Commerce Bancshares, Inc.

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FFEIC
Program Coordinator
3501 Fairfax Drive
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Via email: FFIEC-Comments@fdic.gov

Re: Proposed Advisory on Unsafe and Unsound Use of Limitation of Liability Provisions and Certain Alternative Dispute Resolution Provisions in External Engagement Letters

Dear Ladies and Gentlemen:

Thank you for the opportunity to comment on the proposed advisory. The comments below reflect the concerns of Commerce Bancshares, Inc., its Board of Directors, Audit Committee and those Officers who are responsible for the safety and soundness of the company. Commerce Bancshares, Inc. is a publicly traded bank holding company with banking activities centered in Missouri, Kansas, Illinois and Nebraska.

For Commerce Bancshares, the concept of mandatory alternative dispute resolution ("ADR") as part of its auditor engagement is new. As of this date, no engagement letter has been executed that contains such provisions, but the issue is present and negotiations are ongoing. Liability limiting provisions, separate and apart from ADR, are also a current issue.

Before addressing the specific questions raised in the invitation for comment, we would like to provide some general comments.

ADR by its very nature limits the rights and remedies of participants.

Mandatory ADR eliminates the right of appeal. This denial of access to appellate review places an inordinate amount of power in the hands of the arbitrator. The issues that may be litigated can have broad consequences to investors, the marketplace and to regulatory oversight.

The federal banking agencies might intervene in litigation of importance to the financial services industry or the regulated financial institution. Any intervention rights would not exist if all disputes are relegated to arbitration.

Unlike the judicial system, typical ADR provisions limit the discovery rights of the participants. Some ADR procedures provide for discovery only at the discretion of the arbitrator. While the external auditor, by nature of the engagement and audit practices, has broad exposure to the books and records of the financial institution, the financial institution has no rights to the books and records of the auditor. In fact, ADR provisions make the work papers of the auditor off limits, with no enforcement mechanism.

The restriction on discovery is even more pronounced if the PCAOB is involved. The PCAOB in its review of a public accounting firm will examine the accounting practices of particular clients. Yet, those clients may not obtain the communications that are specific to the company. The client is dependent on the information that the public accounting firm provides voluntarily and then subject to the interpretations of the accounting firms. Limitation of liability and/or dispute resolutions procedures prevent any access to communications regarding the examination and prohibit the ability to compel.

Typical ADR provisions do not provide for third party practice. For instance, a lawsuit might be brought against the company and its accounting firm. Neither party would be able to file a cross claim against the other. Likewise, the public company would not be able to bring a third party action against the accounting firm. Provisions such as these would require a separate arbitration procedure thereby negating the basic premise of ADR that it is faster and less complex.

The elimination of appellate rights may have a consequence beyond the single engagement.

The FFIEC must consider the impact of the elimination of appeals. Judicial review at the appellate level leads to the establishment of precedence that may be relied on in the conduct of business. **Where will precedence come from if judicial review is eliminated? Will there be inconsistency that will lead to different practices throughout the industry? What will that mean to the examining agencies?**

Comments.

Items 1.a. and 1. b.- If limitation of liability provisions are deemed "unsafe and unsound", that finding should apply regardless of whether the audit is required. A dispute takes on more importance in those situations where an audit is required. Where not required, it may be a case of "no harm no foul", because of little financial or regulatory impact, but in those situations where an institution has relied on the engagement to its detriment, there may be loss that has no adequate remedy. But clearly, public filing institutions are at the greatest risk.

Item 2.- The issuance of this advisory is critical to negotiations. The insistence of the accounting firm on certain provisions in light of the declaration of an "unsafe and unsound" practice would be requiring the financial institution to engage in that practice. I don't believe they will do that. For a financial institution to accept those provisions could be described as a "material weakness" or at best a "significant deficiency". How can a public accounting firm force that on a company with that knowledge?

Items 3. a., 3.b. and 3.c.- The answers to 3.a. and 3.c. questions would be purely speculative. However, this commentator believes there may be an increase of fees, like there has been since Sarbanes-Oxley, but does not believe that the increase will be significant. The limitation of liability and ADR provisions are new features in engagement letters. The fact is accounting firms have lived and performed without them for years. Fees will continue to be negotiable. This commentator has no opinion on the impact on voluntary audits.

Item 4. a. and 4.b.- It is the opinion of this commentator that stronger emphasis should be placed on ADR in general and not just impliedly in the third category of limitation of remedies. There is no discussion anywhere and no item that asks for specific comment on limitation of remedies. The area that is not addressed is the elimination of equitable relief. See Item 5 response.

Item 5. Appendix A is accurate and valuable as far as it goes. Although this commentator does not know if the following provisions are widespread, but suspects that they are common.

The engagement letter will typically have language that provides something like **"....all disputes between the parties will be resolved pursuant to the dispute resolution procedures described in the attached Appendix......"** The dispute resolution procedures will then provides something like **"In no event shall the Arbitrator have any authority to issue any type of equitable relief."** These provisions effectively remove any right to seek equitable relief or remedy. The very nature of the disputes that might arise between an accounting firm and a public company are often time sensitive. The financial institution would have no right to injunctive relief. It could not force specific performance of its contract. It would only be entitled to pursue damages after the fact. That relief is inadequate if a filing company misses a filing date because the accounting firm failed to sign off. The consequences of missing a filing date are significant. There would be no right to seek a declaratory judgment on issues that are of critical importance. There would be no way for the financial institution to at least ask a court to force the sharing of information regarding a PCAOB examination for instance. There is no remedy at law that can provide sufficient relief in so many instances.

As noted in the introductory remarks, the effect of ADR on multiple party litigation is not inconsequential. It is not the inclusion of any specific language that is critical, but the absence of specific exclusions or exceptions.

Perhaps Appendix A should be broadened, or an additional Appendix developed that will provide examples of problems that must be addressed by the negotiation of additional language.

Item 6.- This commentator can see no valid business purpose to mandatory dispute resolution or broad based limitation of liability provisions. However, mandatory mediation or mutually agreed upon ADR on a specific issue that might arise should not be prohibited. It is not improbable that a company might determine that the scope and nature of a dispute does not warrant the cost of litigation or present any unusual or significant risk. It is also possible that an accounting firm might be retained for a specific and isolated purpose where a limitation of liability provision is not inappropriate. Those situations would involve specific, one-time engagement letters which would be separately negotiated.

Item 7. - In 2004 with the advent of SOX 404, accounting firms went back to public companies requesting additional fees and the inclusion of new ADR and limitation of liability provisions. Those firms and public companies already had engagement letters in place for 2004. Given that history, it does not seem inappropriate-indeed there is a precedent-that 2005 engagement letters should be amended to reflect the issuance of this guidance and the effect of the "unsafe and unsound" declaration.

Lastly and most importantly, this commentator agrees with the excellent analysis that the FFEIC makes on the issue of auditor independence. One of the arguments heard is that litigation or the seeking of equitable relief by a client would destroy the firm's independence relative to that engagement. The business world is not like the academic where tenured professors do not have to worry about what they teach or write. It is important for all in the business world to be accountable and not be able to fall back on this concept of independence to escape accountability.

Very truly yours,

J. Daniel Stinnett
Vice President, Secretary and
General Counsel