MEMORANDUM

TO: Council, ABA Section of Dispute Resolution

FROM: Larson Frisby

SUBJECT: Federal Legislative Update

DATE: January 26, 2019

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. **Arbitration of Disaster Relief Decisions**

On October 5, 2018, President Trump signed a broad Federal Aviation Administration (FAA) reauthorization measure, P.L. 115-254 (H.R. 302), which contains many unrelated disaster aid reforms, including provisions encouraging the greater use of arbitration. Section 1219 of the new law amends Section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5189a) to allow those seeking disaster relief to request arbitration to dispute the eligibility for assistance or repayment of assistance provided for a dispute of more than $500,000 [or $100,000 for applicants in rural areas] for any disaster occurring after January 1, 2016. The arbitration must be conducted de novo by the Civilian Board of Contract Appeals, and the decision of the Board is binding. The provision permits an applicant to submit a request for arbitration at any time before the Administrator of the Federal Emergency Management Agency (FEMA) has issued a final agency determination.

2. **Mandatory Arbitration or Mediation of Sexual Harassment Claims**

On December 21, 2018, President Trump signed legislation known as the Congressional Accountability Act of 1995 Reform Act, P.L. 115-397 (S. 3749), which is designed to increase protections for congressional staff and other victims of sexual harassment by Members of Congress. The new law amends the Congressional Accountability Act of 1995 (CAA) to revise administrative and judicial dispute resolution procedures for resolving sexual harassment and other claims by congressional staffers against their bosses. In particular, the legislation eliminates existing CAA counseling requirements and makes mediation optional before an employee may file a claim with the Office of Compliance alleging the violation. The new law also requires current and former Members of Congress to reimburse the Treasury Department for awards or settlement payments made to aggrieved employees and requires that the final disposition of claims alleging CAA violations by Members of Congress or their senior staff be referred to congressional ethics committees. In addition, the new law requires non-congressional legislative offices that violate
CAA requirements to reimburse the Treasury Department for any award or settlement payments, and it extends CAA nondiscrimination requirements and remedies to unpaid legislative interns, detailees, and fellows.

In addition to enacting these reforms to the Congressional Accountability Act, the 115th Congress also considered, but failed to enact, much broader legislation that would have amended the Federal Arbitration Act to relax existing requirements for employees to arbitrate or mediate 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) in December 2017. The bills would have prohibited 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 provided 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. Although H.R. 4570 and H.R. 4734 were referred to the House Judiciary Committee and S. 2203 was referred to the Senate Health, Education, Labor and Pensions Committee, none of the bills received a vote and they all died at the end of the 115th Congress.

Similar language prohibiting mandatory arbitration of sexual harassment claims was also contained in H.R. 4877, the Department of Defense Appropriations Act for FY2018. Section 8089 of the bill would have prohibited federal agencies from entering into defense procurement contracts valued over $1,000,000 unless the contractor and their covered subcontractors agree not to require any of their employees or independent contractors to agree to arbitrate, as a condition of employment, “any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.” However, the Secretary of Defense could waive these restrictions if necessary for national security reasons. H.R. 4877 was introduced by Rep. Kay Granger (R-TX) in January 2018 and referred to the House Appropriations and Budget Committees, but no further action occurred on the measure before the end of the 115th Congress.

3. **Mandatory Arbitration of Data Breaches**

On January 8, 2019, Rep. Ted Lieu (D-CA) introduced new legislation in the 116th Congress aimed at ending mandatory arbitration of disputes involving data breaches. H.R. 327 would prohibit entities from requiring, as part of their customer agreements or other similar agreements, that an individual agree to arbitrate disputes related to a computer security breach. The bill would allow victims to bring a private right of action in court for violations and also provides for enforcement by the Federal Trade Commission and states. H.R. 327 was referred to the House Energy and
Commerce Committee, but no further action has been scheduled. During the previous 115\textsuperscript{th} Congress, Rep. Lieu introduced a similar bill, H.R. 5165, but that measure failed to advance.

4. **Arbitration Fairness Act**

The 115\textsuperscript{th} Congress considered, but failed to enact, broad legislation known as the Arbitration Fairness Act that would have invalidated all mandatory pre-dispute agreements to arbitrate consumer, antitrust, employment, or civil rights disputes. H.R. 1374 and S. 2591, introduced by Rep. Hank Johnson (D-GA) and Sen. Richard Blumenthal (D-CT), respectively, would have banned all such pre-dispute arbitration agreements, but any agreement to arbitrate entered into after a dispute has arisen would have continued to be enforceable. The bills also provided 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. 2591 would have created a new Chapter 4 to Title 9 and would have made 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. 2591 would have invalidated pre-dispute agreements to arbitrate antitrust disputes but not pre-dispute agreements to arbitrate franchise disputes. Although H.R. 1374 and S. 2591 were referred to the House and Senate Judiciary Committees, respectively, no further action took place on either measure in the Republican-controlled Congress. However, now that Democrats control the House, an updated bill is likely to be introduced in the 116\textsuperscript{th} Congress and may have a greater chance of advancing in the House.

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.

5. **Financial Choice Act**

The 115\textsuperscript{th} Congress considered, but declined to pass, sweeping legislation that would have greatly reduced the ability of the Consumer Financial Protection Bureau (CFPB) or the Securities and Exchange Commission (SEC) to limit or ban arbitration. H.R. 10, also known as the Financial Choice Act, would have repealed many key provisions of the Dodd-Frank Act, including Sections 1028 and 921 that granted the CFPB and the SEC the express authority to prohibit or limit pre-dispute agreements to arbitrate consumer or securities disputes. In particular, Section 737 of the bill would have repealed the CFPB’s authority to adopt rules limiting pre-dispute consumer arbitration agreements, while Section 857 would have repealed the SEC’s ability to limit pre-dispute securities
arbitration agreements. The House passed H.R. 10 in June 2017 and the Senate Banking, Housing, and Urban Affairs Committee held a hearing on the bill in July 2017. However, no further action was taken and the legislation died at the end of the 115th Congress. Although it failed to pass last year, the House passage of the bill, combined with the recent congressional nullification of the CFPB arbitration rule and the new Republican leadership at both the CFPB and the SEC, make it increasingly unlikely that either agency will adopt significant limits on consumer or securities arbitration in the foreseeable future.

Although the ABA did not take a position on H.R. 10 or on the legislation enacted in November 2017 (P.L. 115-74, H.J. Res. 111) that reversed the CFPB’s arbitration rule, the ABA Section of Dispute Resolution submitted its own comments to the Bureau in July 2016 that strongly endorsed the mandatory reporting provisions in the then proposed rule but took no position on the more controversial class action provisions in the rule.

6. U.S. Department of Health and Human Services’ Proposed Limits on Nursing Home Arbitration

In addition to congressional efforts to limit CFPB and SEC authority to ban or limit pre-dispute arbitration, the U.S. Department of Health and Human Services’ Centers for Medicare & Medicaid Services (CMS) also recently signaled its disapproval of new rules that would invalidate pre-dispute arbitration agreements involving nursing home conflicts.

In June 2017, CMS published a new proposed rule substantially revising its previous final rule from October 2016 that sought to impose new requirements on 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 CMS 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 in November 2016 and reaffirmed in June 2017. 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 others 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.
7. **Arbitration of Consumer Financial Disputes**

During the 115th Congress, 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 have amended 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 provided 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. H.R. 1414 and S. 552 were referred to the House Financial Services Committee and the Senate Banking, Housing, and Urban Affairs Committee, respectively, but no further action occurred on either measure during the 115th Congress.

8. **Arbitration of Securities Disputes**

The Investor Choice Act, introduced in the 115th Congress by Rep. Keith Ellison (D-MN) as H.R. 585, would have discouraged the use of arbitration to resolve securities or investment disputes. To accomplish this, the bill would have amended 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 would have prohibited the brokers, dealers, and 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 have applied to any agreement created, modified, or extended after that date. H.R. 585 was referred to the House Financial Services Committee, but no further action occurred on the bill and it died at the end of the 115th Congress.

Legislation was also introduced in the 115th Congress that took the opposite approach and would have required certain securities investors and issuers to use mandatory arbitration to resolve their disputes. In September 2018, House Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced H.R. 6746, the Protecting American Taxpayers and Homeowners Act. Section 322(k) of the bill would have required all disputes between owners and issuers of residential mortgage backed securities relating to representations and warranties to be resolved by mandatory arbitration procedures established by the mortgage security market exchange established by the legislation. H.R. 6746 was referred to the House Financial Services and Ways & Means Committees, but the bill failed to advance during the 115th Congress.

9. **Arbitration of Franchise Disputes**

Rep. Ellison also introduced legislation, known as the Fair Franchise Act, which would have established minimum standards of fair conduct in franchise sales and business relationships, including a prohibition on mandatory arbitration agreements. H.R. 470 also would have prohibited any stipulation or provision of a franchise agreement, or of an agreement ancillary or collateral to a franchise agreement, that deprives a franchisee of the right to bring a legal action against the franchisor in court. The bill also would have banned 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 saw no further action during the 115th Congress. Because Rep. Ellison retired from Congress in early January 2019 to become the new Minnesota Attorney General, both the Investor Choice Act and the Fair Franchise Act will need a new lead sponsor if they are to be reconsidered in the new 116th Congress.

10. **Arbitration and Mediation of Labor and Employment Disputes**

The 115th Congress also considered, but declined to enact, numerous bills that would have either prohibited mandatory arbitration of employment disputes or required the use of ADR to resolve certain types of labor and employment disputes.

The Restoring Justice for Workers Act, introduced by Rep. Jerrold Nadler (D-NY) and Sen. Patty Murray (D-WA) as H.R. 7109 and S. 3615, respectively, would have amended Title 9 of the U.S. Code to invalidate pre-dispute arbitration agreements that require arbitration of employment disputes. The bills also would have banned retaliation against employees for refusing to arbitrate employment disputes and would have provided additional protections to ensure that post-dispute arbitration agreements are truly voluntary and made with the informed consent of employees. In addition, the bills would have amended the National Labor Relations Act (NLRA) to ban agreements and practices that interfere with employees’ right to collectively litigate employment disputes. H.R. 7109 was referred to the House Judiciary and Education & the Workforce Committees and S. 3615 was referred to the Senate Health, Education, Labor and Pensions Committee, but neither bill advanced during the 115th Congress.

On the other hand, H.R. 7109 and H.R. 156, introduced by Rep. Gene Green (D-TX), would have amended Section 8 of the NLRA 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 provided 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 were also contained in Section 401 of H.R. 2275 (introduced by Rep. Jared Polis (D-CO)); Section 2 of H.R. 5728 and S. 2810 (introduced by Rep. Mark Pocan (D-WI) and Sen. Bernie Sanders (D-VT), respectively); and Section 101 of H.R. 6080 and S. 3064 (introduced by Rep. Robert Scott (D-VA) and Sen. Patty Murray, respectively). Unlike H.R. 156, however, the other bills provided 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.
In addition to these mediation and arbitration requirements, Section 101 of H.R. 6080 and S. 3064 would have also amended the NLRA to invalidate any contract or agreement “whereby an employee of the employer undertakes or promises not to pursue, bring, join, litigate, or support any kind of collective legal claim arising from or relating to the employment of such employee in any forum that, but for such contract or agreement, is of competent jurisdiction.” However, this prohibition shall not apply to employees who are represented by a labor organization and covered by a collective bargaining agreement with the employer. Section 208 of both bills also would have prohibited federal agencies from entering into procurement contracts valued over $500,000 “unless the contractor agrees that any decision to arbitrate the claim of an employee or independent contractor performing work under the contract that arises under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or any tort related to or arising out of sexual assault or sexual harassment may only be made with the voluntary consent of the employee or independent contractor after the dispute arises.”

Although these bills were referred to various House and Senate committees of jurisdiction, none of them generated significant bipartisan support and they all died at the end of the 115th Congress.

11. **Sunshine for Regulatory Decrees and Settlements Act**

During the 115th Congress, the House passed legislation known as the Sunshine for Regulatory Decrees and Settlements Act, which would have placed 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 (EPA) 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 have 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 also would have prohibited 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 also would have required 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 in October 2017, S. 119 failed to advance in the Senate and both measures died at the end of the 115th Congress. While similar legislation is not expected to pass in the new 116th Congress, former EPA Administrator Scott Pruitt issued a
Directive in 2017 that established new EPA lawsuit settlement guidelines that match many of the reforms contained in the two recent bills.

12. **Settlements Under the Endangered Species Act**

Legislation was also introduced in the 115th Congress that would have amended 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 have required 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 also would have provided 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 to facilitate settlement discussions. The legislation would have also allowed 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 took place and the bill died at the end of the 115th Congress.

13. **ADA Education and Reform Act**

The 115th Congress also considered, but declined to pass, bipartisan legislation that would have discouraged 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 have promoted 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 either correct it or provide a written plan for removing it within a specific time period. The bill also would have required 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. The House approved H.R. 620 in February 2018, but the Senate declined to vote on it and so the measure failed to pass before the end of the 115th Congress.

Separate ADA reform legislation known as the Disabled Access Credit Expansion Act was also introduced in the 115th Congress. S. 3459, sponsored by Sen. Tammy Duckworth (D-IL), would have expanded the existing tax credit for providing access to disabled individuals and would have required the Attorney General to carry out a new, expanded ADA Mediation Program while authorizing an additional $1 million for Fiscal Year 2019 to boost funding for the program. Rep. Donald McEachin (D-VA) introduced a related House bill, H.R. 5536, with the same name, but that measure did not include the ADA mediation provisions found in the Senate bill. Neither S. 3459 nor H.R. 5536 saw any action, however, and both measures died at the end of the 115th Congress.
14. **Arbitration of Small Business Tax Disputes**

The 115th Congress also considered, but failed to enact, legislation introduced by Sen. Cornyn that would have encouraged the greater use of mediation and arbitration to resolve disputes between the IRS and small businesses. S. 2689, known as the Small Business Taxpayer Bill of Rights Act, would have created many new procedural protections to help small businesses in their dealings with the IRS. Section 8 of the bill would have amended Section 7123 of the Internal Revenue Code to allow taxpayers to request mediation or arbitration in any case unless the Treasury Secretary has specifically excluded that type of case as not appropriate for ADR. The bill also would have allowed the individual or small business taxpayer to elect to have the mediation conducted by an independent, neutral individual not employed by the IRS Office of Appeals but would have required the taxpayer to share the cost of the independent mediator equally with the IRS unless the taxpayer could show that its adjusted gross income did not exceed 250% of the poverty level. Although S. 2689 was referred to the Senate Finance Committee, it died at the end of the 115th Congress.

15. **Mandatory Arbitration for Servicemembers**

Several bills were introduced during the 115th Congress that would have made it more difficult to enforce mandatory arbitration agreements against U.S. servicemembers with respect to their employment and reemployment rights, but none were enacted before Congress adjourned.

S. 646 and H.R. 2631, introduced by Sen. Richard Blumenthal (D-CT) and Rep. David Cicilline (D-RI), respectively, would have invalidated 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 provided 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. In addition, S. 646 contained 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 in June 2017. S. 646 was referred to the Senate Veterans’ Affairs Committee, but no further action took place on that measure.

Although the ABA did not formally endorse 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.

16. **Arbitration Transparency Legislation**

The 115th Congress also considered, but declined to pass, several bills designed to increase the transparency of certain types of mandatory arbitration agreements. In February 2017, Rep. Michael
Capuano (D-MA) introduced H.R. 832, also known as the Arbitration Transparency Act. The bill would have amended 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.

Later in 2017, Rep. Beto O’Rourke (D-TX) and Sen. Richard Blumenthal (D-CT) introduced broader arbitration transparency legislation, H.R. 4130 and S. 647, respectively, which would have amended 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. These bills, also known as the Mandatory Arbitration Transparency Act, also would have deemed such arbitration agreements to be an “unfair or deceptive act or practice” under the Federal Trade Commission (FTC) Act, and they would have instructed the FTC to issue new rules and punish violators. These bills also would have created a private right of action for aggrieved consumers.

None of the three bills generated bipartisan support, and all three died at the end of the 115th Congress.

17. Safety Over Arbitration Act

Early in the 115th Congress, Sen. Sheldon Whitehouse (D-RI) introduced legislation that would have banned 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 have invalidated 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 have continued to be enforceable. The bill also provided 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.” S. 542 was referred to the Senate Judiciary Committee but saw no further action during the 115th Congress.

18. Protecting Whistleblowers Reporting Tax Evasion

On December 20, 2018, the House passed legislation to reform the IRS, including strong protections for employees and other whistleblowers that provide information to the government about possible tax evasion by companies and other employers. H.R. 7227, introduced by Rep. Lynn Jenkins (R-KS), also contained language invalidating any pre-dispute agreement to arbitrate disputes relating to the discharge or other acts of retaliation against an employee whistleblower. A companion measure, S. 3246, was also introduced by Sen. Orrin Hatch (R-UT). However, neither H.R. 7227 nor S. 3246 received a vote in the Senate, and both bills died at the end of the 115th Congress.
19. **Restoring Statutory Rights and Interests of the States Act**

Rep. David Cicilline (D-RI) and Sen. Patrick Leahy (D-VT) reintroduced legislation during the 115th Congress that would have amended 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, also would have invalidated 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 have authorized 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. H.R. 1396 and S. 550 were referred to the House and Senate Judiciary Committees, respectively, but neither measure advanced during the 115th Congress.

20. **Arbitration of College Enrollment Disputes**

The 115th Congress also considered, but declined to enact, legislation known as the Court Legal Access and Student Support (CLASS) Act that would have invalidated 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, stated 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 also would have amended 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 have taken effect one year after the date of enactment. Although 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, both measures died at the end of the 115th Congress.

21. **Ombudsman Legislation**

a. **Municipal Ombudsman within the EPA**

On January 14, 2019, President Trump signed legislation known as the Water Infrastructure Improvement Act, P.L. 115-436 (H.R. 7279), which created an Office of the Municipal Ombudsman within the Environmental Protection Agency. The new law requires the ombudsman 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.
b. House Office of the Whistleblower Ombudsman

The House adopted new Rules for the 116\textsuperscript{th} Congress (H. Res. 6) on January 9, 2019, including a rule establishing a new whistleblower ombudsman position within that chamber. Section 104(e) of the resolution established an Office of the Whistleblower Ombudsman in the House, to be headed by the Whistleblower Ombudsman. The new ombudsman shall be appointed by the Speaker in consultation with the chairs and ranking members of the House Administration Committee and the House Oversight & Reform Committee. Once appointed, the Whistleblower Ombudsman will work under the direction of the House Administration Committee, and in consultation with the leaders of other House committees, the ombudsman will be required to promulgate best practices, train House offices, maintain confidentiality, and advise staff of relevant laws and policies.

c. Public Health Insurance Option Ombudsman

S. 3, introduced on January 3, 2019 by Sen. Benjamin Cardin (D-MD), 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. The new ombudsman would have duties regarding the public health insurance option that are similar to the duties of the Medicare Beneficiary Ombudsman under Section 1808(c)(2) of the Social Security Act. S. 3 was referred to the Senate Finance Committee, but no further action has been scheduled on the measure. During the 115\textsuperscript{th} Congress, several other bills containing similar ombudsman provisions were introduced, including H.R. 635, sponsored by Rep. Jan Schakowsky (D-IL); H.R. 1307, sponsored by Rep. Peter DeFazio (D-OR); S. 194, sponsored by Sen. Sheldon Whitehouse (R-RI); and S. 1511, sponsored by Sen. Cardin. However, none of these measures advanced and all of them died at the end of the 115\textsuperscript{th} Congress.

d. Other Ombudsman Bills in the 115\textsuperscript{th} Congress

Many other bills designed to establish or reform ombudsman positions in certain federal agencies were also considered, but ultimately rejected, by the 115\textsuperscript{th} Congress. For example:

- H.R. 10, introduced by Rep. Jeb Hensarling (R-TX), would have required the Securities and Exchange Commission Ombudsman to report to the Commission instead of the SEC’s Investor Advocate and would have created a separate Enforcement Ombudsman within the SEC. H.R. 10 was approved by the House in June 2017 and the Senate Banking, Housing, and Urban Affairs Committee held a hearing on the bill in July 2017, but no further action was taken on the bill.

- S. 794, introduced by Sen. Johnny Isakson (R-GA), and H.R. 3635, introduced by Rep. Lynn Jenkins (R-KS), would have amended 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. H.R. 635 passed the House on September 12, 2018, while S. 794 was referred to the Senate Finance Committee. However, neither bill received final
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approval and both died at the end of the 115th Congress despite significant bipartisan support.

- H.R. 6744, introduced by Rep. Matt Cartwright (D-PA) in September 2018, would have amended the Older Americans Act to establish a National Adult Protective Services Resource Center to improve the ability of state and local adult protective services programs to respond effectively to abuse, neglect, and exploitation of residents of long-term care facilities. The bill also would have required the Center to coordinate with the Long-Term Care Ombudsman Program to protect home care consumers and residents more effectively. H.R. 6744 was referred to the House Education and the Workforce Committee but saw no further action.

- H.R. 5575, introduced by Rep. Scott Taylor (R-VA) on April 18, 2018, would have required the Attorney General to designate an ombudsman within the federal penal system to oversee and monitor prisoner transportation, use of segregated housing, strip searches of prisoners, and alleged civil rights violations. Similar ombudsman language was also contained in Section 5001 of H.R. 5785, introduced by Rep. Cedric Richmond (D-LA), and in Section 2 of S. 1524, introduced by Sen. Cory Booker (D-NJ). None of the three measures advanced during the 115th Congress.

- S. 2724, introduced by Sen. Richard Durbin (D-IL) in April 2018, would have created a Civil Rights Ombudsman within the Bureau of Prisons to review, investigate, and attempt to remedy any civil rights complaints by inmates. The ombudsman also would have been required to refer all prison staff misconduct and possible violations of law to the Bureau of Prisons and the Department of Justice, recommend improvements to the Bureau of Prisons’ solitary confinement and civil rights policies, and make periodic reports to the House and Senate Judiciary Committees. S. 2724 was referred to the Senate Judiciary Committee, but the bill saw no further action in the 115th Congress.

- H.R. 1986, introduced by Rep. Sheila Jackson Lee (D-TX), would have established 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 there was no further action on the bill.

- H.R. 2707, introduced by Rep. Michelle Lujan Grisham (D-NM), would have created a Veterans Health Administration (VHA) Ombudsman in the Department of Veterans Affairs (VA). The bill also would have required 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, there was no further action on the bill.

- H.R. 3015, also introduced by Rep. Lujan Grisham, would have required 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 there was no further action on the measure during the 115th Congress.

- H.R. 3020, introduced by Rep. Beto O’Rourke (D-TX), would have created 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 the bill saw no further action during the 115th Congress.

- S. 663, introduced by Sen. John Thune (R-SD), would have created a Choice Program Ombudsman within the VA’s Office of Inspector General. S. 663 was referred to the Senate Veterans’ Affairs Committee, but there was no further action on the bill.

- S. 757, introduced by Sen. Jeff Flake (R-AZ), would have established 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. S. 757 was referred to the Senate Homeland Security and Governmental Affairs Committee, but the bill failed to advance in the 115th Congress.

- S. 1146, introduced by Sen. Jeanne Shaheen (D-NH), would have expanded the ability of the Small Business Administration’s (SBA) Office of the National Ombudsman to assist small businesses to meet regulatory requirements and would have authorized 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 there was no further action on the bill.

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.