

CONSULTATION PAPER

09 - 2003
September 2003

Draft Guidelines on the Application of Section 339 of the Securities and Futures Act (Cap. 289)

MAS

Monetary Authority of Singapore

1.0 BACKGROUND

1.1 Section 339 of the Securities and Futures Act (Cap. 289) (“SFA”) confers extra-territorial jurisdiction in certain instances. This is to address the increasingly cross-border nature of capital markets transactions. MAS had earlier provided guidance on the application of section 339 in respect of Parts II (Markets), IV (Capital Markets Services Licence and Representative’s Licence) and XIII (Offers of Investments) of the SFA in the form of Guidelines or Regulations. In response to industry feedback, MAS will be issuing a new set of Guidelines to set out the **general principles** underlying MAS’ policy stance on section 339.

1.2 The objective of this set of Guidelines is to provide industry with greater clarity on what type of cross-border activities require licensing or MAS’ prior approval under the SFA. They do not address how section 339 should be read together with Part XII (Market Conduct) provisions on issues of market misconduct.

2.0 SECTION 339 (EXTRA-TERRITORIALITY OF THE ACT)

2.1 Section 339 is enacted to expressly grant the Singapore courts jurisdiction over acts taking place outside Singapore that may constitute offences under the primary offence-creating provisions in Parts II, III, IV, VIII, XII, XIII and XV of the SFA.

2.2 The Guidelines, inter alia, set out MAS’ policy views on what MAS considers to be “a substantial and reasonably foreseeable effect” in section 339(2). They also depict a series of scenarios that the industry has sought MAS’ views on. For example, the Guidelines clarify that it is not MAS’ policy intent to regulate activities carried out by a foreign entity wholly outside Singapore in response to unsolicited enquiries or applications from persons in Singapore. Section 339 is also not intended to apply where the foreign entity trades with a regulated intermediary in Singapore to provide services to persons outside Singapore.

3.0 CONSISTENCY WITH THE EXTRA-TERRITORIAL PROVISIONS IN THE FINANCIAL ADVISERS ACT (CAP. 110)

3.1 Section 90 of the Financial Advisers Act (“FAA”) mirrors section 339(1) of the SFA in the imposition of extra-territorial jurisdiction over an act carried out partly in and partly outside Singapore that would have constituted an offence if it had been carried out wholly in Singapore. While the FAA does not contain a provision codifying the effects doctrine, the provision of financial advisory services from outside Singapore to persons in Singapore would fall within the ambit of the FAA by virtue of section 6 FAA. Regulation 3 of the Financial Advisers Regulations 2002 also addresses the jurisdictional scope of section 6 FAA. In drafting this set of Guidelines, MAS has taken into consideration the need for consistent application of the extra-territorial provisions in the SFA and the FAA.

4.0 REQUEST FOR COMMENTS

4.1 MAS invites interested parties to provide views and comments on the draft Guidelines. You are invited to comment on:

- a) MAS’ general approach towards the applicability of the extra-territorial provisions in the SFA;
- b) the application of section 339 in the scenarios presented in the illustrations;
- c) any other issues relating to the Guidelines.

4.2 Please submit written comments by 18 Oct 2003 to:

Market Conduct Policy Division
Market and Business Conduct Department
Monetary Authority of Singapore
10 Shenton Way, MAS Building
Singapore 079119

Email: s339@mas.gov.sg

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4.3 Please note that all submissions received may be made public unless confidentiality is specifically requested for whole or part of the submission.

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 services providers to reduce costs and to satisfy investors’ growing sophistication provide strong underpinnings 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), IV (Capital Markets Services Licence and Representative’s Licence) and XIII (Offers of Investments) of the SFA in the form of Guidelines or Regulations¹. The purpose of this set of Guidelines is to elaborate on the general principles behind MAS’ policy stance on the scope and 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 SFA².

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

¹ *Guidelines on the Regulation of Markets* issued 11 Sep 2002; *Securities and Futures (Licensing and Conduct of Business) Regulations 2002*; *Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2002*; *Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2002* respectively.

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.

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 proceeding³.

- 2.3 This document⁴ 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 law⁵. 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 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.

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 a person approved as a securities exchange or futures exchange, a person recognised as a recognised trading system provider, a person approved as a 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).

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

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 Tan 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 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 an 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; or
- d) the offer is priced in Singapore dollars.

4.5 It is MAS’ policy intent not 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 that are substantially different from those

currently supplied by the foreign entity and that involve the carrying out of regulated activities) from the client once he is resident in Singapore; or

- c) the foreign entity purchases the services of, or trades with 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.

“Trading with” versus “Trading through”

4.6 “Trading with” in paragraph 4.5(c) should be distinguished from “trading through”. The former consists of the sale or purchase of services between the foreign entity and a regulated person and would not normally attract regulatory oversight under 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 “Trading through” could fall within the ambit of section 339 if 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. 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. This is because the foreign entity “traded through” the Singapore entity to provide services involving regulated activities to persons in Singapore⁶.

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;

⁶ If the foreign entity is related to the Singapore entity and the latter is licensed or exempt from licensing under Part IV 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.

- 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 in relation to the relevant act being directed or targeted at persons in Singapore; and
- d) The absence of any advertisement or published information in relation to the relevant act being referred to in, or directly accessible from, any source which is intended for persons in Singapore.

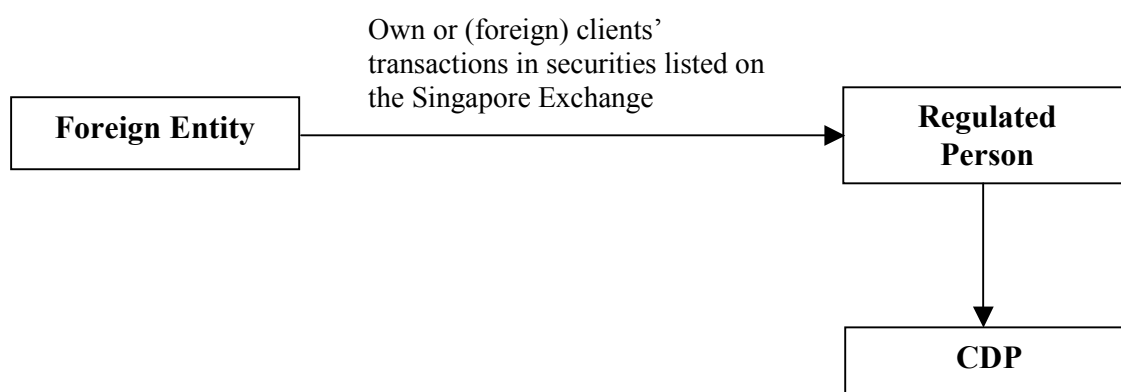
5.2 Consideration of the circumstances highlighted in paragraph 5.1 is already provided for as relevant in part 3 of the **Guidelines on the Regulation of Markets**; regulation 52 of the **Securities and Futures (Licensing and Conduct of Business) Regulations 2002**; regulation 29 of the **Securities and Futures (Offers of Investments)(Shares and Debentures) Regulations 2002** and regulation 35 of the **Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations 2002**.

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. 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).

Illustration 1: Foreign Entity Trading with a Regulated Person

A foreign entity routes its or its clients' transactions in securities and futures listed on the Singapore Exchange to a regulated person⁷ 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.



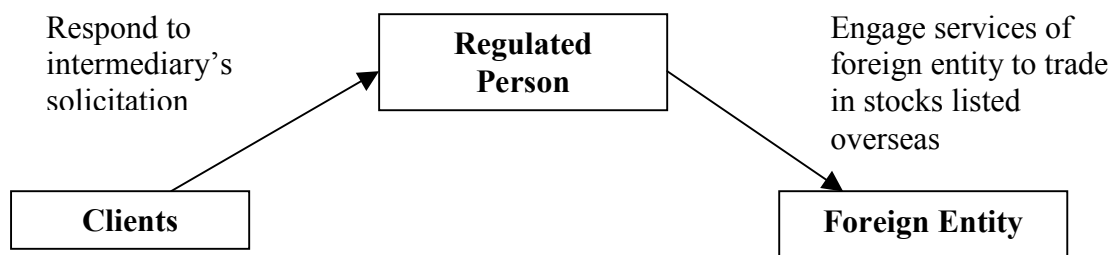
6.1.1 The foreign entity is a client of the regulated person. In engaging the latter's execution and clearing services, the foreign entity is not carrying on business in, nor inducing persons in Singapore to engage in, any activity for which the entity needs to be licensed, or exempt from licensing,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

⁷ See footnote 4 for the definition of "regulated person".

Illustration 2: Regulated Person Introduces Persons in Singapore to Foreign Entity

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

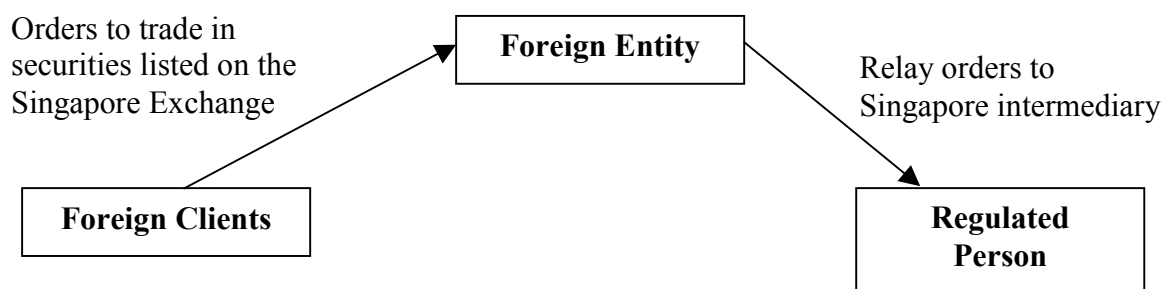


6.2.1 The regulated person acts as an agent of the foreign entity by introducing its clients in Singapore to the foreign entity. As such, the foreign entity is regarded as having “traded through” the regulated person to provide services in a regulated activity to the clients. MAS considers the foreign entity to have directed or targeted its services at persons in Singapore, and there would also be issues of investor protection for the clients in Singapore. Therefore, the acts of the foreign entity are considered to have a substantial and reasonably foreseeable effect in Singapore.

6.2.2 Under this scenario, MAS considers the acts of the foreign entity to be subject to section 82 read together with section 339(2). However, if the foreign entity is related to the regulated person, and the regulated person is a holder of a capital markets services licence or exempted under section 99(1)(a), (b), (c) or (d), the regulated person may apply for approval of the arrangement under paragraph 9 of the Third Schedule to the SFA (see footnote 6).

Illustration 3: 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.

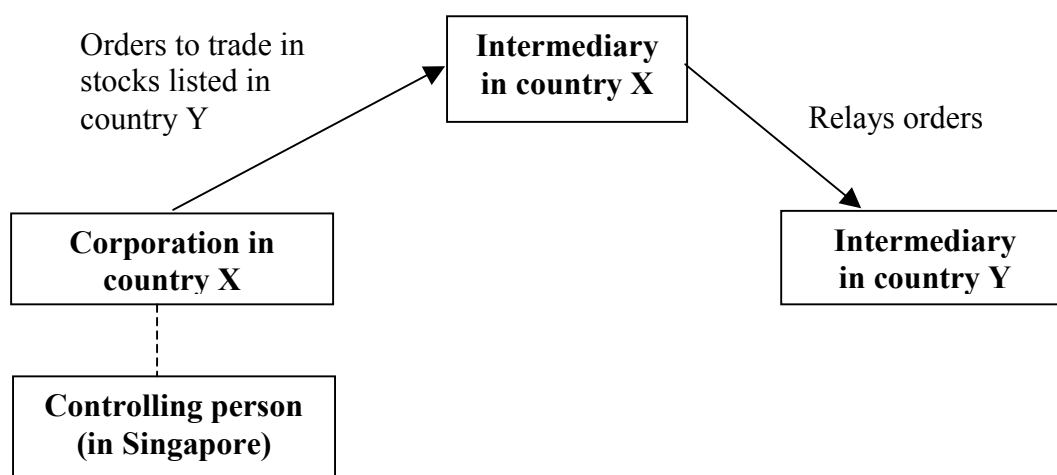


6.3.1 The foreign entity is not directing or targeting its services at persons in Singapore, but trading with the regulated person to service its own clients who are not persons in Singapore. MAS considers the foreign entity not to be carrying on business in any regulated activity.

6.3.2 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).

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

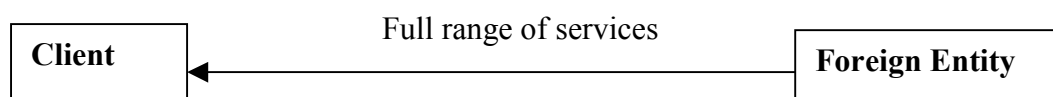
An intermediary based in country X channels trade orders from a corporation based in country X to an intermediary in country Y. The controlling person of the corporation resides in Singapore.



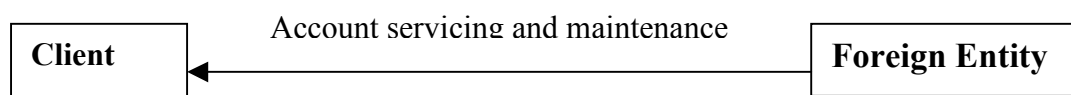
6.4.1 As the intermediary in country X is servicing its institutional client that is also based in that country, it is not considered to be carrying on business in Singapore even though the controlling person of the corporation resides in Singapore. The act of the intermediary in country X is therefore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

Illustration 5: Foreign Entity Continues to Service a Previously-Overseas Client

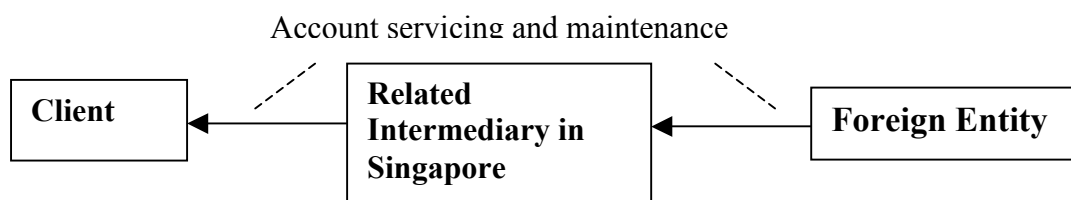
A person (“client”) who previously resided overseas and was a client of a foreign entity has moved to Singapore but wishes to maintain his account with the foreign entity. Transactions in respect of this client’s account may be effected directly with the foreign entity or through an intermediary related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

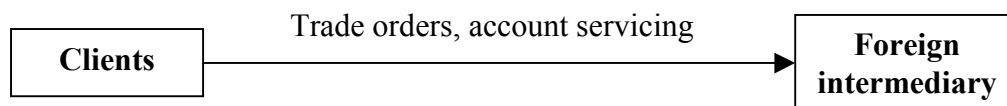
6.5.2 MAS' view is that the foreign entity is not considered to actively solicit the client where it only maintains and services the client's account⁸, and does not solicit new types of business (that involve products or services substantially different from those currently supplied by the foreign entity 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 intermediary⁹. 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.

⁸ 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).

⁹ 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.

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.



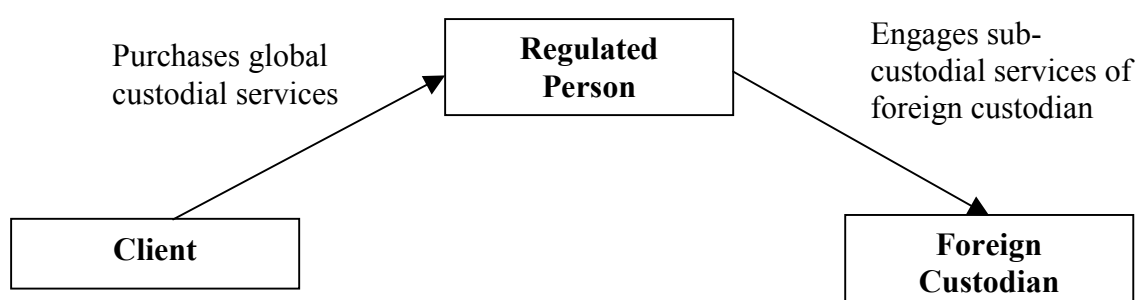
6.6.1 Under this scenario, the acts of the foreign intermediary would fall within the scope of dealing in securities and trading in futures contracts (which are regulated activities under Part IV). Section 339(2) applies to the foreign intermediary if the foreign intermediary had solicited persons in Singapore to use its services to trade on the overseas market. By targeting persons in Singapore, 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 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

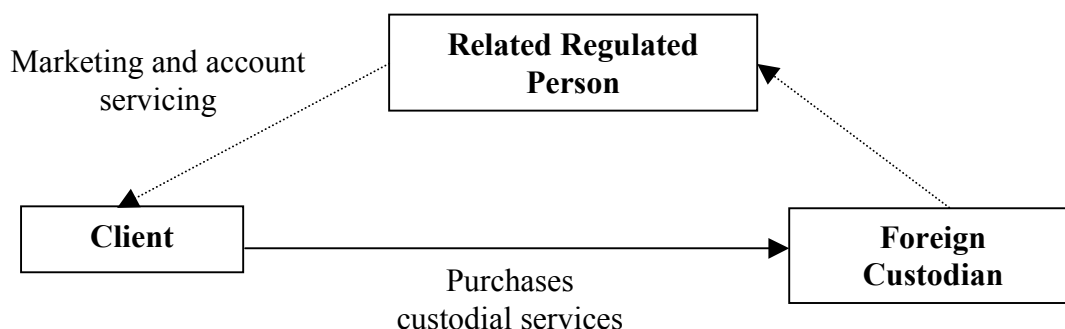
A person in Singapore (“client”) contracts with a holder of a capital markets services licence to provide custodial services for securities (“the regulated person”) to purchase custodial services on a global basis. The regulated person in turn purchases sub-custodial services from foreign custodians, 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 The foreign custodians are considered to be trading with the regulated person and not targeting or directing their services at persons in Singapore. 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 overseas custodian who is related to a regulated person. The person in Singapore contracts directly with the overseas custodian, but the regulated person provides marketing and account maintenance services.

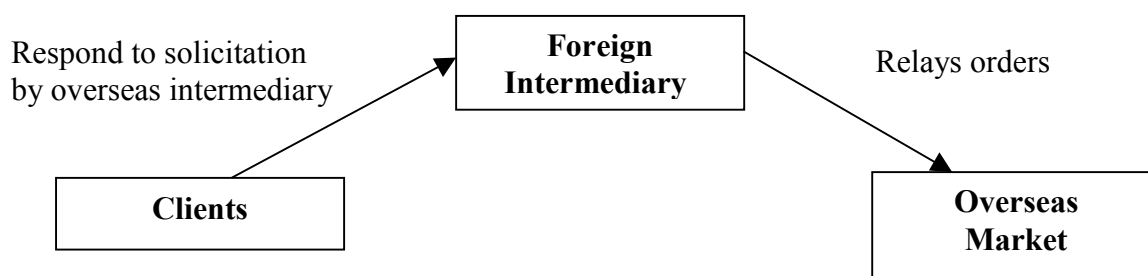


6.7.2 Where the regulated person carries out marketing and solicitation of on behalf of the foreign custodian, the acts of the foreign custodian would be within the scope of section 339(2) and would be in breach of section 82 read together with section 339(2) unless the arrangement has been approved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

Illustrations 8 and 9: Secondary Markets (To be read together with “Guidelines on the Regulation of Markets”)

Illustration 8

A foreign intermediary actively solicits persons in Singapore (“clients”) to trade in a securities market operating in the same jurisdiction as the intermediary. The intermediary will forward orders from the clients to the overseas market.



6.8.1 As the foreign intermediary is targeting persons in Singapore to deal in securities (an activity regulated under Part IV), its acts would be in breach of section 82 read together with section 339(2). The Authority will also evaluate on a case-by-case basis whether the person operating the overseas market is operating a securities market under section 5 and would have regard to the factors set out in paragraph 3.3 of the Guidelines on the Regulation of Markets.

Illustration 9

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.

6.9.1 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 trading system provider otherwise it would be in breach of section 6 read together with section 339.



Monetary Authority of Singapore