

66 FR 18632-02

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NOTICES

**FEDERAL DEPOSIT INSURANCE CORPORATION**

Statement of Policy Regarding Binding Arbitration

Tuesday, April 10, 2001

\***18632** AGENCY: **Federal Deposit** Insurance Corporation (FDIC).

ACTION: Final statement of policy.

SUMMARY: This FDIC Statement of Policy addresses the Corporation's use of binding arbitration and complies with the requirements of the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320. This policy statement reaffirms and supplements the FDIC's existing policy (62 FR 66370) to use all forms of Alternative Dispute Resolution for resolving appropriate disputes in a timely and cost efficient manner.

EFFECTIVE DATE: March 26, 2001.

FOR FURTHER INFORMATION CONTACT: Mark G. Flanigan, Counsel (202) 898-6865, Legal Division, **Federal Deposit** Insurance Corporation, 550 17th Street, NW., Rm. 5082, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The Board of Directors of the FDIC has adopted a Statement of Policy regarding binding arbitration. The text of the Policy Statement follows:

Statement of Policy on the Use of Binding Arbitration

The **Federal Deposit** Insurance Corporation (FDIC) has long been and continues to be a strong advocate for the use of various forms of Alternative Dispute Resolution (ADR) for resolving appropriate disputes in a more timely, less costly manner than litigation. The FDIC's ADR program is an organization-wide effort implementing the spectrum of ADR processes including negotiation, facilitation, mediation, evaluation and advisory ADR in internal and external conflict management and dispute resolution. This policy statement reiterates the FDIC's commitment and full support for using ADR in appropriate instances and sets forth a framework for the continuing and expanding use of ADR by providing for the use of binding arbitration as a means of dispute resolution.

Arbitration is a private, informal process by which parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding decision or award with limited rights of appeal. The final and binding nature of the decision distinguishes arbitration from mediation and other non-binding forms of ADR. Potential benefits of arbitration are its greater flexibility, potential for limited discovery and streamlined hearing processes, use of panels of trained and subject-area expert arbitrators, and restricted judicial review rights.

Although the FDIC encourages non-binding, consensual forms of ADR, the Corporation views the use of binding arbitration in appropriate circumstances as an additional ADR technique to accomplish its business in an efficient economical and productive manner. The Corporation will consider using non-binding ADR to resolve disputes prior to engaging in binding arbitration.

66 FR 18632-02

(Cite as: 66 FR 18632, \*18632)

### Scope

This Policy Statement applies to disputes arising with the FDIC in all its capacities and complies with the \*18633 arbitration provisions of the Administrative Dispute Resolution Act of 1996. This Policy also applies to federal court-based arbitration programs under the Alternative Dispute Resolution Act of 1998. Offices and Divisions considering the use of binding arbitration should refer to this Policy and the separate Directive on use of Binding Arbitration. The use of binding arbitration in state court-based arbitration programs, employment/labor arbitration, contracts or leases entered into by a depository institution prior to the appointment of the FDIC as conservator or receiver, or in connection with any other of the FDIC's regulatory, compliance and enforcement activities, is not the subject of this Policy Statement.

### Background

The Administrative Dispute Resolution Act of 1990 ("ADRA"), 5 U.S.C. 571-583, was amended in 1996. The 1996 amendments made significant changes in the provisions found in the ADRA of 1990, and specifically authorized federal agencies to voluntarily use binding arbitration without the former qualifying provisions that allowed the head of an agency to vacate an arbitration award. The 1996 ADRA amendments authorize an agency to use binding arbitration, in its discretion, and in appropriate cases. However, the ADRA amendments establish certain requirements an agency must meet before arbitrating disputes.

### ADRA Requirements

Before engaging in binding arbitration, an agency must:

- Issue guidance, in consultation with the Attorney General, on the appropriate use of binding arbitration (5 U.S.C. 575(c));
- Require that all agreements to arbitrate disputes be in writing and specify the subject matter to be submitted to the arbitrator for decision (5 U.S.C. 575 (a) (2)) ;
- Include in the arbitration agreement the maximum award amount that may be granted by the arbitrator (5 U.S.C. 575(a) (2));
- Require any officer or employee of the agency offering to use arbitration in resolution of a dispute to have either the authority to enter into a settlement concerning the matter, or the specific authority to consent to arbitration on behalf of the agency (5 U.S.C. 575(b) (1) and (2)); and
- Not require anyone to consent to binding arbitration as a condition to contracting with the agency (5 U.S.C. 575(a) (3)).

Finally, the use of binding arbitration must be voluntary on the part of all parties (5 U.S.C. 575(a) (1)).

Aside from the foregoing, the 1996 ADRA amendments provide that an agency shall consider not using a dispute resolution proceeding such as binding arbitration if the dispute:

- Requires an authoritative determination as precedent for other cases;
- Involves a significant question of government policy;
- Significantly impacts persons who are not parties to the proceedings;
- Requires a public record of the proceedings;
- Must be monitored on an on-going basis by a court or an administrative body to ensure compliance;
- Must be adjudicated to establish a body of law.

### Purpose and Intended Uses

The FDIC may use binding arbitration to resolve disputes in a number of situations where it is

66 FR 18632-02

(Cite as: 66 FR 18632, \*18632

more practical, cost-effective, or efficient than litigation or other consensual methods of ADR such as negotiation or mediation. The FDIC may agree to use binding arbitration in Corporation contracts (before an actual dispute arises), subject to the required approval and authority. Complex commercial/business transactions, construction contracts, insurance agreements, asset sales, real estate sales, leasing, and securities and securitizations are examples of substantive areas where binding arbitration may be used to resolve disputes. The FDIC may also agree to enter into binding arbitration after a dispute has arisen, and where no previous contractual dispute resolution mechanism exists.

#### Directive

The Legal Division is simultaneously issuing a directive providing further guidance to employees on the Corporation's use of binding arbitration. This directive will provide the following information:

- Considerations in rendering a decision to use binding arbitration;
- Circumstances where the Corporation will not use binding arbitration;
- Considerations relating to the nature and extent of damages;
- Responsibility for costs associated with arbitration;
- Arbitrator selection criteria; and
- Arbitration case preparation, processing and review procedures.

It is the responsibility of all FDIC employees to practice and promote cost effective dispute resolution in FDIC programs and in corporate operations. All officers and employees of Divisions and Offices of the FDIC considering the use of binding arbitration are hereby directed to take the necessary steps to implement this policy to promote effective and appropriate use of binding arbitration.

By order of the Board of Directors.

Dated at Washington, DC, this 26th day of March, 2001.

**Federal Deposit** Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

66 FR 18632-02  
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66 FR 18632-02  
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66 FR 18632-02, 2001 WL 338787 (F.R.) END OF DOCUMENT