

ASIC Class Order [CO 11/272]

About this compilation

Compilation No. 2

This is a compilation of ASIC Class Order [CO 11/272] as in force on 24 March 2017. It includes any commenced amendment affecting the legislative instrument to that date.

This compilation was prepared by the Australian Securities and Investments Commission.

The notes at the end of this compilation (the *endnotes*) include information about amending instruments and the amendment history of each amended provision.

Australian Securities and Investments Commission Corporations Act 2001 – Subsection 673(1) – Declaration

Enabling provision

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

Title

2. This instrument is ASIC Class Order [CO 11/272].

Commencement

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

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

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;

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.”.

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 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) In subsections (10A), (10B) 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:

- (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 (iia) 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.

(b) after subsection (4) insert:

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

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

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

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 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(10C).

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

Notes to ASIC Class Order [CO 11/272]

Note 1

ASIC Class Order [CO 11/272] (in force under s673(1) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the tables below.

Table of Instruments

Instrument number	Date of FRL registration	Date of commencement	Application, saving or transitional provisions
[CO 11/272]	14/4/2011 (<i>see</i> F2011L00607)	14/4/2011	
[CO 13/854]	4/10/2013 (<i>see</i> F2013L01766)	4/10/2013	-
2017/65	23/3/2017 (<i>see</i> F2017L00284)	24/3/2017	-

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Para 5	am. 2017/65
Para 6(a).....	am. [CO 13/854]
Para 6(b).....	am. [CO 13/854]