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E-MAIL**

June 9, 2005

Federal Financial Institutions Examination Council  
Program Coordinator  
3501 Fairfax Drive, Room 3086  
Arlington, VA 22226

Fax: 703.516.5487

**Re: Federal Financial Institutions Examination Council Interagency Advisory on the  
Unsafe and Unsound Use of Limitation of Liability Provisions and Certain Alternative  
Dispute Resolution Provisions in External Audit Engagement Letter**

Dear Sir or Madam:

This letter is written on behalf of the American Arbitration Association ("AAA") to provide comments to the Federal Financial Institutions Examination Council's Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions and Certain Alternative Dispute Resolution Provisions in External Audit Engagement Letters ("Advisory").

By way of background, the AAA was founded in 1926 and is widely considered to be the preeminent provider of alternative dispute resolution services. The AAA is in the unique position of being able to draw on our experience administering over 2,000,000 arbitrations covering a wide range of subject matters since our founding. The AAA has 35 offices in the United States and in Dublin, and 60 cooperative agreements with arbitral institutions in 43 countries. The AAA provides a forum for the hearing of disputes, case administration, tested rules and procedures, and a roster of impartial experts to hear and resolve cases. Significantly, the use of AAA administered arbitration is referenced in 8 federal statutes, 31 sections of the United States Code of Federal Regulations and over 300 state statutes.

The AAA's comments are directed solely to those provisions of the Advisory which address the use of arbitration to resolve disputes between financial institutions and external auditors. In particular, the AAA is concerned with the provisions that the Advisory which address the use of pre-dispute agreements to binding alternative dispute resolution, and in particular, arbitration. With respect to the FFIEC, the portion of the Advisory directed to agreements to arbitrate is drafted in a manner that appears to evince a suspicion of the arbitration process and some of the characteristics

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of arbitration, including limitations on discovery and appellate review of arbitration awards.

However, the United States Supreme Court has for decades repeatedly ruled in arbitration related cases in a manner that is supportive of arbitration as a method of resolving disputes. In the course of doing so, and in an unbroken line of cases, the Supreme Court has unequivocally enforced agreements to arbitrate disputes that govern a wide range of subject matters, including a numerous cases involving statutory claims. In the view of the Supreme Court:

"[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution on an arbitral, rather than a judicial, forum."

*Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-27 (1985). The Supreme Court cited to and reaffirmed these concepts and language subsequently in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), and in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), both of which resulted in opinions that endorsed the use of arbitration in the employment context and which squarely declined to provide any validity to the attacks on the sufficiency of arbitration to provide an effective forum for the resolution of disputes.

Furthermore, the Supreme Court has cautioned against the attribution of any suspicion of the arbitration process. As that Court stated, "[w]e have likewise rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000), citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989). A review of these opinions therefore reflects that the Advisory is not consistent with the holdings and spirit of the United States Supreme Court's arbitration related cases.

The AAA also raises a concern regarding those provisions of the Advisory which may incorrectly equate an agreement to arbitrate with a limitation of liability. The discussion of agreements to resolve disputes by alternative dispute resolution and jury trial waivers is intertwined with a discussion on limitations of liability, despite the fact that they deal with wholly separate issues. As stated previously, an agreement to arbitrate merely changes the forum for the resolution of a dispute. The remedies available to the parties to the larger contract are not diminished or enhanced by the mere fact that they have agreed to arbitrate their disputes, unless the parties have separately agreed to those changes in remedies. Conversely, an agreement to limit liability has nothing to do with the forum for the resolution of a dispute, but bears directly on the diminution of remedies that may be available to the parties.

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For these reasons, the AAA suggests that the FFIEC omit the portion of the Advisory which address the use of arbitration or other forms of alternative dispute resolution. We further note that while it is clear that the use of agreements that contain limits on the liability by external auditors when providing those services to financial institutions is of tremendous concern to the FFIEC, the AAA takes no position on such terms. Instead, it is apparent that financial institutions, auditors and the FFIEC are in the best and most informed position to comment and deliberate over those portions of the Advisory.

Please let me know if the AAA can be of any further assistance in connection with the important issues addressed in the Advisory, either by providing additional information, by meeting personally with the Federal Financial Institutions Council, or providing testimony in any hearings that may take place.

Sincerely yours,

A handwritten signature in black ink that reads "W. K. Slate" with a stylized flourish at the end that extends upwards and to the right.

William K. Slate, II

FFIEC