

accordance with their terms even if the clearing member fails in its obligations to obtain required consents or agreements from customers. This is consistent with the provision of UCC 8-503(e), which provides that an action based on an entitlement holder's property interest with respect to a financial asset held for its account by a securities intermediary, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of the financial asset or an interest therein (which would include lien holders) who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations to maintain the property for the entitlement holder. OCC's security interest is protected under this provision.¹⁶

The first sentence of proposed Interpretation .03 is intended to clarify that OCC's lien extends to all assets in the market-maker accounts and JBO participant accounts. Article VI, Sections 3(b), (c), and (h) of OCC's By-Laws governs such accounts and uses the same language to describe OCC's lien's over those assets.¹⁷ This language has always been intended and understood to describe the scope of OCC's lien as extending to all assets in the accounts. "Long positions" were specifically referred to in Section 3 because in the case of options only long positions have asset value. Short option positions represent only a liability. However, as OCC begins clearing security futures, it seems prudent to clarify that OCC's lien extends to all positions that represent an asset in the account, including short futures positions, which may have asset value if the market has moved in their favor since the most recent mark-to-market payment. Thus, the first sentence of proposed Interpretation .03 clarifies that the "long positions, securities, margin and other funds" over which OCC's lien extends includes any "investment property," as defined in Article 9 of the UCC,¹⁸ including long and short

positions in security futures as well as any other asset.

The second sentence of proposed Interpretation .03 is also motivated by security futures, although it more broadly clarifies that OCC's lien acts as security for all obligations of the clearing member to OCC with respect to separate or combined market-maker accounts, customer accounts, or segregated futures accounts. OCC uses similar language in Sections 3(b), (c), (e), and (f) of Article VI of OCC's By-laws, which governs such accounts, to indicate that OCC has a lien on all long positions, margins, and other funds in the market-maker account with OCC as security for the clearing member's obligations to OCC in respect of all exchange transactions effected through such an account, short positions maintained in such an account, and exercise notices assigned to such an account. When OCC begins clearing security futures, its lien will also secure the clearing member's obligations with respect to long security futures positions in the account, which unlike long options which are always an asset may be a liability if the market has moved against those positions since the last mark-to-market payment. In order to avoid any confusion caused by reference to short positions but not to long positions, the proposed Interpretation .03 clarifies that obligations to OCC with respect to all exchange transactions should be read broadly to encompass, where applicable, obligations arising from long or short positions, obligations to make payments or delivery under cleared contracts, and obligations with respect to fees and charges associated with such transactions.

OCC has determined to clarify the language in Section 3 through the addition of Interpretation .03 rather than through an amendment to the text of Section 3 because OCC wants to avoid any possible inference that it is making a substantive change from the language that is Section 3, which language is currently used in outstanding market-maker account agreements.

Changes to Rule 1105(b) are intended merely to conform to the changes in Article VI, Section 3. Rather than refer to the market-maker account agreement, the rule would now refer directly to the applicable provisions in Article VI, Section 3, of the By-Laws which are required to be incorporated into an agreement between the clearing member and the market-maker.

OCC believes the proposed rule change is consistent with the requirements of Section 17A of the

Act¹⁹ and the rules and regulations thereunder applicable to OCC because it will promote the prompt and accurate clearance and settlement of securities transactions, fosters cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-OCC-2002-10. This file number should be included on the subject line if e-mail is used. Copies of the

¹⁶ See also UCC 8-511(b), which provides that a claim of a creditor (OCC) of a securities intermediary (the failed clearing member) that is perfected by control has priority over the claims of the securities intermediary's entitlement holders.

¹⁷ Article VI, Sections 3(b), (c), and (h) contain language to indicate that OCC has a lien on all long positions, securities, margin, and other funds in such accounts.

¹⁸ UCC 9-102(a)(49) defines "investment property" to mean a "security, whether certified or uncertified, security entitlement, securities account, commodity contract, or commodity account."

¹⁹ 15 U.S.C. 78q-1.