

certain conditions, are eligible to be ECPs as that term is defined in section 1a(12) of the Act. Under the terms of this order, the SADB's would meet the financial qualifications of an ECP by having a financial guarantee for the OTC transactions from a natural person who is an ECP and by satisfying certain minimum financial requirements.

Accordingly, the Commission has determined to issue an order, pursuant to section 1a(12)(C) of the Act, subject to certain conditions, that SADB's as described herein with a natural person who is an ECP acting as guarantor qualify as ECPs. The order permits the SADB's to enter into OTC transactions pursuant to section 2(c), 2(d)(1) and 2(g) of the Act.

IV. Cost Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15 does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, section 15 simply requires the Commission to "consider the costs and benefits" of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The order is intended to reduce regulatory barriers to permit SADB's, when acting in a proprietary capacity, with a natural person who is an ECP as guarantor, to enter into OTC transactions for hedging purposes. The Commission has considered the costs and benefits of the order in light of the specific provisions of section 15(a) of the Act.

A. Protection of Market Participants and the Public

The order would permit an SADB to participate in the OTC markets, subject to a guarantee from a natural person who qualifies as an ECP. Accordingly, there should be no effect on the Commission's ability to protect market participants and the public.

B. Efficiency and Competition

The order is not expected to have an effect on efficiency or competition.

C. Financial Integrity of Futures Markets and Price Discovery

The order should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity of the futures and options markets.

D. Sound Risk Management Practices

The order should have no effect, from the standpoint of imposing costs, on the risk management practices of the OTC derivatives, futures or options industry.

E. Other Public Interest Considerations

The order will have the positive effect of allowing SADB's to hedge the risks that they may be exposed to as a result of their business operations.

V. Order

Upon due consideration, and pursuant to its authority under section 1a(12)(C) of the Act to determine that persons other than those enumerated in the Act are ECPs in light of the financial or other qualifications of these persons, the Commission hereby determines that an SADB, whose OTC derivatives obligations are guaranteed by a natural person who is an ECP, is an eligible contract participant and may enter into OTC derivatives contracts, agreements or transactions under the following conditions:

1. The contracts, agreements or transactions must be entered into pursuant to section 2(c), 2(d)(1) or 2(g) of the Act.

2. Washington Mutual must verify that each natural-person ECP guarantor to an SADB meets the financial requirements to be an ECP as a natural person, pursuant to section 1a(12)(A)(xi)(I).

3. The SADB must have obtained a financial guarantee for the contracts, agreements or transactions from a natural person that meets the qualifications to be an ECP as such term is currently defined in section 1(a)(12)(A)(xi)(I) of the Act and as may be amended from time to time.

4. An SADB may engage in OTC derivatives contracts, agreements or

transactions only to the extent that such OTC derivatives contracts, agreements or transactions are necessary to hedge the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by an SADB in the conduct of its business.

5. SADB's may only engage in OTC derivatives trades with Washington Mutual if they have an existing lending relationship with Washington Mutual and they act in a principal capacity with Washington Mutual.

6. A guarantor must compute its net worth and total assets in accordance with generally accepted accounting principles consistently applied.

7. Natural persons acting as guarantors must unconditionally guarantee the full amount of an SADB's OTC derivatives contracts, agreements or transactions.

8. Washington Mutual will keep records relating to its OTC derivative contracts, agreements and transactions with SADB's and their guarantors under this Order, including documentation demonstrating compliance with conditions 2, 3, 4, 5 and 7 of this order, the levels of OTC trading and the number of SADB's and guarantors who participated in these activities. Such records shall be made available upon the request of any representative of the Commission, the Department of Justice, Washington Mutual's banking regulators or any other governmental entity with jurisdiction over Washington Mutual or the OTC derivatives transactions in question.

This Order is based upon the representations made and supporting material provided to the Commission by Washington Mutual. Any material changes or omissions in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the provisions set forth herein are appropriate. Further, if experience demonstrates that the continued effectiveness of this Order would be contrary to the public interest, the Commission may condition, modify, suspend, terminate or otherwise restrict the provisions of this Order, as appropriate, on its own motion. This Order pertains only to OTC derivative transactions that are not contrary to banking laws and regulations that may otherwise govern Washington Mutual's conduct.