

securities intermediary has priority over any security interest granted by the debtor to another secured party.”¹⁴

Because it remains the case that as between a clearing member and its customers (including market-makers), the clearing member has a duty to obtain each customer's consent before subjecting the customer's securities to a security interest or taking certain other actions potentially affecting the customer's interests,¹⁵ the rule continues to require clearing members to obtain specified agreements from market-makers and to require them to represent to OCC that such agreements have in fact been obtained. Those clearing members that choose to continue to use an existing form of market-maker account agreement will be permitted to do so, but OCC will also permit the agreements required under Article VI, Section 3 of its By-Laws to be incorporated into a clearing member's own forms of account agreements to the extent that the clearing member chooses to do so.

OCC also will add two new items to the Interpretations and Policies to Article VI, Section 3. The first sentence of new Interpretation .02 sets forth a representation and warranty from each clearing member that it has obtained the agreement of each person for whom a transaction is effected in any account of the clearing member established and maintained pursuant to the provisions of Section 3, including the granting of a security interest in the account to OCC, and that the inclusion of the person's transactions and positions in such account is in compliance with the laws, regulations, and rules applicable to the clearing member.

This representation will apply to not only market-maker accounts and JBO participant accounts but also to firm

accounts, pledge accounts, securities customer accounts, cross margining accounts, and segregated futures accounts that are provided for under paragraphs (a) and (d) through (g) of Section 3. While OCC has never required that a specific form of agreement be obtained by clearing members from persons whose transactions are included in these other types of accounts, Commission Rule 15c3-3, Rule 8c-1, Rule 15c2-1, and the Commission's hypothecation rules, as well as certain state laws, where applicable, require that certain consents and agreements be obtained.¹⁶

The second sentence of new Interpretation .02 is intended to make clear that the rights of OCC, including its security interest, in any account of the clearing member with OCC are enforceable in accordance with their terms even if the clearing member fails in its obligations to obtain the required consents or agreements from its customers. This is consistent with the provisions of UCC Article 8, under which OCC's security interest is protected.¹⁷

The first sentence of new Interpretation .03 will clarify that pursuant to Article VI, Section 3 of OCC's By-Laws, OCC's lien extends to all assets in account which are “investment property” as defined under Article 9 of the UCC,¹⁸ including long and short positions in security futures and any other asset in the account. This interpretation is consistent with OCC's long-standing interpretation of Section 3 of Article VI.

The second sentence of Interpretation .03 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's lien secures the clearing member's obligation with respect to long security futures positions in the account. Long security futures positions, 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, 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.

Changes to Rule 1105(b) are made to conform that rule to Article VI, Section 3. Rather than refer to the market-maker account agreement, the rule will now refer to the provisions in Article VI, Section 3 of the By-Laws which are applicable to the market-maker account.

III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.¹⁹ The rule change permits OCC to eliminate the requirement that a clearing member must obtain a specified form of account agreement from each market-maker for whom it carries an account and submit those agreements to OCC for approval because UCC amendments in conjunction with requirements under federal and state law make the requirement redundant and unnecessary. OCC's rule change does not substantively alter the rights or obligations of OCC clearing members or their customers but rather streamlines the process by which OCC perfects its security interest in clearing members' market-maker accounts under the UCC. Accordingly, the Commission finds the rule change is consistent with section 17A of the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in

maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.” Accounts established under Section 3 of OCC's By-Laws would ordinarily be “securities accounts,” but certain accounts might be construed as commodity accounts or as both securities accounts and commodity account given that OCC may clear commodity contracts and security futures as well as security options. In any case, the Article 9 rules governing perfection and priority of security interests in commodity accounts and assets contained therein are substantively identical to those governing securities accounts and assets therein because all are included in the UCC 9-102(a)(49) definition of “investment property” to which those rules apply. To the extent that an account is a “commodity account,” OCC will fall within the definition of a “commodity intermediary” under UCC 9-102(a)(17).

¹⁴ UCC 9-328(3).

¹⁵ See UCC 8-504(b), which states that a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain on behalf of an entitlement holder except as otherwise agreed by the entitlement holder.

¹⁶ For example, consent to the commingling of a customer's securities with the securities of another customer must be obtained. Such consents are normally included in the account documentation obtained by broker-dealers from their customers and are the responsibility of the broker-dealers.

¹⁷ UCC 8-503(e) 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. See, also, UCC 8-511(b), which provides that a claim of a creditor (*i.e.*, OCC) of a securities intermediary (*i.e.*, the failed clearing member) that is perfected by control has priority over the claims of the securities intermediary's entitlement holders.

¹⁸ UCC 9-102(a)(49) defines “investment property” to mean a “security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.”

¹⁹ 15 U.S.C. 78q-1(b)(3)(F).