



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 107

Securities lending and substantial holding disclosure

July 2009

About this paper

In this consultation paper, we are seeking to improve disclosure of substantial holdings that may arise from participation in securities lending or prime broking.

The paper 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.

We ask for feedback from you on whether ASIC should modify the substantial holding disclosure requirements for securities lending and prime broking to ensure that the market has useful information 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 paper was issued on 3 July 2009 and is based on the Corporations Act as at 3 July 2009.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

Your comments will help us determine what relief we should give for substantial holding notices that securities lenders and borrowers are required to lodge. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see [Section D Regulatory and financial impact](#), p. 24.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by Friday 7 August 2009 to:

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What will happen next?

Stage 1	3 July 2009	ASIC consultation paper released
Stage 2	7 August 2009	Comments due on the consultation paper
Stage 3		Publish our decision on the proposals

A Background to the proposals

Key points

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

We are concerned there has been a lack of transparency when substantial holdings are acquired through securities lending transactions and prime broking arrangements. This disclosure is also important as these activities affect the supply of securities.

Why we are consulting

- 1 Disclosure of substantial holdings under s671B 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). Substantial holding disclosure also gives the market information about any consideration for substantial holdings and details of any agreements or special conditions that may affect voting rights or disposal of the securities.
- 2 For the reasons set out in Section B, securities lending transactions and prime broking arrangements need to be taken into account in calculating a substantial holding.
- 3 Recent experience has demonstrated that disclosure of substantial holdings acquired through securities lending and prime broking arrangements is important for an efficient, competitive and informed market in quoted securities. There are four main reasons for this:
 - (a) disclosure achieves transparency of the volume of a company's securities that are subject to these activities. This is relevant for identifying pricing pressures and prospective settlement failures in those securities. For example, disclosure of securities subject to prime broking arrangements indicates the number of securities available for loan;
 - (b) relevant interests acquired through securities lending or prime broking may affect the control of a company;
 - (c) without this disclosure, there is a risk that the market will be misled as to 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.

- 4 This consultation paper sets out how s671B applies to securities lending transactions and asks for feedback on how to make disclosure more effective. This paper is not intended to address other issues that may be associated with securities lending and short selling (such as short selling disclosure rules). This paper is also not intended to address other issues that may be associated with the substantial holding provisions, such as their extension to certain derivative products.¹

Clarifying the requirements

- 5 There appear to be differing interpretations of how the relevant interest provisions in s608 and 609 apply to securities lending and prime broking. This contributes to different practices for compliance with s671B (and s606) across the sector, which leads to a lack of transparency in the ownership and control of listed entities. It also undermines an efficient and informed market.
- 6 For this reason, in Section B we set out our view on how the relevant interest provisions in s608 and 609 generally apply to standard securities lending transactions and prime broking arrangements. We also discuss what must be disclosed under s671B and, for completeness, how the takeovers threshold in s606 applies.
- 7 The analysis in Section B indicates ASIC's general approach to these provisions for standard transactions. Participants need to obtain legal advice about how these provisions apply to their individual agreements to ensure they comply with s671B and 606.

Improving disclosure

- 8 We are aware that the securities lending sector has had difficulty complying with s671B. ASIC has issued some guidance in Information Release 08-03 *ASIC reminds market participants about stock lending disclosure requirements*. We now seek to further improve substantial holding disclosure. In Section C of this paper, we ask for your feedback on specific proposals for:
- (a) modifying the substantial holding disclosure requirements in relation to securities lending and prime broking; and
 - (b) providing more guidance on some of the requirements.

Expectations for compliance

- 9 It is critical that persons engaged in securities lending transactions and prime broking participants fully comply with the requirements in s671B. Substantial

¹ Treasury has released a consultation paper on disclosure of equity derivative products. For more details go to: www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1556.

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.

- 10 We will be monitoring and enforcing compliance to promote adequate disclosure. 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.

Securities lending and short selling disclosure regimes

- 11 We understand the Government will soon announce the details of the permanent disclosure regime for short selling. In the meantime, the existing disclosure regime for short selling under ASIC's Class Order [CO 08/751] *Covered short sales* achieves disclosure of volumes of daily short sales trades executed by:
- (a) requiring brokers to be informed at the time of placing a sell order whether it is for a short or long sale; and
 - (b) requiring brokers to record the type of sale requested and report gross short sales executed that day by security to the ASX by 9am the following day.
- 12 The disclosure regime for securities lending to be introduced by the Reserve Bank of Australia (RBA) by December 2009 will require disclosure by participants in securities settlement facilities of:
- (a) daily number and value of securities subject to loan transactions entered into by security;
 - (b) daily outstanding on-loan and borrowed positions by security held by settlement participants; and
 - (c) the aggregate number of shares in each line of securities committed to any lending program under the control of each settlement participant (disclosed quarterly).

This disclosure is to be provided to the ASX.

Note: for more information about the RBA's disclosure regime, please consult the RBA's website www.rba.gov.au/PaymentsSystem/StdClearingSettlement/DisEquSecLen0209/.

- 13 Neither of these regimes achieves the disclosure required under substantial holdings notices for securities lending and prime broking. In particular, substantial holding notices are required to detail the counterparty to the securities lending transaction, the holder's associates, and details of the securities lending agreement. None of these details are captured by either the disclosure regime for securities lending or short selling.

B Clarifying the requirements

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.

Securities lending will result in both the lender and the borrower having a relevant interest in the securities: see paragraphs 22–28.

Prime broking arrangements also generally engage the relevant interest provisions: see paragraphs 29–34.

The substantial holding requirements under s671B may be triggered if the person has an interest in 5% or more of a listed entity: see paragraphs 39–47.

We are concerned there has been a lack of transparency of substantial holdings acquired through securities lending transactions and prime broking arrangements: see paragraphs 50–53.

Securities lending transactions

- 14 ‘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 consultation paper 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.

- 15 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 completion of a standard form schedule.
- 16 Before the securities are transferred, the borrower usually gives the lender collateral in the form of cash or other securities as security 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.

- 17 Once 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.
- 18 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).

Prime broking

- 19 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, typically comprising custodial services, execution, securities lending and financing.
- 20 Prime brokers often have extensive rights to borrow or rehypothecate any securities credited to the client's account. The prime broker is generally authorised to borrow the client's securities without seeking any further consent from the client.

Relevant interest provisions: s608 and 609

- 21 The following paragraphs explain how the relevant interest provisions in s608 and 609 generally apply to securities lending transactions and prime broking conducted on usual terms. Participants should obtain their own advice on how the law applies to their individual agreements, in light of the principles set out in this consultation paper.

Relevant interests and securities lending

- 22 The 'relevant interest' concept is central to the substantial holding and takeover provisions.
- 23 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 paragraph 48.

24 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 they have 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 paragraphs 29–34.

25 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.

26 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.

27 This chain requires that a subsequent borrower retains 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 their 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.

28 However, the original borrower and lender may not be aware of a subsequent disposal and the trigger to substantial holding disclosure is only 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, to the extent they do not actually become aware of a change to their relevant interests.

Relevant interests and prime broking

- 29 A prime broker that has the type of rights to borrow or rehypothecate its client's securities set out in paragraph 20 will have a relevant interest in those securities under s608 from the commencement of the prime broking arrangement.
- 30 The prime broker's mere right to use its client's securities generates a relevant interest in their client's securities at the time of entry into the 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 use the client's securities.
- 31 A prime broker's relevant interest in a client's securities does not change when the prime broker exercises its right to use 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.
- 32 The client retains a relevant interest in the securities because they have the right to recall the securities: see paragraph 24.
- 33 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).
- 34 A prime broker's relevant interests may 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.

Relevant interest exemptions for mortgages and derivatives do not apply

- 35 Section 609 provides exemptions for derivatives and mortgages from the relevant interest provisions in s608. However, we believe the better view is 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

- 36 For completeness, we note that there is no exemption for relevant interests arising from securities lending and prime broking from the takeover

provisions. Section 606 basically prohibits a person from acquiring a relevant interest in the voting shares of a listed company if that person or someone else's voting power would increase from 20% or below to more than 20% (or from above 20% to more than 20% but less than 90%).

Substantial holding disclosure: timing of disclosure under s671B

- 37 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).

- 38 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 9.30am of the next business day during a takeover bid for the shares.

Securities lending and substantial holding disclosure

- 39 Persons engaged in securities lending may be required to give substantial holding notices under s671B at various stages in a securities lending transaction.
- 40 The borrower may be obliged to give a substantial holding notice once it has a firm (legally binding) commitment to transfer 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).

- 41 The lender may gain a substantial holding through the delivery of collateral securities under the transaction.
- 42 The borrower will also need to consider its disclosure obligations if it loses a relevant interest in the lent securities because, for example, 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.

- 43 We consider it is reasonable for the lender to assume the borrower retains a relevant interest in the securities for the purpose of the lender's disclosure of substantial holdings and compliance with s606. Upon this assumption, the lender does not have to disclose a change in relevant interest as a result of the loan. See also paragraph 28.
- 44 Table 1 contains examples of when persons engaged in securities lending may be required to give substantial holding notices under s671B in various scenarios.

Table 1: Examples—s671B and securities lending

Transaction	Consequence			
	Relevant interest in X Co at T	s671B requirement at T+2	Relevant interest in X Co at T+3	s671B requirement at T+5
A buys shares representing a 5% relevant interest in X Co from B on market.	A acquires a relevant interest of 5%. B retains a relevant interest of 5%.	A must lodge a substantial holding notice.	A becomes holder of the shares. No change in its reported relevant interest. B no longer holds the shares. B ceases to have a relevant interest.	B must give notice of ceasing to have a substantial holding.
A enters agreement to lend X Co shares representing a relevant interest in 5% of X Co to C. A agrees to deliver the borrowed shares to C at T+3.	A retains a relevant interest of 5%. C has a relevant interest in 5%.	C must lodge a substantial holding notice.	A retains relevant interest of 5%. C now holds the X Co shares. No change in its reported relevant interest.	No substantial holding notice required.
C then executes a covered short sale of these X Co shares to D.	A retains a relevant interest of 5%. C retains a relevant interest of 5%. D acquires a relevant interest of 5%.	D must lodge a substantial holding notice.	A retains a relevant interest of 5%. C ceases to have a relevant interest of 5%. No change in D's reported relevant interest.	C must give notice of ceasing to have a substantial holding in X Co.

Prime broking and substantial holding disclosure

- 45 The entry into a prime broking agreement may trigger the need for a prime broker to give a substantial holding notice if the client's relevant interests in securities when combined with the prime broker's other relevant interests

(and the interests of any associates) are 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. Exercising that borrowing right will not, however, trigger any fresh obligation to give a substantial holding notice.

- 46 We consider that a prime broker assessing its substantial holding disclosure requirements at the time it becomes a prime broker of the relevant client's securities provides useful disclosure for the market as to the securities available for securities lending. Details of actual borrowings will then be disclosed under the planned RBA disclosure regime for securities lending.
- 47 Table 2 contains examples of when persons engaged in prime broking arrangements may be required to give substantial holding notices under s671B in various scenarios.

Table 2: Examples—s671B and prime broking

Transaction	Consequence	
	Relevant interest in X Co at T	s671B requirement at T+2
Bank enters prime broking agreement with Client A who has a relevant interest in 1% of X Co.	Bank acquires a 1% relevant interest. Bank's total relevant interest is 3%. Client A retains its 1% relevant interest.	No substantial holding notice required.
Bank then enters another prime broking agreement with a new Client B who has an existing relevant interest in 3% of X Co.	Bank acquires a 3% relevant interest. Bank's total relevant interest is 6%. Client B has 3% relevant interest.	Bank must lodge a substantial holding notice.
Bank then exercises its right to 'borrow' Client A's X Co shares.	No change to Bank's relevant interest. Client A retains 1% relevant interest.	No substantial holding notice required.
Client B sells a 1% stake in X Co shares.	Bank loses a 1% relevant interest. Bank's total relevant interest is 5%. Client B's relevant interest is 2%.	Bank must give notice of the 1% decrease in substantial holding.
Client A buys a 5% stake in X Co shares.	Bank acquires a 5% relevant interest. Bank's total relevant interest is 10%. Client A acquires a 5% relevant interest.	Bank must give notice of the 5% increase in its substantial holding. Client A must lodge a substantial holding notice.

Contents of the substantial holding notice: s671B

48 Subsection 671B(3) specifies the details that must be included in a substantial holding notice in relation to both the substantial holder and any associates that have a relevant interest in the company or scheme. The information must be given in the prescribed form. Table 3 summarises what must be disclosed by persons who acquire substantial holdings through securities lending and how this information should be provided.

Table 3: Summary of disclosure requirements under s671B

Requirement	What must be disclosed	Reference
Details of holder and associates	The borrower must disclose: <ul style="list-style-type: none"> its and its associates' name and ACN/ARSN; and the nature of any association. 	s671B(3), prescribed forms*
Details of the relevant interest in voting shares of the company	The borrower must disclose: <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 and acquired in the four months before the date that the substantial holder became a substantial holder. 	s671B(3), prescribed forms*See proposal C5 for our consultation on consideration.
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 (see paragraph 49(b) of this paper). 	s671B(4)See proposals C1–C4 for our proposed relief.

*Note: 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*.

- 49 Unless the relevant transaction occurred on market, s671B(4) requires the substantial holding notice to be accompanied by the following documents:
- (a) a copy of any document setting out the terms of any relevant agreement that contributed to the substantial holding and which is available to the holder in writing; and
 - (b) 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.

Compliance issues

- 50 We are concerned that there has been insufficient information disclosed in substantial holding notices given by some participants in the securities lending and prime broking markets. For example, often the holder simply describes the nature of the relevant interest as ‘stock loan’ and fails to disclose the terms of the transaction. There is also a common practice of not attaching the transaction documents required by s671B(4). These deficiencies mean that the market has insufficient information about the borrower’s interest which hinders transparency in the market.
- 51 Borrowers also often fail to disclose key details of the transaction, such as the lender counterparty and term of the loan. We are also concerned that some participants give their substantial holding notices significantly after the deadline in s671B.
- 52 Some parties engaged in securities lending have been under the misapprehension that a substantial holding notice given by the counterparty to their transaction is sufficient compliance for s671B. This is not the case unless 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.
- 53 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.

C Proposals for better disclosure

Key points

We seek your feedback on the following aspects of the substantial holding provisions so that we can take this into account in considering relief to improve disclosure under the substantial holding provisions:

- the requirement to attach agreements to the notice (see proposals C1–C4);
- how the consideration for securities lending should be disclosed in substantial holding notices (see proposal C5); and
- how the counterparty details for securities lending and prime broking should be disclosed in substantial holding notices (see proposal C6).

We also seek your feedback generally on whether disclosure of substantial holdings for securities lending and prime broking should be simplified to make compliance more practical: see proposal C7.

Relief from the requirement to attach standard form documents

Proposal

- c1** We propose to give relief from s671B(4) so that a substantial holder need not attach a copy of the AMSLA or GMSLA to the substantial holding notice, provided the notice gives adequate disclosure about the key terms of the particular securities lending agreement and any significant variations to the AMSLA or GMSLA.
- c2** To satisfy this requirement, the notice may be accompanied by a copy of the completed schedules to the AMSLA, or the holder may summarise the information in an annexure.
- c3** Disclosure of the key terms of the particular securities lending agreement would include:
- (a) the counterparty to the agreement;
 - (b) any consideration;
 - (c) a summary of any party's voting rights attaching to the securities and any qualifications to these rights;
 - (d) any party's right to dispose of or control disposal of the securities and any qualifications to these rights;
 - (e) the borrower's rights to return the securities or equivalent securities;
 - (f) the lender's rights to recall the securities or equivalent securities and the time frame for re-delivery by the borrower;

(g) the parties' rights to terminate the agreement.

c4 We do not propose to give relief from s671B(4) for any other documents that may be connected with a securities lending transaction. Therefore, any other contract or agreement connected with the securities lending transaction would need to be annexed to the substantial holding notice.

Your feedback

C4Q1 Is our proposal to give relief from the requirement to lodge the AMSLA or GMSLA with substantial holding notices likely to make compliance with s671B easier?

C4Q2 Should the notice be required to:

- (a) summarise the key terms of the agreement, or
- (b) be accompanied by a copy of the completed schedules?

C4Q3 Is our proposal likely to result in the market being deprived of important information?

C4Q4 Should relief from the requirement to attach copies of standard master agreements be conditional on the substantial holder providing the listed entity and the market with a copy if requested by an investor or the entity?

C4Q5 Should we give relief for any other types of contracts or arrangements that contribute to a person acquiring a substantial holding through securities lending transactions? For example, should we give relief so that prime broking arrangements, borrowing requests or notifications of unconditional 'holds' (binding legal commitments to lend securities) do not have to be attached?

Rationale

54 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. We are proposing to allow parties to comply with this requirement by attaching a copy of the completed schedules to the AMSLA or GMSLA.

55 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.

56 The view that lengthy, standard documentation may not assist the market is reflected in the Takeovers Panel's *Guidance Note 20: Equity Derivatives* at paragraph 37.

Guidance on disclosure of consideration

- 57 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. Disclosure of consideration is a key substantial holding content requirement.
- 58 The disclosure required in relation to 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’: see the notes to Forms 603, 604 and 605.
- 59 There are various interpretations as to how consideration for securities lending should be disclosed in substantial holding notices. Some participants have argued that the concept of consideration does not readily apply to securities lending. Other participants simply disclose the market price of the securities.

Proposal

- c5** We propose issuing guidance indicating that notices for substantial holdings acquired through securities lending set out any benefits given by the holder in relation to the securities. This would include:
- (a) any borrowing fees payable by the borrower to the lender;
 - (b) any reduction in fees that would otherwise be payable by the lender to the borrower;
 - (c) any reduction in interest payable by the lender to the borrower on cash collateral.

If any of these amounts cannot be accurately estimated, then the notice should clearly explain how they will be calculated. Consideration that is remote from the particular securities lending transaction does not have to be disclosed (e.g. any reduction in custody fees by a prime broker negotiated for all securities for a period, such as 12 months).

Your feedback

- C5Q1 Will our proposed guidance be impractical or otherwise cause undue difficulties for the securities lending industry?
- C5Q2 Is information about fees useful market information (e.g. as an indicator to supply and demand for borrowing and lending the securities), having regard to the purpose of the substantial holding disclosure regime?
- C5Q3 What information about consideration for securities lending transactions is useful for the market, having regard to the purpose of the substantial holding disclosure regime?

Rationale

- 60 We consider that the proposed disclosure will make useful information available. Disclosure of the borrowing fee is relevant to supply and demand for the securities.
- 61 If it is useful information for the market it should be disclosed even if it is commercially sensitive.
- 62 Disclosure of information about consideration that is not directly related to the securities lending transaction should not be required in a substantial holding notice. For example, prime broking clients often obtain a general reduction in fees because they allow the prime broker to utilise their securities. We accept that this is not relevant information for a notice required under s671B.

Guidance on disclosure of registered holder of shares

- 63 The prescribed forms for notification of substantial holdings require disclosure of the identity of persons registered as holders of the securities in respect of which the substantial holder (or its associate) has a relevant interest.
- 64 In the context of securities lending and prime broking, this means:
- (a) the borrower must include details of the lender; and
 - (b) the prime broker must include details of its clients.
- 65 In the case of a substantial holder whose substantial holding is comprised of relevant interests from a number of securities lending or prime broking transactions, this requires disclosure of details of a lender's or client's shareholding in circumstances where the relevant lender or client would not otherwise need to disclose. Some participants comply with this requirement by listing all persons who are registered holders while others simply state 'other party'. Some include no details.

Proposal

- c6 We propose issuing guidance that notices for substantial holdings acquired through securities lending or prime broking give full disclosure of the registered holder of the shares in which a relevant interest is disclosed. This would, in the case of a prime broker, require disclosure of the registered holder of its client's shares (which may be just the custodian or client or both).

Your feedback

- C6Q1 Will our proposed guidance be impractical or otherwise cause undue difficulties for the securities lending and prime broking sectors?
- C6Q2 Is information about the registered holder of the shares (in respect of which the relevant interest is disclosed) useful market information?
- C6Q3 What information on the registered holder of the relevant shares for prime broking or securities lending transactions is useful for the market?

Rationale

- 66 We consider that the proposed disclosure will make useful information available. The identity of the registered holder is relevant to control of a company's securities.
- 67 ASIC is aware that a concern about disclosure of the registered holder is that it is confidential information and commercially sensitive. Moreover, it is argued that, but for the appointment of a prime broker, the client's details may not be subject to disclosure under the substantial holding provisions.
- 68 On the other hand, we consider that if it is useful information for the market, then it should be disclosed even if it is commercially sensitive.

Simplifying disclosure in substantial holding notices

- 69 We would like your feedback on how the requirements could be made more workable while improving market transparency and avoiding the risk of avoidance or warehousing.
- 70 In the United Kingdom, for example, there is a specific exemption from substantial holding requirements for securities lending where the borrowed stock is on-lent or otherwise disposed of by the borrower by T+1 and the borrower does not declare any intention of exercising (and does not exercise) the voting rights attaching to the shares.
- 71 Some market participants have argued that the disclosure of a substantial holding required by s671B is inappropriate for securities lending and prime broking.
- 72 Market participants have also suggested that multiple notices lodged by parties in a chain of securities lending can be confusing to the market.
- 73 We would also be interested in feedback on the relevance of the complementary information that will be gathered under the RBA's

disclosure regime for securities lending and the disclosure regime for covered short selling.

Issue

- c7** We would like your feedback on how the requirements could be made more workable while retaining market transparency.

Your feedback

- C7Q1 What information on substantial holdings acquired through securities lending transactions is important for the market?
- C7Q2 What information on substantial holdings acquired through prime broking arrangements is important for the market?
- C7Q3 Are there any aspects of our guidance on relevant interests in Section B that are inconsistent with how securities lending transactions occur? If so, should we give any relief?
- C7Q4 Are there any aspects of the substantial holding disclosure requirements that are inappropriate for securities lending transactions and if so, how should they be changed?
- C7Q5 Are there any aspects of the substantial holding disclosure requirements that are inappropriate for prime broking arrangements and if so, how should they be changed? For instance, what consequences would you see if ASIC provided relief so that the prime broker's relevant interest arising from its right to borrow or rehypothecate its client's securities could be disregarded (for substantial holding disclosure) until the time when the prime broker exercises that right?
- C7Q6 Do you have suggestions for specific relief that ASIC should consider that would improve compliance with the provisions while still:
- (a) achieving market transparency of substantial holdings; and
 - (b) mitigating the risk of avoidance or the risk of warehousing?
- C7Q7 If ASIC were to simplify the requirements for securities lending (e.g. to allow the non-inclusion in substantial holding calculations of borrowed securities that are on-lent or otherwise disposed of by the borrower by T+1), how would this not:
- (a) compromise market transparency; and
 - (b) increase the risk of avoidance or the risk of warehousing?
- C7Q8 Is the information gathered under the disclosure regimes for securities lending and short selling adequate for achieving disclosure of substantial holdings in a particular security through securities lending or prime broking? Why?

D Regulatory and financial impact

- 74 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) ensuring the market has important information on substantial holdings acquired through stock lending and prime broking; and
 - (b) facilitating disclosure so that it can be made in a timely and cost effective way.
- 75 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 76 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 77 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches including:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see ‘The consultation process’ p. 4.

Key terms

Term	Meaning in this document
AMSLA	Australian Master Securities Lending Agreement
ASIC	Australian Securities and Investments Commission
borrower	See 'securities lending' below
Corporations Act	<i>Corporations Act 2001</i> including any regulations made for the purposes of the Act
GMSLA	Global Master Securities Lending Agreement
lender	See 'securities lending' below
manufactured payments	The equivalent economic value of any dividends or distributions received during the term of the loan and returned by the borrower
RBA	Reserve Bank of Australia
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)