

M E M O R A N D U M

TO: Council, ABA Section of Dispute Resolution

FROM: Larson Frisby

SUBJECT: Federal Legislative Update

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The following is an update on the status of federal alternative dispute resolution (“ADR”) legislation and other related proposals and measures that may be of interest to the Council:

1. Implementation of Arbitration Limitations in the Dodd-Frank Act

Several of the most significant arbitration regulatory measures in recent years were contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), which was signed into law by President Obama in July 2010. Section 1028 of the Dodd-Frank Act required the Consumer Financial Protection Bureau (“CFPB”) to conduct a study regarding the use of pre-dispute arbitration agreements in consumer cases and authorized (but did not require) the agency to issue regulations prohibiting or limiting such pre-dispute arbitration agreements in the future if it finds that such measures are “in the public interest and for the protection of consumers.” Similarly, Section 921 of the Act granted the Securities and Exchange Commission (“SEC”) the authority to issue new rules prohibiting or limiting the use of pre-dispute agreements to arbitrate securities disputes if it finds that such actions are “in the public interest and for the protection of investors.” Although the CFPB attempted to place significant limits on consumer arbitration under Section 1028 before those efforts were reversed by Congress, the SEC so far has declined to exercise its authority to limit securities arbitration under Section 921.

a. CFPB Arbitration Study and Final Rule Under Section 1028

On July 19, 2017, the CFPB published a [final rule](#) that sought to regulate the use of pre-dispute consumer arbitration agreements in two principal ways. First, the rule would have barred consumer financial companies from using pre-dispute arbitration agreements to prevent customers from filing or participating in class action lawsuits. Second, the rule would have required companies that arbitrate individual disputes to provide the CFPB with information regarding the arbitration claims that were filed and the awards that were ultimately issued. This requirement was designed to help the CFPB to monitor consumer arbitrations to ensure that the process is fair and would have allowed the Bureau to publish information regarding the claims and awards on its website. The effective date of the rule was September 18, 2017, and the rule applied prospectively to contracts

entered into more than 180 days after the effective date. Therefore, the CFPB had designated March 19, 2018 as the “compliance date” for the new rule.

The CFPB’s final rule was generally consistent with some of the key findings outlined in its March 10, 2015 [Arbitration Study and Report to Congress](#) (“Arbitration Study”) that was required by Section 1028 of the Dodd-Frank Act. As with the preliminary study that was previously issued in December 2013, the final CFPB study was highly critical of both the mandatory arbitration clauses typically included in consumer contracts and the related language in such clauses that prevent consumers from joining class action lawsuits.

In an effort to prevent the new CFPB rule from taking effect, the House passed a resolution on July 25, 2017, H.J. Res. 111, which sought to repeal the rule pursuant to the [Congressional Review Act](#), a 1996 law that created an expedited procedure through which Congress and the President can nullify certain recent federal agency rules. The Senate then adopted the resolution on October 24 by a vote of 51-50, with Vice President Pence breaking the initial 50-50 tie. President Trump signed the measure into law on November 1 as P.L. 115-74.

Although the ABA did not take a position on the CFPB’s proposed arbitration rule, the ABA Section of Dispute Resolution submitted its own [comments](#) to the Bureau pursuant to the ABA’s Blanket Authority process on July 29, 2016 that strongly endorsed the mandatory reporting provisions in the proposed rule but took no position on the class action provisions in the rule.

b. Possible SEC Rulemaking Under Section 921

While the CFPB spent substantial time and resources attempting to implement Section 1028 of the Dodd-Frank Act, the SEC so far has declined to exercise its authority under Section 921 to prohibit or limit pre-dispute agreements to arbitrate securities disputes. Despite repeated demands from many Democratic Senators and Representatives and numerous consumer and legal organizations that the SEC issue rules banning mandatory arbitration of securities disputes, former SEC Chair Mary Jo White and the other commissioners refused to do so, opting instead to solicit comments on the costs and benefits of arbitration. Following the November 2016 election, Ms. White resigned as SEC Chair, and President Trump appointed Jay Clayton to replace her. President Trump also recently filled the two other vacancies on the Commission, resulting in a Republican majority.

Because of these major changes to the SEC leadership and the continuing support for mandatory securities arbitration in Congress, the Trump White House, and the business community, it is doubtful that the SEC will seek to exercise its authority to ban or limit such arbitration under Section 921 anytime soon.

c. Financial Choice Act

On June 8, 2017, the House approved H.R. 10, sweeping legislation that would repeal many key provisions of the Dodd-Frank Act, including Sections 1028 and 921 that grant the CFPB and SEC the authority to prohibit or limit pre-dispute agreements to arbitrate consumer or securities disputes.

In particular, Section 737 of the bill would repeal the CFPB's current authority to adopt rules limiting pre-dispute consumer arbitration agreements, while Section 857 repeals the SEC's authority to limit pre-dispute securities arbitration agreements. Although the Senate Banking, Housing, and Urban Affairs Committee held a hearing on the bill on July 13, 2017, no further action has been scheduled on the measure. However, the House passage of H.R. 10, combined with the recent congressional nullification of the CFPB arbitration rule and the change in leadership at the SEC, make it increasingly unlikely that either agency will adopt significant limits on consumer or securities arbitration in the foreseeable future.

2. **U.S. Department of Health and Human Services' Proposed Limits on Nursing Home Arbitration**

On June 8, 2017, the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services ("CMS") published a new [proposed rule](#) substantially revising its previous [final rule](#) from October 2016 that established new requirements for long-term care facilities, including certain limits on nursing home arbitration. (See Department of Health and Human Services Proposed Rule on Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities; CMS-3342-P0; RIN 0938-AT18; 82 Fed. Reg. 26649 (June 8, 2017)). The new proposal would eliminate the earlier rule's ban on pre-dispute nursing home arbitration agreements, consistent with the [preliminary injunction](#) that the U.S. District Court for the Northern District of Mississippi issued last November. The proposed rule would also mandate greater transparency in the nursing home arbitration process, including requirements that such agreements be in plain language, be clearly explained to the resident and his or her representative, and not contain any language discouraging the resident or anyone else from communicating with federal, state, or local officials, among other requirements.

In response to the original proposed rule issued by CMS in July 2015, the ABA submitted [written comments](#) identifying several areas in which the proposed rule should be strengthened or clarified, including new language: (1) supporting residents' right to vote; (2) encouraging advance care planning; and (3) expressly prohibiting pre-dispute agreements to arbitrate disputes between nursing homes and residents. On August 7, 2017, the ABA also submitted [additional written comments](#) to CMS in response to the new proposed rule reiterating its opposition to mandatory nursing home arbitration. The ABA's comments were prepared by the ABA Commission on Law and Aging and the ABA Governmental Affairs Office, with input from the ABA Dispute Resolution and Tort Trial & Insurance Practice Sections. According to the regulatory timetable posted on regulations.gov, final action is not expected on the proposed rule until June 2020.

3. **Women, Peace, and Security Act**

On October 6, 2017, President Trump signed a measure, P.L. 115-68 (S. 1141 and H.R. 2484), which expands the role of women in preventing and resolving violent conflict around the world. The legislation, sponsored by Rep. Kristi Noem (R-SD) and Sen. Jeanne Shaheen (D-NH), requires the President to devise and publicize a comprehensive Women, Peace, and Security Strategy to promote the meaningful participation of women in all aspects of overseas conflict prevention, management, and resolution, as well as post-conflict relief and recovery efforts. The strategy also would include benchmarks, goals, performance metrics, timetables and plans for the U.S. Agency

for Agency Development, the Departments of State and Defense, and other relevant agencies specified by the President to ensure the strategy is being carried out. In addition, the President and the Secretary of State will be required to submit periodic reports to Congress on the implementation of the new strategy, the new training programs established under the bill, and other related topics.

4. ADA Education and Reform Act

On September 7, 2017, the House Judiciary Committee approved bipartisan legislation that would discourage lawsuits under the Americans with Disabilities Act (“ADA”) while encouraging the greater use of mediation and other forms of ADR to resolve such disputes. H.R. 620, also known as the “ADA Education and Reform Act,” would promote compliance with the ADA through greater education, clarifying the requirements for ADA demand letters, and barring lawsuits against property owners unless the disabled individual provides written notice of the architectural barrier to access and the property owner fails to correct it within a specific period of time. The bill would also require the Judicial Conference of the United States, in consultation with property owners and disability rights advocates, to develop a model program under Federal Rule of Civil Procedure 16 to promote the use of mediation or other ADR mechanisms to resolve claims of architectural barriers to access to public accommodations. H.R. 620, introduced by Rep. Ted Poe (R-TX), currently has 93 Republican and 11 Democratic cosponsors. So far, no comparable legislation has been introduced in the Senate.

5. Mandatory Arbitration of Sexual Harassment Claims

In response to the growing problem of sexual harassment in the workplace, bipartisan legislation has been introduced in Congress that would amend the Federal Arbitration Act to ban pre-dispute agreements to arbitrate sexual discrimination disputes.

H.R. 4570, H.R. 4734, and S. 2203—all known as the “Ending Forced Arbitration of Sexual Harassment Act”—were introduced in the House by Rep. Cheri Bustos (D-IL) and in the Senate by Sen. Kirsten Gillibrand (D-NY) last December. The bills would prohibit pre-dispute arbitration agreements to resolve “a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under title VII of the Civil Rights Act of 1964 (42 U.S.C.2000e et seq.) if the employment were employment by an employer (as defined in section 701(b) of that Act (42 U.S.C. 2000e(b))), regardless of whether a violation of title VII is alleged.” The bills also provide that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement.

H.R. 4570 and H.R. 4734 were referred to the House Judiciary Committee, while S. 2203 was referred to the Senate Health, Education, Labor and Pensions Committee. Because each bill has several Republican cosponsors and involves a sensitive subject that has received a great deal of media attention in recent months, the prospects for passage of these arbitration bills are considered somewhat greater than those of many other more partisan arbitration bills now pending in Congress.

6. Mandatory Arbitration for Servicemembers

Congress also is considering legislation that would make it more difficult to enforce mandatory arbitration agreements against U.S. servicemembers with respect to their employment and reemployment rights.

S. 646 and H.R. 2631, introduced by Sen. Richard Blumenthal (D-CT) and Rep. David Cicilline (D-RI), respectively, would invalidate any pre-dispute agreement to arbitrate employer-employee disputes arising under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) unless the parties knowingly and voluntarily consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board. The bills also provide that consent shall not be considered voluntary when a person is required to agree to arbitrate as a condition of future or continued employment, advancement in employment, or receipt of any right or benefit of employment. S. 646 also contains other new non-arbitration related legal protections for servicemembers under USERRA and under the Servicemembers Civil Relief Act. H.R. 2631 was referred to the House Veterans’ Affairs Committee, and its Subcommittee on Economic Opportunity held a hearing on the bill on June 29, 2017. S. 646 was referred to the Senate Veterans’ Affairs Committee, but no further action has been scheduled on that measure.

Although the ABA has not formally endorsed either of these bills, the ABA House of Delegates adopted a policy in August 2011 ([Resolution 120](#)) supporting various amendments to USERRA, including making unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act. Therefore, the ABA generally supports the substance of H.R. 2631 and that portion of S. 646 prohibiting pre-dispute agreements to arbitrate USERRA claims.

7. Arbitration Fairness Act

Congress continues to consider broad legislation known as the “Arbitration Fairness Act” that would invalidate all mandatory pre-dispute agreements to arbitrate employment, consumer, antitrust and civil rights disputes. H.R. 1374 and S. 537, introduced last March by Rep. Hank Johnson (D-GA) and Sen. Al Franken (D-MN), respectively, would ban all such pre-dispute arbitration agreements, but any agreement to arbitrate entered into after a dispute has arisen would continue to be enforceable. The bills also provide that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement.

Unlike some previous versions of the bill introduced in recent years, H.R. 1374 and S. 537 would create a new Chapter 4 to Title 9 and would make only technical and conforming changes to Chapter 1 of that Title (i.e., the Federal Arbitration Act). In addition, unlike some earlier versions of the bills, H.R. 1374 and S. 537 would invalidate pre-dispute agreements to arbitrate antitrust disputes but not pre-dispute agreements to arbitrate franchise disputes. Although H.R. 1374 and S.

537 were referred to the House and Senate Judiciary Committees, respectively, no further action has been scheduled and neither bill is expected to pass due to strong Republican opposition in both the House and the Senate. Prospects for the Senate bill were further reduced when its lead sponsor, Sen Franken, resigned last month over multiple charges of sexual misconduct.

In 2010 and 2011, the ABA sent letters to the sponsors of the legislation expressing concerns regarding certain specific language in earlier versions of the bills that could inadvertently void existing international commercial arbitration agreements and potentially discourage international commercial parties from engaging in commerce with U.S. parties. The ABA also provided the sponsors with proposed technical amendments designed to protect international commercial arbitration and to clarify several ambiguous definitions in the legislation. ABA representatives subsequently met with the sponsors' senior counsels to further explain and discuss the ABA's proposed technical amendments, and some, but not all, of the ABA's recommendations were later incorporated into the legislation.

8. Arbitration of Securities Disputes

In January 2017, Rep. Keith Ellison (D-MN) introduced legislation, known as the "Investor Choice Act," which would discourage the use of arbitration to resolve securities or investment disputes. To accomplish this, H.R. 585 would amend the Securities Exchange Act of 1934 and the Investment Advisors Act of 1940 to prohibit mandatory pre-dispute arbitration agreements between securities brokers, dealers, or investment advisors and their customers or clients. The bill also prohibits such brokers, dealers, or advisors from entering into agreements that restrict the ability of their customers or clients to select a forum for resolution of the dispute or to participate in class actions suits. If enacted, the bill would apply to any agreement created, modified, or extended after that date. Although H.R. 585 was referred to the House Financial Services Committee, no further action has been scheduled and no Senate companion bill has been introduced so far. While the bill has attracted 14 Democratic cosponsors so far, the legislation has received no Republican support and the bill is unlikely to advance in the 115th Congress. Rep. Ellison introduced similar legislation in the 114th Congress, H.R. 1098, but that measure failed to advance.

9. Arbitration of Franchise Disputes

Rep. Ellison also introduced separate legislation, known as the "Fair Franchise Act," which would establish minimum standards of fair conduct in franchise sales and business relationships, including a prohibition on mandatory arbitration agreements. H.R. 470 would also prohibit any stipulation or provision of a franchise agreement, or of an agreement ancillary or collateral to a franchise, that deprives a franchisee of the right to bring a legal action against the franchisor in court. The bill also bans provisions in such agreements that would prevent a franchisee from bringing or participating in a consolidated action or consolidated arbitration, a mass action or mass arbitration, a class action lawsuit, a class arbitration, or any other similar consolidated, mass, or class proceeding. H.R. 470 was referred to the House Judiciary Committee, but no further action has been scheduled on the bill.

10. Arbitration of Consumer Financial Disputes

Last March, Rep. Brad Sherman (D-CA) and Sen. Sherrod Brown (D-OH) introduced legislation known as the “Justice for Victims of Fraud Act” that was inspired by recent alleged improper sales practices by Wells Fargo bank. Both H.R. 1414 and S. 552 would amend the Truth in Lending Act and the Electronic Fund Transfer Act to prohibit pre-dispute agreements to arbitrate disputes relating to credit cards, bank accounts, or other credit accounts that were not issued in response to a request or application for the accounts. The bills also provide that the applicability of their arbitration prohibitions to particular pre-dispute arbitration agreements shall be determined by a state or federal court of competent jurisdiction, not the arbitrator. Although H.R. 1414 and S. 552 were referred to the House Financial Services Committee and the Senate Banking, Housing, and Urban Affairs Committee, respectively, no further action has been scheduled on either measure.

11. Arbitration Transparency Legislation

Congress currently is considering several bills designed to increase the transparency of certain types of mandatory arbitration agreements. Last February, Rep. Michael Capuano (D-MA) introduced H.R. 832, also known as the “Arbitration Transparency Act.” The bill would amend Section 2 of the Federal Arbitration Act to require that any arbitration proceeding between a consumer and a financial institution to resolve a dispute involving a consumer financial product or service shall be open to the public.

Last March, Sen. Richard Blumenthal introduced broader arbitration transparency legislation, S. 647, which would amend Title 9 to ban all pre-dispute agreements to arbitrate employment, consumer, or civil rights disputes if the agreements contain confidentiality provisions preventing a party from contacting a state or federal agency regarding unlawful conduct or other issues of public policy or public concern. The bill, also known as the “Mandatory Arbitration Transparency Act,” would also deem such arbitration agreements to be an “unfair or deceptive act or practice” under the Federal Trade Commission (“FTC”) Act, and it would instruct the FTC to issue new rules and punish violators. The bill would also create a private right of action for aggrieved consumers.

Although H.R. 832 and S. 647 were referred to the House and Senate Judiciary Committees, respectively, no further action is expected on either measure during the 115th Congress

12. Safety Over Arbitration Act

In March 2017, Sen. Sheldon Whitehouse (D-RI) introduced legislation that would ban pre-dispute arbitration agreements that have the potential to harm the health and safety of the public. S. 542, also known as the “Safety Over Arbitration Act,” would invalidate any arbitration agreement to resolve a future claim or controversy alleging facts relevant to a public health or safety hazard. However, any such agreements to arbitrate that are entered into after a dispute has arisen would continue to be enforceable. The bill also provides that if the parties proceed with the arbitration, the arbitrator must provide the parties with a written explanation of the factual and legal basis for any award or other outcome, and the explanation “shall not be made under seal by the arbitrator or a

court.” Although S. 542 was referred to the Senate Judiciary Committee, no further action is expected on the legislation this year.

13. Restoring Statutory Rights and Interests of the States Act

Last March, Rep. David Cicilline (D-RI) and Sen. Patrick Leahy (D-VT) reintroduced legislation that would amend the Federal Arbitration Act to prohibit pre-dispute agreements to arbitrate claims brought by individuals or small businesses for alleged violations of a federal or state statute, the U.S. Constitution, or a state constitution. H.R. 1396 and S. 550, also known as the “Restoring Statutory Rights and Interests of the States Act,” would also invalidate agreements to arbitrate that are prohibited by a federal or state statute, or the finding of a federal or state court, on grounds that the agreements are unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of public policy. In addition, the legislation would authorize the courts, rather than arbitrators, to determine whether the FAA applies to an agreement to arbitrate, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the contract containing the agreement. Although H.R. 1396 and S. 550 were referred to the House and Senate Judiciary Committees, respectively, no further action has been scheduled on either measure.

14. Mediation and Arbitration of Labor and Employment Disputes

Congress also is considering legislation that would require the use of ADR to resolve certain types of labor and employment disputes. H.R. 156, introduced by Rep. Gene Green (D-TX), would amend Section 8 of the National Labor Relations Act to provide that if an employer and a newly-certified employee representative are unable to reach a collective bargaining agreement regarding the terms and conditions of employment within 60 days, the employer and representative would be required to mediate the dispute. The mediator would be selected jointly by the employer and the employees’ representative, but if they are unable to agree upon a mediator, either party could request that the Federal Mediation and Conciliation Service (“FMCS”) select the mediator. The bill further provides that if the parties are unable to reach a settlement within 30 days after the selection of a mediator, either party may transfer the dispute to the FMCS for binding arbitration.

Similar provisions requiring mediation and arbitration of initial collective bargaining agreements are also contained in Section 401 of H.R. 2275, which was introduced by Rep. Jared Polis (D-CO) on May 1, 2017. Unlike H.R. 156, however, Section 401 of H.R. 2275 provides that any binding arbitration decision by the FMCS shall be binding upon the parties for a period of two years unless it is amended during that period by written consent of the parties.

H.R. 156 was referred to the House Education and the Workforce Committee, while H.R. 2275 was referred to the House Education and the Workforce, Financial Services, and Oversight and Government Reform Committees. However, no further action has been scheduled on either bill.

15. Arbitration of College Enrollment Disputes

Congress is also considering legislation known as the “Court Legal Access and Student Support (CLASS) Act” that would invalidate all mandatory pre-dispute agreements to arbitrate controversies involving enrollment agreements between a student and a college. H.R. 2301 and S. 553, introduced by Rep. Maxine Waters (D-CA) and Sen. Richard Durbin (D-IL), respectively, states that Chapter 1 of Title 9 of the U.S. Code relating to enforcement of arbitration agreements shall not apply to enrollment agreements between students and institutions of higher education. The bills would also amend Section 487(a) of the Higher Education Act of 1965, 20 U.S.C. § 1094(a), to prohibit such institutions that participate in federal student aid programs from requiring a student to agree to any restriction on the student’s ability to pursue an individual or group claim against it in court. The legislation would take effect one year after the date of enactment.

H.R. 2301 was referred to the House Education & the Workforce and House Judiciary Committees, and S. 553 was referred to the Senate Health, Education, Labor, and Pensions Committee, but no further action has been scheduled on either measure.

16. Sunshine for Regulatory Decrees and Settlements Act

On October 25, 2017, the House passed legislation known as the “Sunshine for Regulatory Decrees and Settlements Act,” which would place new limitations on the ability of federal agencies and private parties to enter into consent decrees or settlement agreements requiring the agencies to take or expedite regulatory actions that affect the rights of other private parties or state or local governments. H.R. 469 and S. 119, sponsored by Rep. Doug Collins (R-GA) and Sen. Charles Grassley (R-IA), respectively, were designed to prevent the Environmental Protection Agency and other agencies from collaborating with friendly interest groups to secure consent decrees or settlements requiring the agency to take tougher regulatory actions or adopt stricter regulations than it could otherwise obtain through the usual regulatory process.

H.R. 469 and S. 119 would shed light on so-called “sue-and-settle” tactics by requiring the notice of intent to sue, the complaint, the consent decree or settlement agreement, the statutory basis for the decree or agreement and its terms, and any award of attorneys’ fees to be published electronically for the public. The bills would also prohibit parties from filing a motion for a consent decree or to dismiss the case pursuant to a settlement decree until other affected parties have had the opportunity to intervene in the action. If the court grants a motion to intervene and the parties enter into settlement negotiations, those negotiations must include any intervening party and be conducted pursuant to the court’s mediation or ADR resolution program or by a district judge other than the presiding judge. The bills would also require the defendant agency to publish proposed consent decrees or settlement agreements for at least 60 days of public comment, respond to the comments, and provide the court with a summary of both the comments and the agency’s response to those comments when seeking approval of the consent decree or settlement agreement.

Although H.R. 469 was approved by the House, S. 119 is still pending in the Senate Judiciary Committee, and no further action has been scheduled on that measure. Similar legislation was

approved by the House in January 2016, but ultimately died when the Senate declined to take action before the end of the 114th Congress.

17. Settlements Under the Endangered Species Act

Legislation is also pending in the Senate that would amend the Endangered Species Act to establish a procedure for approving settlements in certain types of federal lawsuits. S. 375, introduced by Sen. John Cornyn (R-TX), would require the Secretary of the Interior to publish any complaint filed against the Department that alleges a failure to perform an act or duty related to an endangered or threatened species. The bill would also provide all affected parties—including businesses and state and local governments—with a reasonable opportunity to intervene in the suit. If the court grants a motion to intervene, it would be required to refer the matter to mediation or a magistrate judge in order to facilitate settlement discussions. The legislation would also allow the court to award litigation costs—such as attorneys’ fees and expert witness fees—to any appropriate party as part of a final order, but such costs could not be awarded if the case is resolved by a consent decree or settlement agreement. The court would also be prohibited from approving a consent decree unless each state and county containing the relevant species is given notice and either approves of the settlement or fails to respond within 45 days. Although S. 375 was referred to the Senate Environment and Public Works Committee, no further action has been scheduled on the measure.

18. Ombudsman Legislation

A number of bills are also pending in Congress that are designed to establish or reform ombudsman positions in certain federal agencies. For example:

- H.R. 10, introduced by Rep. Jeb Hensarling (R-TX), would require the **Securities and Exchange Commission Ombudsman** to report to the Commission instead of the SEC’s Investor Advocate and would create a separate **Enforcement Ombudsman within the SEC**. H.R. 10 was approved by the House on June 8, 2017 and referred to the Senate Banking, Housing, and Urban Affairs Committee for further consideration.
- H.R. 1971, H.R. 2355, and S. 692, introduced by Rep. Lloyd Smucker (R-PA), Rep. Bob Latta (R-OH), and Sen. Deb Fischer (R-NE), respectively, would create an **Office of the Municipal Ombudsman within the Environmental Protection Agency** to provide both technical assistance to municipalities seeking to comply with the Federal Water Pollution Control Act and the Safe Drinking Water Act and information to the EPA Administrator to help the Administrator ensure that agency policies are implemented by all EPA offices, including regional offices. S. 692 was approved by the Senate on October 5, 2017 by unanimous consent and was referred to the House Transportation & Infrastructure and Energy & Commerce Committees for further consideration. H.R. 1971 and H.R. 2355 were also referred to those same House committees, though no further action has been scheduled.
- H.R. 4043 and S. 1869, introduced by Rep. Rod Blum (R-IA) and Sen. Charles Grassley (R-IA), would amend the Inspector General Act of 1978 to reauthorize the whistleblower

protection program and would change the title of the **Whistleblower Protection Ombudsman** to the Whistleblower Protection Coordinator. The bill would also make various reforms to that program. H.R. 4043 was approved by the House Oversight and Government Reform Committee on November 2, 2017 and sent to the full House for further consideration. S. 1869 was approved by the Senate Homeland Security and Governmental Affairs Committee on October 4, 2017 and placed on the Senate Legislative Calendar for further action.

- H.R. 635 and H.R. 1307, introduced by Rep. Jan Schakowsky (D-IL) and Rep. Peter DeFazio (D-OR), respectively, would amend the Patient Protection and Affordable Care Act to create a public health insurance option and establish an **Office of the Ombudsman for the Public Health Insurance Option within the Department of Health and Human Services**. Although both bills were referred to the House Energy & Commerce Committee, no action has been scheduled on either measure.
- H.R. 1986, introduced by Rep. Sheila Jackson Lee (D-TX), would establish a **Transportation Security Administration (“TSA”) Ombudsman in the Department of Homeland Security** to assist TSA employees who have complaints about the agency. H.R. 1986 was referred to the House Homeland Security Committee, but no further action has been scheduled.
- H.R. 2707, introduced by Rep. Michelle Lujan Grisham (D-NM), would create a **Veterans Health Administration (“VHA”) Ombudsman in the Department of Veterans Affairs (“VA”)**. The bill would also require each VA medical facility to have a local ombudsman, to be trained by the VHA Ombudsman, who would be responsible for resolving their patients’ complaints. Although H.R. 2707 was referred to the House Veterans’ Affairs Committee, no further action has been scheduled on the measure.
- H.R. 3015, introduced by Rep. Michelle Lujan Grisham (D-NM), would require the Director of the Consumer Financial Protection Bureau to appoint a **Mortgage Servicer Ombudsman within the CFPB** to help mortgage servicers and borrowers to comply with federal law regarding servicing of mortgage loans and offer resolution to borrowers who are facing noncompliance. H.R. 3015 was referred to the House Financial Services Committee, but no further action has been scheduled on the legislation.
- H.R. 3020, introduced by Rep. Beto O’Rourke (D-TX), would create an **Ombudsman for Border and Immigration Related Concerns in the Department of Homeland Security (“DHS”)** to receive, investigate, and resolve complaints from individuals, associations, and employers regarding the border security and immigration activities of DHS. H.R. 3020 was referred to the House Homeland Security, Judiciary, and Ways & Means Committees, but no further action has been schedule on the legislation.

- S. 663, introduced by Sen. John Thune (R-SD), would create a new **Choice Program Ombudsman within the VA’s Office of Inspector General**. Although S. 663 was referred to the Senate Veterans’ Affairs Committee, no further action has been scheduled.
- S. 757, introduced by Sen. Jeff Flake (R-AZ), would establish a **Private Landowner Ombudsman in U.S. Customs and Border Protection (“CBP”)** to assist persons owning real property along the U.S.-Mexico border to communicate their needs and interests to the CBP Commissioner. Although S. 757 was referred to the Senate Homeland Security and Governmental Affairs Committee, no further action has been scheduled on the measure.
- S. 794, introduced by Sen. Johnny Isakson (R-GA), and H.R. 3635, introduced by Rep. Lynn Jenkins (R-KS), would amend Title XVIII of the Social Security Act to direct the Secretary of Health and Human Services (“HHS”) to appoint a **Medicare Reviews and Appeals Ombudsman within the Centers for Medicare and Medicaid Services** to provide administrative and technical assistance to interested parties with regard to specified local coverage determinations. S. 794 was referred to the Senate Finance Committee, while H.R. 3635 was referred to the House Energy & Commerce and Ways & Means Committees. Although both bills have numerous Republican and Democratic co-sponsors and enjoy strong bipartisan support, no further action has been scheduled on either measure.
- S. 1146, introduced by Sen. Jeanne Shaheen (D-NH), would expand the ability of the **Small Business Administration’s (“SBA”) Office of the National Ombudsman** to assist small businesses to meet regulatory requirements and authorizes the SBA National Ombudsman to develop additional outreach initiatives to promote greater awareness of its services. S. 1146 was referred to the Senate Small Business and Entrepreneurship Committee, but no further action has been scheduled on the measure.

The ABA has previously adopted several resolutions favoring the greater use of “ombuds” both in the public and private sectors. In August 2001 and February 2004, the ABA House of Delegates approved resolutions encouraging the greater use of “ombuds” to resolve complaints and endorsing general standards for the establishment and operation of ombudsman offices. The ABA also previously adopted other resolutions in 1971, 1989 and 1995, recommending that the federal government experiment with the creation of several different types of ombudsman programs.

At the ABA’s 2017 Annual Meeting, the House of Delegates adopted [Resolution 103](#), sponsored by the Section of Dispute Resolution, which encourages the greater use and development of ombuds programs that comply with generally recognized standards of practice.

Copies of the legislation described above or any other federal legislation involving ADR issues can be obtained directly from the U.S. Congress web site at <https://www.congress.gov/>, or by contacting Larson Frisby in the American Bar Association’s Governmental Affairs Office at (202) 662-1098 or larson.frisby@americanbar.org.