



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 222

Substantial holding disclosure: Securities lending and prime broking

April 2011

About this guide

This regulatory guide is for persons who engage in securities lending and prime broking activities. It:

- seeks to improve disclosure of substantial holdings that may arise from participation in securities lending or prime broking;
- explains how the concept of relevant interests in s608 and 609 and the substantial holding disclosure requirements in s671B of the *Corporations Act 2001* (Corporations Act) apply to securities lending and prime broking; and
- explains how ASIC has modified the substantial holdings disclosure requirements for securities lending and prime broking to allow improved compliance with the requirements and facilitate better disclosure of useful information to the market within the required time frames.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued on 15 April 2011 and is based on legislation and regulations as at 15 April 2011.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Disclosure of substantial holdings under s671B is important for an informed market in quoted securities.

Relevant interests arising from securities lending transactions and prime broking arrangements are important in assessing whether a person has a substantial holding that requires notification.

Disclosure of substantial holdings acquired through securities lending and prime broking arrangements promotes an efficient, competitive and informed market in quoted securities.

What is substantial holding disclosure?

- RG 222.1 Disclosure of substantial holdings under s671B of the *Corporations Act 2001* (Corporations Act) allows the market, security holders and directors to monitor who has a relevant interest in 5% or more of a listed entity. This promotes the principle that the acquisition of control takes place in an efficient, competitive and informed market: s602(a).
- RG 222.2 Substantial holding disclosure also gives the market information about the nature of the relevant interest giving rise to the substantial holding, any consideration for substantial holdings and details of any agreements or special conditions that may affect voting rights or disposal of the securities.

What is securities lending?

- RG 222.3 'Securities lending' is the term used to describe a market transaction where securities are transferred from the owner (the lender) to another party (the borrower). The borrower is obliged to return the securities or equivalent securities to the lender either on demand or at the end of the loan term.
- RG 222.4 A securities lending transaction on standard terms will usually result in both parties having a relevant interest in the securities under s608: see RG 222.27.
- RG 222.5 Securities lending usually occurs between institutional or professional investors in the market and usually involves securities held by custodians. It can, but does not always, occur ahead of, or as part of, short selling activity. Securities lending can also be undertaken to cover potential failed trades, dividend-driven transactions or other transactions relating to corporate actions, including voting.

What is prime broking?

- RG 222.6 Prime broking is a commercial term for a package of services offered by an investment bank, typically comprising custodial services, execution, securities lending and financing: see RG 222.47. These services are normally offered to institutional and professional investors.
- RG 222.7 As part of this package of services, a prime broker may have the right to borrow its client's securities under a securities lending arrangement. Such a right will be non-exclusive, where the client remains free to deal in particular securities (though the client may need to ensure its account is otherwise sufficiently funded and may need to satisfy certain procedural requirements).
- RG 222.8 This will usually result in the prime broker having a relevant interest in the client's securities: see RG 222.51–RG 222.56. The prime broker must take this interest into account in its substantial holding calculations at the time of entry into the prime broking arrangement and not subsequently when it borrows the securities. Disclosure at the time of actual borrowing would be more relevant to control over and voting of the securities: see RG 222.59–RG 222.65.

Why is substantial holding disclosure important?

- RG 222.9 Disclosure of substantial holdings is important for an efficient, competitive and informed market in quoted securities. This includes substantial holdings acquired through securities lending and prime broking arrangements. Reasons for this include:
- (a) disclosure achieves transparency about the volume of a company's securities that are subject to these activities;
 - (b) relevant interests acquired through securities lending or prime broking may affect the control of a company;
 - (c) without appropriate disclosure, there is a risk that the market will be misled about the ownership and control of listed entities, particularly where a significant proportion of the entity's securities are subject to securities lending; and
 - (d) disclosure also achieves transparency about the volume of securities that may be thought to be 'locked up' in investment funds but are actually at large in the market.

Content of substantial holding notices

- RG 222.10 It is critical that persons engaged in securities lending transactions and prime broking participants fully comply with the requirements in s671B, as modified by our class order relief.

- RG 222.11 Substantial holders should give full, rather than minimal or technical, disclosure so that the market understands the nature of the substantial holding or the change in substantial holding: see Regulatory Guide 159 *Takeovers, compulsory acquisitions and substantial holding notices* (RG 159) at RG 159.262 and RG 159.274.

Exemptions and modifications

- RG 222.12 ASIC has the power to exempt a person from the substantial holding provisions of Ch 6C of the Corporations Act. We may also declare that the substantial holding provisions apply as if specified provisions were omitted, modified or varied: see s673. We have used these powers to grant relief under Class Order [CO 11/272] *Substantial holding disclosure: securities lending and prime broking*.
- RG 222.13 The relief in [CO 11/272] is designed to achieve better disclosure of substantial holdings where those holdings arise wholly or partly from securities lending or prime broking activities.
- RG 222.14 The relief relates only to compliance with the substantial holding provisions and not more broadly—that is, there is no relief from any other obligations under Ch 6 of the Corporations Act.

Scope of regulatory guide and class order

- RG 222.15 With this regulatory guide and relief under [CO 11/272], we are seeking to improve disclosure of substantial holdings. We have provided guidance on when notification is required and the nature of disclosures that should be made. We expect this to lead to better disclosure of substantial holdings where those holdings arise wholly or partly from securities lending and prime broking activities. Disclosure of substantial holdings is important for ensuring a fully informed market and is relevant to control over, and voting of, securities of listed entities.
- RG 222.16 In this way, substantial holding disclosure is distinct from any transaction specific reporting, such as short selling disclosures. In brief, a short seller must report daily gross short sales to the ASX and net short sales data to ASIC. Securities lending can, but does not always, occur ahead of, or as part of short selling activity. Short selling disclosures do not provide details of substantial holdings that allow the market to be informed of control of a listed entity.
- RG 222.17 Substantial holding disclosure is also distinct from any disclosures that an ultimate ‘lender’ in a securities lending arrangement, such a superannuation fund or long term institutional investor, may make to inform their clients of their practices in relation to those securities.

Monitoring compliance

RG 222.18 ASIC will be monitoring compliance to promote better disclosure of substantial holdings. Persons who fail to comply with s671B commit an offence of strict liability and may be liable to compensate investors for loss suffered as a result of the contravention.

Table 1: Summary of class order relief available under [CO 11/272]

Relief	Description	Reference
Securities lending: Lender's relevant interest	We have given class order relief so that a lender's relevant interest in the loaned securities under a securities lending arrangement is not affected by the subsequent actions of the borrower in relation to those loaned securities.	See RG 222.34–RG 222.37
Prime broking: Timing of disclosure under s671B	We have given class order relief so that a prime broker with a borrowing (or rehypothecation) right must defer the time at which it takes into account its relevant interest arising from that borrowing right for the purposes of substantial holding disclosure compliance to the time at which it exercises that borrowing right.	See RG 222.59–RG 222.67
Content of substantial holding notices: Attaching AMSLA/GMSLA/prime broking agreement	We have given class order relief from s671B(4) to allow a substantial holder to comply with the requirement to attach a copy of the AMSLA, GMSLA or prime broking agreement to the substantial holding notice by providing certain prescribed information, which is listed in the appendix to this regulatory guide. A condition of the relief is that the substantial holder provide the full documentation on request to us or the listed entity (but not to other parties).	See RG 222.70–RG 222.73 and RG 222.74–RG 222.75
Content of substantial holding notices: Disclosure of consideration	We have given class order relief so that a substantial holder does not need to include any consideration in a substantial holding notice, as long as the relevant interest arises from a securities lending transaction.	See RG 222.76–RG 222.83

B Securities lending: When a substantial holding arises

Key points

Securities lending involves a transfer of securities from the lender to the borrower and a subsequent transfer of equivalent securities to the lender: see RG 222.19–RG 222.23.

Securities lending will generally result in both the lender and the borrower having a relevant interest in the securities: see RG 222.24–RG 222.33.

We have given class order relief so that a lender's relevant interest in the loaned securities under a securities lending arrangement is not affected by the subsequent actions of the borrower in relation to those loaned securities: see RG 222.34–RG 222.37.

The substantial holding requirements under s671B may be triggered if the person has an interest in 5% or more of a listed entity: see RG 222.38–RG 222.46.

Securities lending transactions

RG 222.19 'Securities lending' is the term used to describe a market transaction where securities are transferred from the owner (the lender) to another party (the borrower). The borrower is obliged to return the securities or equivalent securities to the lender either on demand or at the end of the loan term.

Note: While securities lending is a sale with an undertaking to return the sold property, this regulatory guide uses the common market terminology to describe the transaction and parties. For detailed analysis on the legal characterisation of securities lending agreements, see *Beconwood Securities Pty Ltd v ANZ Group Ltd* [2008] FCA 594.

RG 222.20 In Australia, securities lending transactions are usually entered into under the Australian Master Securities Lending Agreement (AMSLA) or the Global Master Securities Lending Agreement (GMSLA). These master agreements provide a framework of standard terms for securities lending transactions, but a number of key terms need to be negotiated and agreed before commencement of the loan. This includes the number and type of securities and the consideration. This is usually done by completing a standard form schedule.

RG 222.21 Before the securities are transferred, the borrower usually gives the lender collateral in the form of cash or other securities as warranty for the borrower's performance of its obligations. If the borrower delivers cash collateral, the lender usually pays the borrower interest on the cash. Any

collateral securities are transferred to the lender as a loan, although generally the borrower cannot recall them unless it provides substitute collateral.

RG 222.22 After the securities are transferred, the borrower has unencumbered title and unrestricted rights to dispose of the securities. The standard agreement requires the borrower to use its best endeavours to ensure the securities are voted in accordance with the lender's instructions, provided the borrower holds the securities at the time. However, we understand this clause is often deleted.

RG 222.23 Under a standard securities loan, the borrower may return the securities at any time and the lender has a corresponding right to recall them at any time during the loan. If recalled, the borrower is required to return the securities or equivalent securities within one normal market settlement cycle. The borrower also returns the equivalent economic value of any dividends or distributions received during the term of the loan (manufactured payments).

Relevant interest provisions: s608 and 609

RG 222.24 The following paragraphs explain how the relevant interest provisions in s608 and 609 generally apply to securities lending transactions conducted on usual terms. Participants should obtain their own advice on how the law applies to their individual agreements.

Relevant interests and securities lending

RG 222.25 The 'relevant interest' concept is central to the substantial holding and takeover provisions.

RG 222.26 The borrower and lender's substantial holdings reflect the relevant interests they have through their securities lending business, their other relevant interests and those of any associates (e.g. holdings of any entity in the group): see RG 222.68.

RG 222.27 A securities lending transaction on standard terms will usually result in both parties having a relevant interest in the securities under s608 for the following reasons:

- (a) the borrower will have a relevant interest in the securities under s608(1) when it has a legally binding commitment to borrow particular securities; and
- (b) the lender will continue to have a relevant interest in the securities through its right to recall the securities from the borrower, which, when accelerated by s608(8), amounts to a right to control disposal of the securities.

Note: Mere entry into the AMSLA will generally not result in the borrower acquiring a relevant interest in securities, but a relevant interest will arise when the borrower secures a firm (i.e. legally binding) commitment to borrow the securities. The situation is generally different for prime broking agreements: see RG 222.52.

- RG 222.28 The lender is also likely to acquire a relevant interest in any securities delivered by the borrower as collateral for the loan of securities. The borrower will continue to have a relevant interest in the collateral securities where it has a right to recall them, even if the right of recall is conditional on the provision of substitute collateral.
- RG 222.29 When a borrower on-lends the securities to a third party, provided the borrower retains a relevant interest in the securities, the lender will continue to have a relevant interest in the securities under s608(8). In this way, a number of securities lending transactions will result in a chain of people having a relevant interest in the same securities, meaning that each party in the chain must calculate their own holdings to determine if they have a substantial holding.
- RG 222.30 This chain requires that a subsequent borrower retain a relevant interest. The borrower will lose its relevant interest in the lent securities if it disposes of them in circumstances where it does not retain any rights (e.g. where the borrower sells on market). The lender will also lose its relevant interest in the securities in these circumstances, even though the lender has the right to require the borrower to deliver equivalent securities under its securities lending agreement. This is because the lender's relevant interest arises under s608(8) and that provision depends on the counterparty having a relevant interest in the securities.
- RG 222.31 However, the original borrower and lender may not be aware of a subsequent disposal and the trigger to substantial holding disclosure only occurs on becoming aware of the change in relevant interest. As such, we consider it to be prudent and good policy for the original borrower and lender to assume they retain their respective relevant interests.

Relevant interest exemptions for mortgages and derivatives do not apply

- RG 222.32 Section 609 provides exemptions for derivatives and mortgages from the relevant interest provisions in s608. However, we consider that securities lending agreements are not derivatives under s609(6), or mortgages, charges or other securities under s609(1). Accordingly, there are no relevant interest exemptions under s609 that will ordinarily prevent a relevant interest from arising under securities lending or prime broking transactions.

Takeovers threshold: s606

- RG 222.33 For completeness, we note that there is no exemption from the takeover provisions for relevant interests arising from securities lending and prime broking. Section 606 basically prohibits a person from acquiring a relevant interest in the voting shares of a listed company if the voting power of that person, or someone else, would increase from 20% or below to more than 20% (or from above 20% to more than 20% but less than 90%).

ASIC relief: Lender's relevant interest

- RG 222.34 We have given class order relief so that a lender's relevant interest in the loaned securities, under a securities lending arrangement, is not affected by the subsequent actions of the borrower in relation to those loaned securities: see [CO 11/272]. We have done this to remove any doubt and to ensure that the lender's right of recall is recognised consistently, irrespective of the subsequent actions of the borrower.
- RG 222.35 We recognise that the effect of the relief is that the lender will continue to recognise a relevant interest even though the lender may have actual knowledge of the borrower's disposal of the securities. However, in a usual market transaction, the lender is unlikely to know with certainty what the borrower does with the 'loaned' securities after the lender effects the transfer. As such, we consider it appropriate that the assumption operate in all circumstances, even where the lender has actual knowledge of the borrower's disposal.
- RG 222.36 This assumption does not affect the required disclosures of the borrower in circumstances where the borrower sells the securities rather than on-lends them. On the other hand, where the borrower on-lends the securities, that borrower would then be in the position of a lender. The modification would operate so that the original borrower (now a lender) would recognise its relevant interest arising from its right of recall, irrespective of the actions of the second borrower. It also operates in respect of any securities that are provided by a borrower to a lender as collateral under a securities lending arrangement.
- RG 222.37 This assumption only applies for the purposes of assessing whether further substantial holding notification is required. It does not affect any other obligations to properly inform the market. For example, while a securities lending arrangement is in place, the market for a particular security may change and the existence of the particular securities lending arrangements in place may mean that the relevant listed entity has continuous disclosure obligations to notify the market about the enforceability of a right of recall in particular circumstances. [CO 11/272] does not alter this position.

Securities lending and substantial holding disclosure

When disclosure is required under s671B

- RG 222.38 Persons engaged in securities lending may be required to give substantial holding notices under s671B at various stages in a securities lending transaction.
- RG 222.39 The borrower may be obliged to give a substantial holding notice after it has a firm (legally binding) commitment to borrow the borrowed securities. A

borrower that obtains a substantial holding through securities lending must comply with s671B, even if the holding is only temporary (i.e. the obligation to give a substantial holding notice remains, even if the borrower on-sells the securities immediately and no longer has a substantial holding by the time it gives initial notice).

Note: See Note 2 to s671B(1).

- RG 222.40 The lender may gain a substantial holding through the delivery of collateral securities under the transaction.
- RG 222.41 The borrower will also need to consider its disclosure obligations if it loses a relevant interest in the lent securities (e.g. because the borrower returns the securities to the lender or sells them on market). Depending on the size of the disposal and the other holdings of the borrower and its associates, this may trigger the need to give notice of a movement in relevant interests or a notice of ceasing to be a substantial holder.
- RG 222.42 We consider it reasonable for the lender to assume that the borrower retains a relevant interest in the securities for the purposes of the lender's disclosure of substantial holdings. Based on this assumption, the lender does not have to disclose a change in relevant interest resulting from actions after the loan merely for these purposes: see also RG 222.34–RG 222.37.
- RG 222.43 We have provided class order relief so that a lender's relevant interest under a securities lending arrangement in the loaned securities is not affected by the subsequent actions of the borrower in relation to those loaned securities: see [CO 11/272]. We have done this to remove any doubt and to ensure that the lender's right of recall is consistently recognised irrespective of the subsequent actions of the borrower.
- RG 222.44 Figure 1 gives examples of various scenarios where persons engaged in securities lending may be required to give substantial holding notices under s671B.

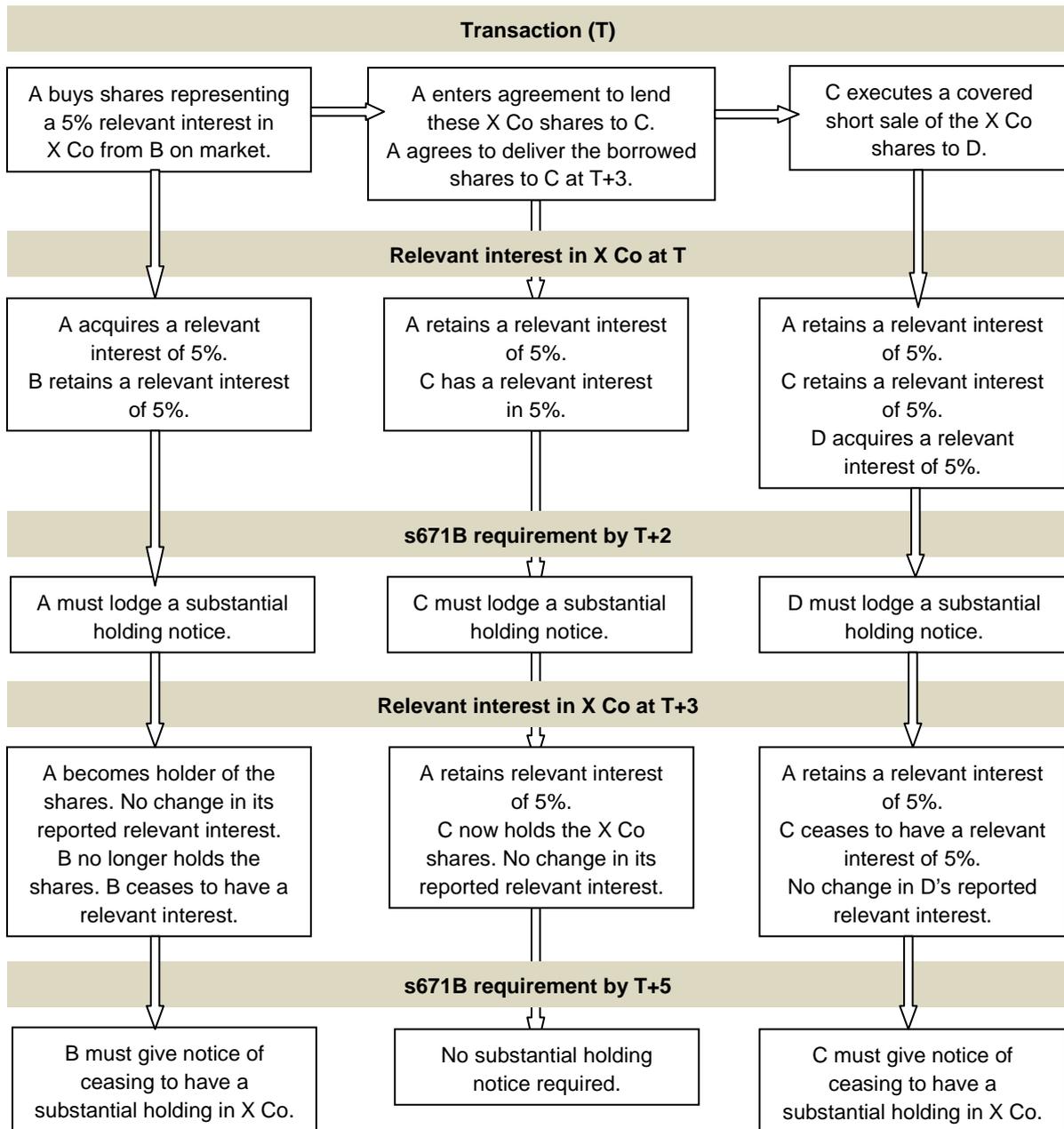
Timing of disclosure under s671B

- RG 222.45 Under s671B(1) of the Corporations Act, a person must give an initial substantial holding notice to the listed entity and the market operator if they have a relevant interest in 5% or more of the listed entity. The substantial holder is then obliged to give a notice if there is a movement of 1% in its substantial holding: s671B(2).

Note: A person's substantial holding and any movements in that holding include the relevant interests of the person's associates, as defined in s12 of the Corporations Act. See s9 (definition of substantial holding) and s671B(2).

- RG 222.46 A substantial holder must give the notice to the listed entity and market operator within two business days after becoming aware of the information or by 9.30 am of the next business day during a takeover bid for the shares.

Figure 1: Examples: s671B and securities lending



C Prime broking: When a substantial holding arises

Key points

Prime brokers, and sometimes other market participants, can have extensive rights to borrow or rehypothecate any securities credited to their client's account: see RG 222.48–RG 222.50.

This will generally result in both the prime broker and the client having a relevant interest in the securities: see RG 222.51–RG 222.56.

The substantial holding requirements under s671B may be triggered if the prime broker's relevant interests (and the interests of any associates), including those arising from its borrowing right, is 5% or more of a listed entity: see RG 222.57–RG 222.58.

We have given class order relief so that a prime broker with a borrowing (or rehypothecation) right can defer the time at which it takes into account its relevant interest arising from that borrowing right for the purposes of substantial holding disclosure compliance: see RG 222.59–RG 222.67.

Prime broking

RG 222.47 Securities lending commonly occurs as part of prime broking arrangements. Prime broking is a commercial term for a package of services offered by an investment bank to its clients, mainly institutional clients. Services typically comprise trade execution, settlement and custody, trade financing and securities lending.

Right to borrow securities

RG 222.48 Prime brokers often have extensive rights to borrow any securities credited to the client's account. A prime broker with such a right is generally authorised to borrow the client's securities without seeking any further consent from the client. This can be referred to as a 'rehypothecation' right.

RG 222.49 However, it is usually not an exclusive right. A client of a prime broker can usually continue to deal in securities subject to the prime broking arrangement and may also appoint more than one prime broker for the same parcel of securities.

RG 222.50 Other market participants, such as custodians operating a securities lending program, may also have a broad right or mandate to borrow their client's securities without seeking any further consent from the client. We consider that such a right is analogous to the prime broker's borrowing (or rehypothecation) right and it should be recognised in the same manner as a prime broker's right to borrow.

Relevant interests and prime broking

- RG 222.51 The following paragraphs explain how the relevant interest provisions in s608 and 609 generally apply to prime broking conducted on usual terms. As noted, this guidance also applies to a custodian operating a securities lending program with the rights described in RG 222.50. Participants should obtain their own advice on how the law applies to their individual agreements.
- RG 222.52 A prime broker that has the type of rights to borrow (or rehypothecate) its client's securities as described in RG 222.48 will have a relevant interest in those securities under s608(8) from the commencement of the prime broking arrangement.
- RG 222.53 The prime broker's right to borrow its client's securities generates a relevant interest in its client's securities, either when it enters into a prime broking agreement with a new client or when an existing prime broking client acquires new securities. This is the case even if the prime broker has not exercised its right to borrow the client's securities.
- RG 222.54 The client retains a relevant interest in the securities at all times. This is because they either continue to be the beneficial owner (before the borrowing right is exercised) or, after the securities are borrowed, they have the right to recall the securities: see RG 222.27.
- RG 222.55 The prime broker's substantial holding comprises the relevant interests of all its prime broking clients together with its other relevant interests and those of any associates (e.g. holdings of any entity in the group).
- RG 222.56 A prime broker's relevant interests will change as the relevant interest of the client changes. Accordingly, a prime broker will need to recalculate its holdings to assess whether notification is required.

Prime broking and substantial holding disclosure

- RG 222.57 Under the Corporations Act, entry into a prime broking agreement triggers the need for a prime broker to give a substantial holding notice if the client's relevant interest in the securities, when combined with the prime broker's other relevant interests (and the interests of any associates), is 5% or more of a listed entity. This is also the case when an existing prime broking client acquires new securities over which the prime broker has borrowing rights.
- RG 222.58 A prime broker's relevant interest in a client's securities does not change when the prime broker exercises its right to borrow the securities. This means the prime broker does not need to lodge a fresh substantial holding notice at this stage, as no new relevant interest has been acquired.

ASIC relief: Timing of disclosure under s671B

Deferral until borrowing right exercised

- RG 222.59 We have given class order relief under [CO 11/272] so that a prime broker with a borrowing (or rehypothecation) right must defer the time at which it takes into account its relevant interest arising from that borrowing right for the purposes of substantial holding disclosure compliance to the time at which it exercises that borrowing right. The prime broker would then take into account the relevant interest arising from that borrowing in assessing whether it needed to file a substantial holding notice at that time.
- RG 222.60 We have given this relief on the basis that aligning the timing of any substantial holding notification with the time the borrowing right is actually exercised more closely aligns notification with the timing of changes in control of the securities. Without our relief, a prime broker would take into account the relevant interest when the right is acquired and could, depending on their other interests, file a substantial holding notice at that time. However, the prime broker would not need to make another notification if it proceeds to exercise the right and borrow the securities.
- RG 222.61 Our relief modifies the Corporations Act so that the deferral of recognition, for the purposes of compliance with the substantial holding provisions, applies to all prime brokers and custodians with analogous rights. We have done this to ensure consistency in disclosure.
- RG 222.62 Subject to the conditions of our relief, a prime broker or custodian that has a borrowing right will be taken to not have a relevant interest arising from that borrowing right alone. If the prime broker or custodian then exercises that right and borrows the securities, they will then have a relevant interest and will need to take this interest into account in determining whether any substantial holding notification is required. In this sense, the timing of disclosure is effectively deferred to when the disclosure should be more meaningful.
- RG 222.63 We have given the relief subject to two conditions. First, the relief only relates to the relevant interest arising from the borrowing right alone and, as part of that, the client is not restricted in how it can deal with the securities in respect of which the borrowing right is given. A prime broker or custodian may, in certain cases, have a relevant interest because of other arrangements, such as one arising from a separate agreement under which the client agrees not to dispose of particular securities. Our relief does not apply to the relevant interest arising from that other agreement. Usual course restrictions relating to the client needing to ensure its account is otherwise sufficiently funded and satisfying certain procedural requirements before dealing in the securities do not affect the relief.

- RG 222.64 Second, we have limited the relief to circumstances where the borrowing right is obtained in the ordinary course of the prime broker's or custodian's business. Whether a specific arrangement would be in the ordinary course of the prime broker's or custodian's business would depend on the circumstances. However, if the prime broker or custodian had a borrowing right over particular securities and was accumulating or 'warehousing' that security for a corporate purpose (whether its own or a client's), we would not consider that right to be obtained in the ordinary course of that prime broker's or custodian's business. The very nature of the borrowing right usually obtained by a prime broker or custodian is over the securities that may be in the client's account from time to time rather than particular securities.
- RG 222.65 We believe this relief will enhance market transparency and improve the quality of information being provided in substantial holding notices.

Control transactions

- RG 222.66 Under our relief, a prime broker or custodian may defer taking into account the relevant interest arising from the borrowing right for compliance with the substantial holding provisions at all times, including when a control transaction is underway for the relevant listed securities.
- RG 222.67 Despite this, a prime broker or custodian may determine that voluntary disclosure to the market and the listed entity is appropriate in such circumstances to avoid the non-disclosure of the nature or extent of their borrowing right giving rise to unacceptable circumstances.

D Content of substantial holding notices

Key points

Prescribed information must be included in a substantial holding notice: see RG 222.68–RG 222.69.

We have given class order relief from certain requirements: see RG 222.70–RG 222.83.

Full rather than minimal disclosure must be made in a substantial holding notice: see RG 222.87–RG 222.94.

Requirements under s671B

RG 222.68 Section 671B(3) specifies the details that must be included in a substantial holding notice for both the substantial holder and any associates that have a relevant interest in the listed entity. The information must be given in the prescribed form. Table 2 summarises what must be disclosed by persons who acquire substantial holdings and how this information should be provided.

Table 2: Summary of disclosure requirements under s671B

Requirement	What must be disclosed	Reference
Details of holder and associates	<p>The borrower must disclose:</p> <ul style="list-style-type: none"> its name, its associates' names and their Australian Company Number (ACN) or Australian Registered Scheme Number (ARSN), and the nature of any association. 	s671B(3), prescribed forms*
Details of the relevant interest in voting shares of the company	<p>The borrower must disclose:</p> <ul style="list-style-type: none"> the class of securities, number of securities, person's votes and voting power the nature of the relevant interest—including any qualifications to the borrower's power to vote the securities or dispose of them: see note in 'Directions' on prescribed forms* details of all holders of the relevant interest (including registered holder of the shares and the person entitled to be registered as holder), and the consideration paid for each relevant interest acquired in the four months before the date that the substantial holder became a substantial holder. 	s671B(3), prescribed forms*

Requirement	What must be disclosed	Reference
Agreements, requests and confirmations	The notice must be accompanied by a copy of: <ul style="list-style-type: none"> • each securities lending agreement that contributed to the holding • any related borrowing requests and confirmations, and • a statement reflecting any unwritten arrangements that contributed to the holding. 	s671B(4)

* The prescribed forms are Form 603 *Notice of initial substantial holder*, Form 604 *Notice of change of interests of substantial holder* and Form 605 *Notice of ceasing to be a substantial holder*.

- RG 222.69 Unless the relevant transaction occurred on market, s671B(4) requires the substantial holding notice to be accompanied by the following documents:
- a copy of any document setting out the terms of any relevant agreement that contributed to the substantial holding and is available to the holder in writing; and
 - a statement giving full and accurate details of any contract, scheme or arrangement that contributed to the holding, but which is not in writing and readily available.

ASIC relief: Attaching AMSLA/GMSLA agreement

- RG 222.70 Securities lending master agreements are lengthy, complex documents. We consider that a clear summary of the key terms of the particular securities lending transaction, and any variations from the master agreement, will be more useful information for investors.
- RG 222.71 Often borrowers are party to a number of securities lending arrangements with different lenders. They may also enter into a large number of securities lending transactions within a short period of time. Attaching a large number of standard agreements would result in very long substantial holding notices. It may result in 'information overload' for the market. Investors can also obtain a copy of the standard AMSLA or GMSLA if they require.
- RG 222.72 The view that lengthy, standard documentation may not assist the market is reflected in Takeovers Panel Guidance Note 20 *Equity derivatives*, at paragraph 37.
- RG 222.73 Accordingly, we have given relief from s671B(4) under [CO 11/272] to allow a substantial holder to comply with the requirement to attach a copy of the AMSLA or GMSLA to the substantial holding notice by providing certain prescribed information, which is listed in the appendix to this regulatory guide. A condition of the relief is that the substantial holder provide the full documentation on request to us or the listed entity (but not to other parties).

This relief extends to a written agreement that is on substantially the same terms as an AMSLA or GMSLA.

ASIC relief: Attaching prime broking agreement

- RG 222.74 A prime broking agreement is also a lengthy, complex document and, in the context of our relief, the clause conferring the borrowing right is the only relevant clause.
- RG 222.75 The effect of our relief under [CO 11/272]—that is, for a prime broker or custodian to defer taking into account its relevant interest, arising from its borrowing right, to the time of actual borrowing—means that disclosure of any substantial holding (or change in a substantial holding) arising from the exercise of the borrowing right would occur after the actual borrowing. Our relief means that the prime broking agreement does not need to be attached but that the summary of the securities lending transaction will need to be attached.

ASIC relief: Disclosure of consideration

- RG 222.76 The prescribed forms for notification of substantial holdings require disclosure of the consideration for the acquisition or disposal of relevant interests comprising the substantial holding.
- RG 222.77 The disclosure required for the consideration is:
- any and all benefits, money and other, that any person from whom a relevant interest was acquired has, or may, become entitled to receive in relation to that acquisition. Details must be included even if the benefit is conditional on the happening or not of a contingency. Details must be included of any benefit paid on behalf of the substantial holder or its associate in relation to the acquisitions, even if they are not paid directly to the person from whom the relevant interest was acquired.
- Note: See the notes to Forms 603, 604 and 605.
- RG 222.78 We consider that ‘any and all benefits’ would include any borrowing fees payable by the borrower to the lender, any reduction in fees that would otherwise be payable by the lender to the borrower and any reduction in interest payable by the lender to the borrower on cash collateral.
- RG 222.79 ‘Consideration’, in the context of securities lending or prime broking, is generally understood to be the margin or fee charged on the relevant transaction.
- RG 222.80 In calculating this fee, it is generally accepted that the level of fees:
- (a) is usually driven by non-control factors (e.g. arbitrage for dividend reinvestment plans); and

- (b) in the over-the-counter market, reflects counterparty risk, long-standing commercial relationships, deal-specific factors (such as volume and type of securities to be lent or borrowed, duration of the loan and nature of the collateral provided) and other commercial arrangements.

- RG 222.81 The borrowing fee would be useful information for the market if it provided clear information about the control of a listed company (e.g. the demand for the security). However, the factors affecting the level of fees as noted above mean that the fee does not provide this clear information.
- RG 222.82 The margin or fee referable to a particular transaction included within a substantial holding notification can also be difficult and costly to separate out, as the fee can be part of a bundle and not on a transaction-by-transaction basis.
- RG 222.83 Given that the disclosure does not provide useful information towards the objective of the substantial holding provisions, we have given relief so that a substantial holder does not need to include any consideration in a substantial holding notice, as long as the relevant interest arises from a securities lending transaction.

Disclosure of registered holder of shares

- RG 222.84 The prescribed forms for notification of substantial holdings require disclosure of the identity of persons registered as holders of the securities in which the substantial holder (or its associate) has a relevant interest.
- RG 222.85 In the context of securities lending (including lending arising from exercise of a prime broker's borrowing or rehypothecation right), this means the borrower must include details of the registered holder of the securities borrowed.
- RG 222.86 We consider that this information is useful to the market, even if the registered holder is a nominee or custodian. For example, it can provide the basis for a company issuing tracing notices to ascertain beneficial ownership of the relevant securities.

Full disclosure

- RG 222.87 We expect substantial holders to provide full, rather than minimal or technical, disclosure in their substantial holding notices, so that the market understands the nature of the substantial holding or the change in substantial holding: see RG 159.262 and RG 159.274.

- RG 222.88 For securities lending transactions, we consider that the notice should fully, specifically and accurately disclose the identity of the substantial holder and the details of the substantial holding. A notice lacking sufficient information for an investor to understand the nature of the substantial holding or the change in substantial holding, does not promote the purposes of the substantial holding requirement: see RG 159.274.

Multiple substantial holding notices

- RG 222.89 We are aware that participants in the securities lending industry are concerned that compliance with the substantial holding provisions gives rise to multiple substantial holding notices being lodged for the same ‘parcel’ of securities, causing unnecessary ‘noise’ or confusion in the market.
- RG 222.90 The concept of ‘relevant interests’ allows for more than one person to have a relevant interest in the same ‘parcel’ of securities. This does not provide the basis for adopting a position where only the original lender and ultimate borrower, for example, consider their substantial holding notification obligations.
- RG 222.91 On the other hand, we consider that if a substantial holder clearly and fully discloses the details of the substantial holding, particularly beyond the mere technical description from s608(1) of the Corporations Act, the concerns about unnecessary ‘noise’ in the market or confusion about changes in shareholding may be addressed. Other market participants, including the listed entity itself, can meaningfully assess the substantial holding notice lodged. We consider this is the preferable way to meet market concerns about ‘noise’ in the market, rather than seeking to design relief to exclude relevant interests arising from certain transactions from calculations of substantial holdings.
- RG 222.92 The examples at the end of this section include descriptions of ‘Nature of relevant interest’ that we consider would provide clearer information to the market.

Disclosure by others

- RG 222.93 A substantial holding notice lodged by a counterparty to a securities lending transaction is not sufficient compliance with s671B. This will only be the case if the person giving the notice has authority to bind other persons on whose behalf the notice is given and they have similar relevant interests: see RG 159.267–RG 159.268.

RG 222.94 Often the parties to a securities lending transaction will not have similar relevant interests and it will not be possible to give joint notices. One counterparty's notice will not reflect all relevant interests of the other counterparty and of the other's associates.

Example 1: Borrower on-lending shares

A borrower (A) borrows ordinary shares in AX Limited under an AMSLA, which amount to a substantial holding. On the same day, A on-lends the shares it has borrowed to B.

- A lodges Form 603. Under Section 3 of the form, A states the nature of its relevant interest as 'Right, as lender, to recall shares under a securities lending agreement'.
- A does not need to attach a copy of the AMSLA under which it has its right of recall, but does need to provide the prescribed summary information as listed in the appendix to this guide.
- It is not sufficient for A to describe its interest as 'Acquisition and sale' or similar.

Example 2: Prime broker on-lending shares

A prime broker (A) borrows ordinary shares in BY Limited under an AMSLA which amount to a substantial holding. One week later, A on-lends those shares to B.

- A lodges Form 603. Under Section 3 of the form, A states the nature of its relevant interest as 'Holder of securities subject to an obligation to return under a securities lending agreement'.
- When A on-lends those shares to B, it does not change its substantial holding notification.
- B lodges Form 603. Under Section 3 of the form, B states the nature of its relevant interest as 'Holder of securities subject to an obligation to return under a securities lending agreement'.
- B does not need to attach a copy of the AMSLA under which it has an obligation to return securities, but does need to provide the prescribed summary information as listed in the appendix to this guide.
- It is not sufficient for B to describe the nature of its relevant interest as 'Direct interest' or similar.

Example 3: Beneficial owner lends share that are then on-lent

A beneficial owner (A) lends shares in CZ Limited to a custodian operating a securities lending program (B), who immediately on-lends those shares to a hedge fund (C). Each loan occurs under an AMSLA. A has previously lodged Form 603 as a beneficial owner.

One week later, C short sells those shares into the market.

- A does not change its substantial holding notification.
- B lodges Form 603. Under Section 3 of the form, B describes the nature of its relevant interest as 'Right, as lender, to recall shares under a securities lending agreement'.
- B does not need to attach a copy of the AMSLA under which it has its right of recall, but does need to provide the prescribed summary information as listed in the appendix to this guide.
- It is not sufficient for B to describe its interest as 'Acquisition and sale' or similar.
- C needs to lodge Form 603. Under Section 3 of the form, C states the nature of its relevant interest as 'Holder of securities subject to an obligation to return under a securities lending agreement'.
- C does not need to attach a copy of the securities lending agreement under which it has an obligation to return securities, but does need to provide the prescribed summary information.
- When C sells the shares on-market, it needs to lodge Form 605.

Appendix: Prescribed information

Schedule	
Type of agreement	
Parties to agreement	
Transfer date	
Holder of voting rights	
Are there any restrictions on voting rights?	Yes/no
If yes, detail	
Scheduled return date (if any)	
Does the borrower have the right to return early?	Yes/no
If yes, detail	
Does the lender have the right to recall early?	Yes/no
If yes, detail	
Will the securities be returned on settlement?	Yes/no
If yes, detail any exceptions	

Key terms

Term	Meaning in this document
AMSLA	Australian Master Securities Lending Agreement
ASIC	Australian Securities and Investments Commission
ASX	The exchange market known as ASX, operated by ASX Limited
borrower	See 'securities lending'
[CO 11/272] (for example)	An ASIC class order (in this example numbered 11/272)
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
CP 107 (for example)	An ASIC consultation paper (in this example numbered 107)
custodial business	Has the meaning given in [CO 11/272]
custodian	The holder of an Australian financial services licence carrying on a custodial business
GMSLA	Global Master Securities Lending Agreement
lender	See 'securities lending'
relevant interest	Has the meaning given in s9 of the Corporations Act
RG 159 (for example)	An ASIC regulatory guide (in this example, numbered 159)
s671B (for example)	A section of the Corporations Act (in this example numbered 671B)
securities lending	The term used to describe a common market transaction where securities are temporarily transferred from the owner (the lender) to another party (the borrower)
substantial holding	Has the meaning given in s 9 of the Corporations Act
substantial holding notice	A notice given under s671B of the Corporations Act

Related information

Headnotes

securities lending, prime broking, substantial holding notices, relevant interests

Class orders and pro formas

[CO 11/272] *Substantial holding disclosure: securities lending and prime broking*

Regulatory guides

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

Legislation

Corporations Act, Ch 6, 6C, s9, 12, 602(a), 606, 608, 608(1), 608(8), 609, 609(1), 609(6), 655, 671B, 673

Cases

Beconwood Securities Pty Ltd v ANZ Group Ltd [2008] FCA 594

Consultation papers and reports

CP 107 *Securities lending and substantial holding disclosure*

ASIC forms

Form 603 *Notice of initial substantial holder*

Form 604 *Notice of change of interests of substantial holder*

Form 605 *Notice of ceasing to be a substantial holder*

Other publications

Takeover Panel Guidance Note 20 *Equity derivatives*