

Attachment to CP 319: Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Securities Lending and Substantial Holding Information) Instrument 2019/XXX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2019

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

Contents

Part 1—Preliminary	3
Enabling provision.....	3
Title.....	3
Commencement.....	3
Part 2—Declaration	4

DRAFT

Part 1—Preliminary

Enabling provision

- 1 The Australian Securities and Investments Commission (**ASIC**) makes this instrument under subsection 673(1) of the *Corporations Act 2001 (Act)*.

Title

- 2 This instrument is named *ASIC Corporations (Securities Lending and Substantial Holding Information) Instrument 2019/XXX*.

Commencement

- 3 This instrument commences on the day it is registered under the *Legislative Instruments Act 2003*.

Note: The register may be accessed at www.legislation.gov.au.

DRAFT

Part 2—Declaration

4. Part 6C.1 of the Act applies to all persons as if section 608 were modified or varied by, after subsection (8), inserting:

“(8A) If securities are subject to:

- (a) an arrangement (the *securities lending arrangement*) under which:
 - (i) one entity (the *lender*) agrees that it will:
 - (A) deliver the securities to another entity (the *borrower*) or to an entity nominated by the borrower; and
 - (B) vest title in those securities in the entity to which they are delivered; and
 - (ii) the borrower agrees that it will, after the lender does the things mentioned in subparagraph (i):
 - (A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and
 - (B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered; or
- (b) an arrangement (the *securities lending arrangement*) under which:
 - (i) the securities are held by one entity (the *borrower*) or an entity nominated by the borrower, on behalf of another entity (the *lender*); and
 - (ii) the lender agrees that the borrower may deal in the securities on its own behalf or on behalf of a person;
 - (iii) the borrower agrees that it will at some future time:
 - (A) deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender; and
 - (B) vest title in those securities (or those equivalent securities) in the entity to which they are delivered;

DRAFT

and the securities are subsequently disposed of by the borrower or an entity nominated by the borrower resulting in that entity ceasing to have a relevant interest in the securities, the lender of the securities under the securities lending arrangement is taken to have a relevant interest in the securities (or equivalent securities) that the borrower has agreed to deliver to, and vest title in, the lender or an entity nominated by the lender.

(8B) For the purposes of subsection (8A) if:

(a) a person is authorised under an authorisation agreement (within the meaning of subsection 671B(4C)) to act on behalf of the lender in relation to a securities lending arrangement between the lender and a borrower; and

(b) the person has a relevant interest in the securities because of the authorisation;

the person is also taken to have a relevant interest in the securities (or equivalent securities) that the lender is taken to have under that subsection.”.

5. Part 6C.1 of the Act applies to all persons as if section 609 were modified or varied by, after subsection (10), inserting:

“(10A) A service provider does not have a relevant interest in securities under subsection 608(8) merely because, in the course of providing services to a person as part of carrying on a prime broking business or custodial business, the person has, under a securities lending arrangement, given to the provider:

- (a) where the provider or an entity nominated by the provider holds the securities on behalf of the person or an entity nominated by the person—a present right (***borrowing right***) to, at some future time, deal in the securities on its own behalf or on behalf of a person;
- (b) otherwise—a present right (***borrowing right***) to, at some future time, have the securities held by or on behalf of the person delivered to the provider or an entity nominated by the provider and to have the title in those securities vested in the entity to which they are delivered;

provided both of the following are satisfied:

- (c) the person is not subject to any restriction (other than a permissible restriction) by or under any relevant agreement between the person and the provider or an

DRAFT

associate of the provider in how it can deal with the securities in respect of which the borrowing right is given;

- (d) the borrowing right is acquired by the provider as part of a bona fide arrangement entered into in the ordinary course of carrying on that business.

(10B) For the avoidance of doubt, subsection (10A) stops applying in respect of particular securities when the service provider exercises the borrowing right in respect of those securities.

(10C) A person (the *agent*) does not have a relevant interest in securities under subsection 608(8) merely because, in the course of providing services to another person (the *lender*) as part of carrying on a custodial business, the lender has given to the agent under an authorisation agreement (within the meaning of subsection 671B(4C)) the authority (the *lending authority*) to act on behalf of the lender to, at some future time, have the securities held by or on behalf of the lender delivered to a person (the *borrower*) nominated by the agent and to have the title in those securities vested in the borrower under a securities lending arrangement between the lender and the borrower, provided both of the following are satisfied:

- (a) the lender is not subject to any restriction (other than a permissible restriction) by or under the authorisation agreement between the lender and the agent or an associate of the agent in how it can deal with the securities in respect of which the lending authority is given; and
- (b) the lending authority is given to the agent as part of a bona fide authorisation agreement entered into in the ordinary course of carrying on that business.

(10D) For the avoidance of doubt:

- (a) in subsection (10C) the borrower nominated by the agent may be the agent itself acting in the capacity as borrower under a securities lending arrangement;
- (b) subsection (10C) stops applying in respect of particular securities when the agent exercises the lending authority under the authorisation agreement in respect of those securities; and
- (c) subsection (10C) may recommence to apply in respect of particular securities when the securities are redelivered to be held by or on behalf of the lender.

DRAFT

(10E) In subsections (10A), (10B), (10C) and (10D) and this subsection:

custodial business means a business of providing to wholesale clients a package of at least the following financial services and other services:

- (a) custodial or depository services;
- (b) services in relation to a securities lending arrangement.

custodial or depository service has the meaning given by subsection 766E(1).

permissible restriction means:

- (a) a mortgage, charge or security taken or acquired in relation to the securities in the ordinary course of carrying on a prime broking business or custodial business and on ordinary commercial terms; or
- (b) any restrictions of a procedural or administrative nature in relation to giving instructions to the service provider for dealing in the securities.

prime broking business means a business of providing to wholesale clients a package of at least the following services in accordance with a written agreement commonly known as a prime broking agreement or prime brokerage agreement:

- (a) dealing in a financial product to the extent the dealing is acquiring or disposing of the financial product, or arranging for another person to acquire or dispose of the financial product;
- (b) services that enable or facilitate clients to meet their obligations to other persons that arise from entering into transactions with those other persons in connection with the acquisitions and disposals mentioned in paragraph (a);
- (c) custodial or depository services;
- (d) services in relation to a securities lending arrangement;
- (e) consolidated reporting and other operational support services.

securities lending arrangement has the same meaning as in paragraphs 608(8A)(a) and (b).

service provider means a person:

DRAFT

- (a) that holds an Australian financial services licence that covers the provision of a custodial or depositary service; or
- (b) that is exempt under:
 - (i) paragraph 911A(2)(i); or
 - (ii) Schedule 2 to the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*; or
 - (iii) an instrument, not being a legislative instrument, made by ASIC and which applies to the person on terms similar to Schedule 2 of the legislative instrument referred to in subparagraph (ii) or any of the ASIC Class Orders repealed by that legislative instrument;

from the requirement to hold an Australian financial services licence for the provision of a custodial or depositary service.

wholesale client has the meaning given by section 761G. “.

Note: For the avoidance of doubt, nothing in paragraphs 4 and 5 of this instrument has effect for the purposes of Chapter 6 or Part 6C.2 of the Act.

6. Chapter 6C of the Act applies to all persons as if section 671B were modified or varied as follows:

- (a) after subsection (3) insert:

“Information that need not be given

(3A) Where a relevant interest in voting shares in the company or interests in the scheme arises, changes or ceases because of a securities lending arrangement, the consideration paid in relation to the relevant interest does not need to be given.

(3B) Where a relevant interest in voting shares in the company or interests in the scheme arises, changes or ceases because of the terms of an authorisation given under an authorisation agreement by a lender to a person to act on behalf of the lender in relation to a securities lending arrangement between the lender and a borrower, the consideration paid in relation to the relevant interest does not need to be given.”.

- (b) after subsection (4) insert:

“Information that need not be accompanied by certain securities lending agreements

DRAFT

- (4A) Where a securities lending arrangement contributed to the situation giving rise to the person needing to provide the information, the information need not be accompanied by a copy of any master securities lending agreement, provided the information is accompanied by:
- (a) a statement by the person giving full and accurate details of the following matters in relation to the securities lending arrangement:
 - (i) the type of agreement;
 - (ii) the parties to the agreement;
 - (iii) the circumstances in which the parties can exercise the voting rights attached to the securities;
 - (iv) the date the securities were or are expected to be delivered by the lender to the borrower or the entity nominated by the borrower;
 - (v) the scheduled date (if any) the securities (or equivalent securities) are expected to be delivered by the borrower to the lender or to an entity nominated by the lender;
 - (vi) whether the borrower has a right to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;
 - (vii) whether the lender has a right to require the borrower to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;
 - (viii) the circumstances (if any) under which the borrower is not required to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender on settlement; and
 - (b) a statement that the person will, if requested by the company or responsible entity to whom the prescribed form must be given or ASIC, give a copy of the agreement to the company, responsible entity or ASIC.

If the person is requested to give a copy of the agreement, the copy must be given within 2 business days after receiving the

DRAFT

request and the copy must be endorsed with a statement that the copy is a true copy.

(4B) Where the terms of an authorisation given under an authorisation agreement by a lender to a person to act on behalf of the lender in relation to a securities lending arrangement between a lender and a borrower, contributed to the situation giving rise to the person needing to provide the information, the information need not be accompanied by a copy of the authorisation or any master securities lending agreement to which the authorisation relates, provided the information is accompanied by:

(a) in relation to the securities lending arrangement—a statement by the person giving full and accurate details of the following matters:

(i) the type of agreement;

(ii) the parties to the agreement;

(iii) the circumstances in which the parties can exercise the voting rights attached to the securities;

(iv) the date the securities were or are expected to be delivered by the lender to the borrower or the entity nominated by the borrower;

(v) the scheduled date (if any) the securities (or equivalent securities) are expected to be delivered by the borrower to the lender or to an entity nominated by the lender;

(vi) whether the borrower has a right to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;

(vii) whether the lender has a right to require the borrower to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised;

(viii) the circumstances (if any) under which the borrower is not required to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender on settlement; and

DRAFT

- (b) in relation to the authorisation agreement—a statement by the person giving full and accurate details of the following matters:
- (i) the type of agreement;
 - (ii) the parties to the agreement;
 - (iii) the circumstances in which the person who is authorised to act on behalf of the lender in relation to a securities lending arrangement between a lender and a borrower can exercise the authorisation attached to the securities;
 - (iv) the circumstances in which the lender is subject to any restriction in how it can deal with the securities;
 - (v) whether the person who is authorised to act on behalf of the lender in relation to a securities lending arrangement has a right to require the borrower to deliver the securities (or equivalent securities) to the lender or to an entity nominated by the lender earlier than the scheduled date (if any) and, if so, the circumstances in which this right can be exercised; and
- (c) a statement that the person will, if requested by the company or responsible entity to whom the prescribed form must be given or ASIC, give a copy of the authorisation agreement to the company, responsible entity or ASIC.

If the person is requested to give a copy of the authorisation agreement, the copy must be given within 2 business days after receiving the request and the copy must be endorsed with a statement that the copy is a true copy.

(4C) In subsections (3A), (3B), (4A), (4B) and this subsection:

authorisation agreement means a written agreement between a financial services licensee and a wholesale client that relates to a securities lending arrangement between the client (as lender) and a person (as borrower) under which:

- (a) the client grants a right to the licensee to transfer securities held by or on behalf of the client to the borrower (which may be the licensee itself), on the terms of a securities lending arrangement, without giving further notice of such transfer to the client;

DRAFT

- (b) the client grants the licensee the right to call for the redelivery of all or any equivalent securities in accordance with the terms of the securities lending arrangement (either on the client's instructions or without prior instructions) and, if the borrower does not redeliver equivalent securities in accordance with such call, the right to terminate the securities lending arrangement with the borrower;
- (c) the client grants to the licensee the right to appropriate, transfer, use or otherwise deal with all or some of the property provided as collateral by the borrower in connection with the securities lending arrangement; and
- (d) the client grants the licensee the right to terminate any securities lending arrangement with a borrower (including without the client's prior instructions) in accordance with the terms of the relevant securities lending arrangement.

custodial or depository service has the meaning given by subsection 766E(1).

master securities lending agreement means:

- (a) an Australian Master Securities Lending Agreement as published by the Australian Securities Lending Association; or
- (b) a Global Master Securities Lending Agreement as published by the International Securities Lending Association; or
- (c) a written agreement that is on substantially the same terms as an agreement mentioned in paragraph (a) or (b); or
- (d) a written agreement commonly known as a prime broking agreement or prime brokerage agreement between a service provider and a wholesale client under which the provider agrees to provide a package of at least the following services to the client:
 - (i) dealing in a financial product to the extent the dealing is acquiring or disposing of the financial product, or arranging for another person to acquire or dispose of the financial product;
 - (ii) services that enable or facilitate clients to meet their obligations to other persons that arise from entering into transactions with those other persons

DRAFT

in connection with the acquisitions and disposals mentioned in subparagraph (i);

- (iii) custodial or depository services;
- (iv) services in relation to a securities lending arrangement;
- (v) consolidated reporting and other operational support services.

securities lending arrangement has the same meaning as in paragraphs 608(8A)(a) and (b).

service provider has the same meaning as in subsection 609(10E).

wholesale client has the meaning given by section 761G.”.

DRAFT