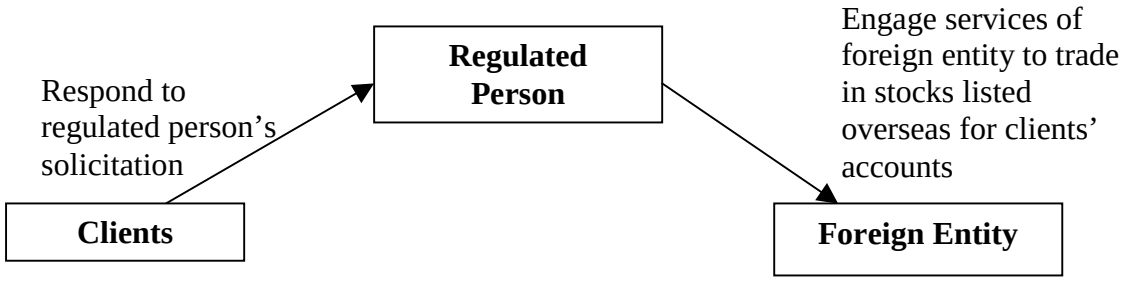


6.2.1 The foreign entity is not directing or targeting its services at persons in Singapore, but engaging the services of the regulated person to service its own clients who are not persons in Singapore. MAS considers the foreign entity not to be carrying on business in any regulated activity.

6.2.2 Under this scenario, MAS considers the acts of the foreign entity to be outside the scope of section 82 read together with section 339(2).

<u>Illustration 3:</u> Introducing Broker Arrangements

A regulated person introduces its clients in Singapore to a foreign entity which acts as an intermediary for the clients to deal in securities listed overseas.



6.3.1 To expand the range of services available to its Singapore clients, the regulated person introduces its clients in Singapore to a foreign entity. The foreign entity carries out activities within the regulatory ambit of Part II, III, IV or XIII in the course of servicing these clients.

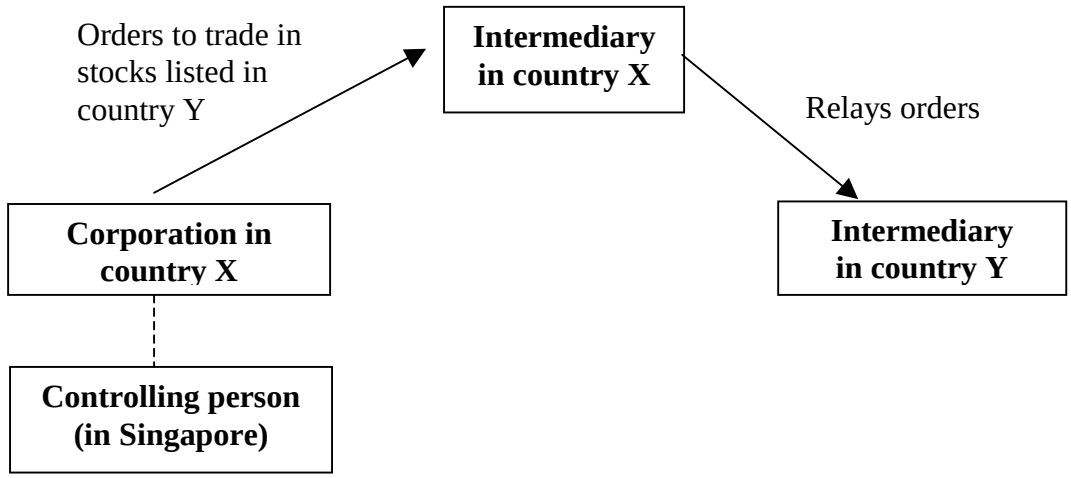
6.3.2 Whether the act of the foreign entity has a "substantial and reasonably foreseeable effect in Singapore" would depend on the nature of solicitation and which entity contracts with the clients in Singapore. Where the foreign entity had not solicited the clients, either directly or indirectly through the regulated person, and the regulated person is the contracting party, the foreign entity's acts would fall outside the scope of section 82 read together with section 339(2). However, if the foreign entity's acts fall within the purview of section 82 read together with section 339(2) and the foreign entity is related to the regulated person who holds a capital markets services licence or is exempt from the requirement to hold a capital markets services

licence under section 99(1)(a), (b), (c) or (d) of the SFA, the regulated person may apply for approval of the arrangement under paragraph 9 of the Third Schedule to the SFA.

[Amended on 1 July 2005]

<u>Illustration 4:</u> Foreign Entity Services a Domestic Institutional Client whose Controlling Person Resides in Singapore

An intermediary based in country X channels trade orders from a corporation based in country X to an intermediary in country Y. The controlling person of the corporation resides in Singapore.

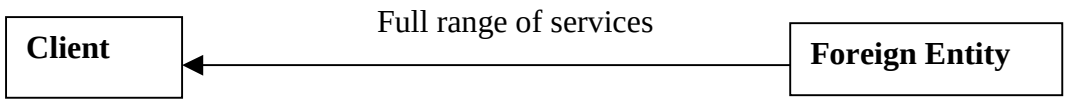


6.4.1 As the intermediary in country X is servicing its institutional client that is also based in that country, it is not considered to be carrying on business in Singapore even though the controlling person of the corporation resides in Singapore. The act of the intermediary in country X is therefore outside the scope of section 82 read with section 339(2).

<u>Illustration 5:</u> Foreign Entity Continues to Service a Previously-Overseas Client

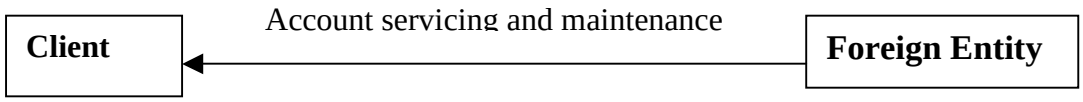
A person ("client") who previously resided overseas and was a client of a foreign entity has moved to Singapore but wishes to maintain his account with the foreign entity. Transactions in respect of this client's account may be effected directly with the foreign entity or through an intermediary related to the foreign entity.

Overseas

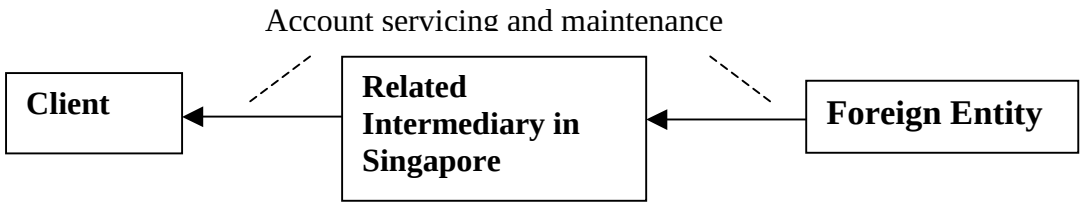


Relocation to Singapore

Scenario 1:



Scenario 2:



6.5.1 It is not MAS' policy intent to regulate business relationships that were formed overseas and that are subsequently transferred to Singapore due to the relocation of the client. In MAS' view, if the account was opened when the client was overseas and the foreign entity continues to service the client's account but ceases to actively solicit the client, the foreign entity would not be within the scope of the policy intent of section 339(2).

6.5.2 MAS' view is that the foreign entity is not considered to actively solicit the client where it only maintains and services the client's account[9], and does not solicit new types of business (that involve products or services substantially different from those currently supplied by the foreign entity and that involve the carrying on of regulated activities) from the client. This is regardless of whether the foreign entity services the client's account directly or through a related intermediary[10]. For example, if the client holds units in a sub-fund of an umbrella fund and is solicited to invest in another sub-fund of the same umbrella fund or other funds managed by the same entity, or if the client had been trading through a securities account that was opened overseas and the foreign entity continues to deal in securities for the client, MAS is less likely to consider the foreign entity as having solicited new types of business from the client.

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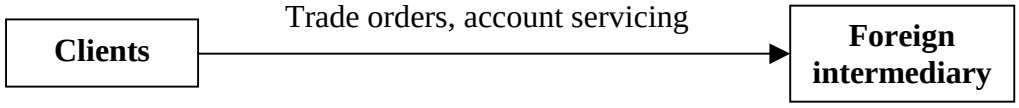
[9] Conversely, where the servicing of clients involves active solicitation, the act of the foreign entity would be a breach of section 82 read with section 339(2) if the foreign entity is carrying on regulated activities without a capital markets services licence. If the foreign entity operates by way of an arrangement with its related intermediary who is a holder of a capital markets services licence or exempted under section 99(1)(a), (b), (c) or (d), the related intermediary may apply for approval of the arrangement under paragraph 9 of the Third Schedule to the SFA (see footnote 6).

[10] Whether the related intermediary is subject to licensing requirements under section 82 in the first place would depend on whether it undertakes the regulated activities as set out in the First Schedule of the SFA.

6.5.3 Whether the foreign entity or its related intermediary is considered to have actively solicited new types of business from the client would depend on the facts of the case.

Illustration 6: Persons in Singapore Trade Directly through Foreign Intermediaries

Due to domestic regulations in certain markets, persons in Singapore ("clients") could be required to deal directly with foreign intermediaries in those countries in respect of securities and futures traded in those markets.



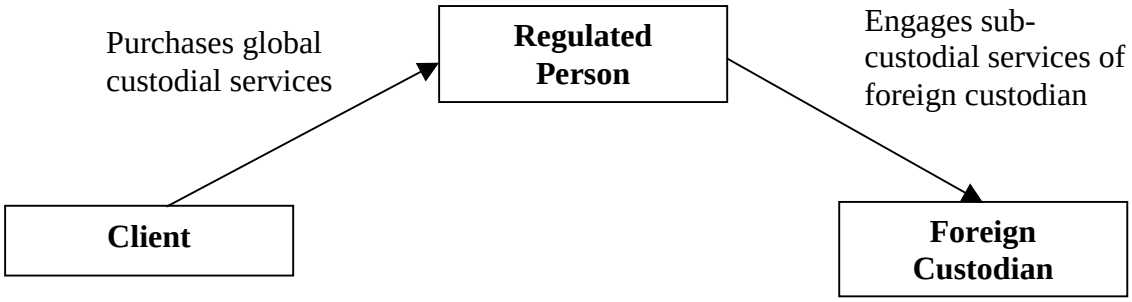
6.6.1 Under this scenario, the acts of the foreign intermediary would fall within the scope of dealing in securities and trading in futures contracts (which are regulated activities under Part IV). Section 339(2) applies to the foreign intermediary if the foreign intermediary had solicited the clients in Singapore to use its services to trade on the overseas market. By targeting these clients, the foreign intermediary's act would have a reasonably foreseeable effect in Singapore. The act would also have a substantial effect given that investor protection issues arise in respect of the clients in Singapore. The acts of the foreign intermediary would be considered to be a breach of section 82 read together with section 339(2).

6.6.2 However, if the foreign intermediary responds to and accepts unsolicited applications from persons in Singapore, MAS considers the acts of the foreign intermediary to be outside the scope of section 82 read together with section 339(2).

Illustration 7: Custodial Services

Scenario 1

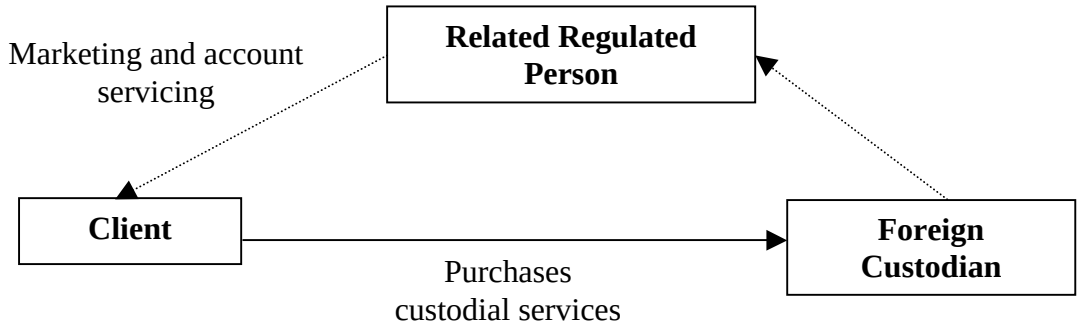
A person in Singapore ("client") contracts with a holder of a capital markets services licence to provide custodial services for securities ("the regulated person") to purchase custodial services on a global basis. The regulated person in turn purchases sub-custodial services from foreign custodians, who may or may not be related to the regulated person, in respect of the client's securities holdings in overseas jurisdictions.



6.7.1 There is no contractual relationship between the foreign custodians and the clients in Singapore. The foreign custodians are not considered to be targeting or directing their services at persons in Singapore as the solicitation is carried out by the regulated person. The acts of the foreign custodians are considered to be outside the scope of section 82 read together with section 339(2).

Scenario 2

A person in Singapore ("client") wishes to open a custody account with an foreign custodian who is related to a regulated person. The client contracts directly with the foreign custodian, but the regulated person provides marketing and account maintenance services.



6.7.2 Where the regulated person carries out marketing and solicitation on behalf of or as an agent of the foreign custodian and the client contracts with the foreign custodian, the acts of the foreign custodian would be within the scope of section 339(2) and would be in breach of section 82 read together with section 339(2) unless the arrangement has been approved by MAS under paragraph 9 of the Third Schedule to the SFA.

<u>Illustration 8:</u> Secondary Markets (To be read together with "Guidelines on the Regulation of Markets")

A foreign entity that is licensed to operate as a futures exchange in its home jurisdiction provides proprietary trading terminals for regulated persons to enter orders and effect transactions on the entity's exchange from the premises of the intermediaries in Singapore. This facility allows the regulated persons to have direct remote access to the foreign entity's exchange. Transactions can be effected on the exchange through the terminals.

6.8.1 As the terminals are located in Singapore and the regulated persons have direct access to the foreign entity's exchange, the foreign entity would be considered as operating a futures market in Singapore (as defined under the First Schedule to the SFA). The foreign entity would require recognition as a recognised market operator otherwise it would be in breach of section 6 read together with section 339.

[Amended on 1 July 2005]