MEMORANDUM

TO: Council, ABA Section of Dispute Resolution

FROM: Larson Frisby

SUBJECT: Federal Legislative Update

DATE: February 4, 2017

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 is now in the process of exercising its authority to limit arbitration under Section 1028, the SEC so far has declined to exercise its authority under Section 921.

a. CFPB Arbitration Study and Proposed Rule Under Section 1028

Last May, the CFPB issued a proposed rule that would regulate the use of pre-dispute consumer arbitration agreements in two principal ways. First, the proposal would prohibit consumer financial companies from using pre-dispute arbitration agreements to prevent customers from filing or participating in class action lawsuits. Second, the proposed rule would require 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 is designed to help the CFPB to monitor consumer arbitrations to ensure that the process is fair and would allow the Bureau to publish information regarding the claims and awards on its website. The deadline for submitting comments on the CFPB’s proposed rule was August 22, 2016, and thousands of comments were ultimately filed.
The CFPB’s proposed rule is 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 response to the CFPB’s proposed rule, House Republican leaders took several steps in an attempt to prevent the rule from taking effect. Last May, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit held a hearing regarding the proposed rule, and in June, Rep. Marlin Stutzman (R-IN) introduced legislation, H.R. 5569, which would have amended the Dodd-Frank Act to repeal the authority of the CFPB to restrict arbitration. Last July, the House also approved H.R. 5485, a fiscal year 2017 appropriations bill containing provisions that would have curbed the CFPB’s authority in various ways. For example, Section 506 of the bill stated that none of the CFPB’s funding may be used to regulate pre-dispute arbitration agreements and that no such regulation shall have any legal effect until various conditions specified in the committee report accompanying the bill are met, including a new peer-reviewed cost-benefit study by the CFPB published in the Federal Register with opportunity for public comment. However, none of these measures were enacted during the 114th Congress.

On January 20, 2017, the incoming Trump Administration issued a memorandum to the heads of all federal departments and agencies freezing all non-final regulations. The memo prohibits the agency heads from sending any regulations to the Office of the Federal Register (“OFR”) for publishing, ordered them to immediately withdraw any regulations that have been sent to the OFR but not yet published in the Federal Register, and instructed them to postpone the effective date of any published regulations that have not yet taken effect. However, because the CFPB is an independent agency—and similar memos sent by former Presidents Clinton, Bush, and Obama were generally deemed to not bind such agencies—it is unclear whether the new memo will prevent the CFPB from issuing its final arbitration rule as currently scheduled in February 2017. This uncertainty is even greater in light of the D.C. Circuit’s recent ruling in PHH Corporation v. CFPB—which has been stayed pending appeal—stating that because the Bureau’s leadership structure is unconstitutional, the agency shall no longer be an independent agency and instead must operate as an executive agency subject to direct presidential control.

For all these reasons, there is great uncertainty as to whether the CFPB will issue its final arbitration rule in the near future. Even if the final rule is issued, opponents are likely to challenge it in court or seek to reverse it pursuant to the Congressional Review Act, a law enacted in 1996 that establishes a procedure by which Congress can nullify a covered rule adopted by a federal agency. Therefore, the CFPB arbitration rule is not likely to take effect any time soon.

Although the ABA has not taken 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

Although the CFPB has spent substantial time and resources implementing 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. In April 2013, Sen. Al Franken (D-MN) and 36 other Democratic Senators and Representatives sent a letter to SEC Chair Mary Jo White urging the Commission to exercise its authority under Section 921 and prohibit mandatory arbitration of securities disputes. Subsequently, a group of 16 consumer and legal organizations and the North American Securities Administrators Association sent separate letters to the SEC requesting similar action.

In her response letter to Sen. Franken, SEC Chair White agreed that the mandatory securities arbitration issue was an important issue for investors and noted that the Commission had solicited comments on the costs and benefits of arbitration and was studying the issue. However, she made no promises regarding whether—or when—the SEC might seek to exercise its regulatory authority under Section 921 of the Dodd-Frank Act. Following the November 2016 election, Ms. White resigned as SEC Chair effective in late January 2017, which created a third vacancy on the Commission. President Trump is expected to appoint a new SEC Chairman and two new Commissioners in the near future.

Because of these major changes to the SEC leadership and the continuing support for mandatory securities arbitration within the Republican majority in Congress and the business community, it seems doubtful that the SEC will seek to exercise its authority to ban or limit such arbitration under Section 921 anytime soon. However, some expert observers—including George Friedman, former Executive Vice President and Director of Arbitration at the Financial Industry Regulatory Authority (“FINRA”)—believe that the SEC may decide to prepare a study on securities arbitration similar to the CFPB study and then eventually require some securities arbitration reforms, though probably not an outright ban on pre-dispute securities arbitration agreements. (See Consumer and Employment Arbitration – Six Things to Look for in 2017, Arbitration Resolution Services, Inc. Blog, https://www.arbresolutions.com/consumer-and-employment-arbitration-2017/; See also Five Things to Look for in 2016, Securities Arbitration Commentator (December 29, 2015), http://www.sacarbitration.com/blog/consumer-arbitration-five-things-look-2016/; CFPB Issues Final Report on Arbitration, Telegraphing a Ban or Limits on Arbitration; Should SEC Follow Suit?, Securities Arbitration Commentator (March 16, 2015), http://www.sacarbitration.com/blog/cfpb-issues-final-report-arbitration-telegraphing-ban-limits-arbitration-sec-follow-suit/.

2. Arbitration of Securities Disputes

On January 17, 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 12 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.

3. **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, introduced on January 12, 2017, would 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 measure.

4. **ADA Education and Reform Act**

On January 24, 2017, Rep. Ted Poe (R-TX) introduced 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, which currently has three Democratic and two Republican cosponsors, was referred to the House Judiciary Committee, though no further action has been scheduled on the bill.

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

The 115th 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. H.R. 156 was referred to the House Education and the Workforce Committee, but no further action has been scheduled. Rep. Green introduced similar bills in each of the last several Congresses, but none of the measures advanced.

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

On October 4, 2016, the U.S. Department of Health and Human Services’ Centers for Medicare & Medicaid Services (“CMS”) published a [final rule](#) that established new requirements for long-term care facilities, including certain limits on nursing home arbitration. See Department of Health and Human Services Final Rule on Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; File Code CMS-3260-F; RIN 0938-AR61; 81 Fed. Reg. 68688 (October 4, 2016). However, the U.S. District Court for the Northern District of Mississippi issued a [preliminary injunction](#) on November 7, 2016 that blocked implementation of the rule. The court also concluded that CMS exceeded its legal authority in issuing the rule and that any future ban on nursing home arbitration should be addressed through federal legislation rather than CMS rules. In response to the original proposed rule, the ABA submitted [written comments](#) to CMS that identified 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. The ABA 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.

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

On January 12, 2017, Rep. Doug Collins (R-GA) and Sen. Charles Grassley (R-IA) reintroduced legislation known as the Sunshine for Regulatory Decrees and Settlements Act. Both H.R. 469 and S. 119 would place new limitations on the ability of federal agencies and private parties to enter into consent decrees or settlement agreements compelling the agencies to take or expedite regulatory actions that affect the rights of other private parties or state or local governments. Supporters of the two bills contend they are needed 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 legislation 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. In addition, the bills would require government agencies to provide monthly reports of the total cost of unfunded mandates to the Office of Information and Regulatory Affairs.

Although H.R. 469 and S. 119 were referred to the House and Senate Judiciary Committees, respectively, no further action has been scheduled on either measure. Similar legislation was approved by the House in January 2016, but the Senate declined to take action before the end of the 114th Congress.

8. Arbitration of Disputes Involving Title VII, Rape or Sexual Assault

The 115th Congress is now considering a measure that would reverse existing federal rules prohibiting federal contractors and subcontractors from requiring their workers to arbitrate civil rights, sexual assault, and sexual harassment claims.

H. J. Res. 37, introduced on January 30, 2017 by Rep. Virginia Foxx (R-NC), would disapprove and reverse a controversial rule issued by the Defense Department, the General Services Administration and NASA (“Federal Acquisition Regulation; Federal Acquisition Circular 2005–90,” 81 Fed. Reg. 58562, August 25, 2016) and a related Executive Order signed by President Obama (E.O. 13673, “Fair Pay and Safe Workplaces,” July 31, 2014). Both the rule and Executive Order require prospective federal contractors to disclose certain labor law violations and prohibit them from entering into pre-dispute agreements with employees or independent contractors to arbitrate disputes involving Title VII of the Civil Rights Act of 1964 or state law torts for sexual assault or harassment.

The arbitration prohibition applies to those companies seeking a federal procurement contract valued at more than $1 million, as well as their subcontractors where the value of their supplies and services exceed $1 million. However, the measures do not apply to (1) agreements to arbitrate reached after a civil rights dispute arises; (2) employees who are covered by any type of collective bargaining agreement; or (3) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by the new Executive Order.

H.J. Res. 37 is part of a series of Congressional Review Act (“CRA”) measures designed to overturn certain Obama Administration regulations. The CRA allows Congress to disapprove and reverse federal agency regulations by enacting a joint resolution within 60 session days (not including recess periods) after the rule is published in the Federal Register or Congress receives the
agency’s formal report on the new rule, whichever occurs later. The House approved H.J. Res. 37 on February 2, 2017, and the measure now moves to the Senate.

Legislation prohibiting pre-dispute arbitration agreements involving discrimination or sexual assault claims was also considered but not approved by the 114th Congress.

In June 2016, the House approved H.R. 5293, the Department of Defense Appropriations Act, which would have provided $575.8 billion in discretionary funding for the Defense Department in fiscal year 2017. Section 8091 of the bill would have prohibited federal contractors with contracts over $1 million from entering into or enforcing pre-dispute agreements with employees or independent contractors to arbitrate discrimination claims under Title VII of the Civil Rights Act of 1964 or any tort claims related to sexual assault, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervisions, or retention. Identical language was also contained in Section 8092 of the Senate bill, S. 3000. Although Senate Majority Leader Mitch McConnell (R-KY) repeatedly sought a full Senate vote on the bill throughout the summer and fall of 2016, those efforts failed to overcome a filibuster. Ultimately, Congress passed a continuing resolution, H.R. 2028, in early December 2016 that extended current funding levels for most federal agencies through April 28, 2017 but did not contain any of the arbitration language in the two DOD appropriations bills. President Obama signed the measure into law on December 10, 2016 as P.L. 114-254.

The 114th Congress also declined to pass legislation that would have prohibited employers from requiring their employees to arbitrate rape claims. S. 852, sponsored by Sen. David Vitter (R-LA), provided that employment-related arbitration agreements shall not be enforceable with respect to tort claims arising out of rape. The bill would have applied to most employers with 15 or more employees, except the United States or corporations owned by the U.S. Government, any agency of the District of Columbia, or bona fide membership clubs exempt from federal taxation. Also excluded from coverage were employees who are elected to state public office, as well as personal staff and policy-making appointees or immediate advisors of those officials. Although S. 852 was referred to the Senate Health, Education, Labor and Pensions Committee, no further action was taken and the measure died at the end of the 114th Congress.

9. Arbitration Fairness Act

The 114th Congress considered, but ultimately declined to enact, broad legislation known as the Arbitration Fairness Act that would have invalidated all mandatory pre-dispute agreements to arbitrate employment, consumer, antitrust and civil rights disputes. H.R. 2087 and S. 1133, introduced by Rep. Hank Johnson (D-GA) and Sen. Franken, respectively, would have banned all such pre-dispute arbitration agreements, but any agreement to arbitrate entered into after a dispute has arisen would continue to be enforceable under the measures. 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. 2087 and S. 1133 would have created a new Chapter 4 to Title 9 and not directly amended Chapter 1 of that Title (i.e., the Federal Arbitration Act). In addition, unlike some earlier versions of the bills, H.R. 2087 and S. 1133 would have invalidated pre-dispute agreements to arbitrate antitrust disputes but not pre-dispute agreements to arbitrate franchise disputes. Although H.R. 2087 and S. 1133 were referred to the House and Senate Judiciary Committees, respectively, there was no further action on either bill during the 114th Congress. Sen. Franken and Rep. Johnson are expected to reintroduce similar legislation this year, but neither bill is expected to pass due to strong Republican opposition in both the Senate and 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.

10. **Restoring Statutory Rights and Interests of the States Act**

During the 114th Congress, Senate Judiciary Committee Ranking Member Patrick Leahy (D-VT) introduced legislation that would have amended the Federal Arbitration Act (“FAA”) to render pre-dispute agreements to arbitrate unenforceable with regard to claims brought by individuals or small businesses for alleged violations of a federal or state statute, the U.S. Constitution, or a state constitution. S. 2506, also known as the Restoring Statutory Rights and Interests of the States Act, would have also 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. A similar companion bill, H.R. 4899, was also introduced in the House by Rep. Hank Johnson (D-GA), but neither the Senate nor the House bill advanced during the 114th Congress.

11. **Mandatory Arbitration for Servicemembers**

The 114th Congress also considered, but ultimately declined to pass, several different bipartisan bills that would have made it more difficult to enforce mandatory arbitration agreements against certain U.S. servicemembers.

Last May, the Senate Armed Services Subcommittee on Personnel approved S. 2814, the National Defense Authorization Act, which would have authorized appropriations for the Defense
Department for fiscal year 2017. Section 1615 of the bill would have invalidated pre-dispute agreements to arbitrate disputes arising under the Servicemembers Civil Relief Act, 50 U.S.C. 3911 et seq. (“SCRA”), a federal statute requiring verification of an individual’s active military status before proceeding with court judgments, collections, repossession, and foreclosure. Section 1615 provides that whenever a contract with a servicemember requires the use of arbitration to resolve a controversy that is subject to the Act and arises out of or relates to such contract, arbitration may be used to settle the controversy only if, after the controversy arises, all parties to the controversy consent in writing to use arbitration. The section also places similar limits on forum selection and choice of law clauses within the arbitration agreement. However, last December, Congress passed a different version of the National Defense Authorization Act, S. 2943, which did not include the arbitration provision, and President Obama signed that measure into law on December 23, 2016 as P.L. 114-328.

Several similar stand-alone bills—S. 2331, S. 2719, and H.R. 4161—were also introduced in the 114th Congress by Sen. Jack Reed (D-RI), Sen. Patty Murray (D-WA), and Rep. Walter Jones (R-NC), respectively. While all three measures would have invalidated pre-dispute agreements to arbitrate SCRA disputes, S. 2331 and H.R. 4161 would have also preserved the rights of servicemembers to bring class action suits under the SCRA. None of these measures advanced during the 114th Congress.

In addition to these measures designed to enhance servicemembers’ protections under the SCRA, the 114th Congress also considered separate legislation aimed at enhancing the employment and reemployment rights of servicemembers. S. 3042 and H.R. 5426, introduced by Sen. Richard Blumenthal (D-CT) and Rep. David Cicilline (D-RI), respectively, would have invalidated any pre-dispute agreement between an employer and employee to arbitrate 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.

S. 2331, S. 2719, and S. 3042 were referred to the Senate Veterans’ Affairs Committee, and H.R. 4161 and H.R. 5426 were referred to the House Veterans’ Affairs Committee, but there was no further action on any of these measures during the 114th Congress.

Although the ABA has not formally endorsed any of these four 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 S. 3042 and H.R. 5426.
12. **Settlements Under the Endangered Species Act**

The 114th Congress also considered, but failed to pass, legislation that would have amended the Endangered Species Act to establish a procedure for approving settlements in certain types of federal lawsuits. S. 293, introduced by Sen. John Cornyn (R-TX), and H.R. 585, introduced by Rep. Bill Flores (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 bills 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 in order to facilitate settlement discussions. The legislation also would have 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. Finally, the legislation would have prohibited the court 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 the Senate Environment and Public Works Committee held a hearing on S. 293 and H.R. 585 was referred to the House Judiciary and Natural Resources Committees, no further action was taken on either measure and both bills died at the end of the 114th Congress.

13. **Mandatory Arbitration of Cell Phone and Other Telecom Disputes**

In April 2016, Sen. Richard Blumenthal (D-CT) introduced legislation, S. 2897, which would have prohibited mandatory arbitration clauses in contracts for cell phone, landline telephone, or cable or satellite TV service. The bill would have banned all such pre-dispute arbitration agreements between consumers and providers, but agreements entered into after a dispute has arisen would have continued to be enforceable. Like the proposed Arbitration Fairness Act referenced above, S. 2897 would have created a new Chapter 4 to Title 9 instead of directly amending Chapter 1 of that Title (i.e., the Federal Arbitration Act). Although S. 2897 was referred to the Senate Judiciary Committee, no further action was taken on the measure during the 114th Congress.

14. **Arbitration of College Enrollment Disputes**

The 114th 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. 2079 and S. 1122, 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 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, including work-study 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.
H.R. 2079 was referred to the House Education & the Workforce and House Judiciary Committees, and S. 1122 was referred to the Senate Health, Education, Labor, and Pensions Committee, but neither measure advanced during the 114th Congress.

15. **Medicare Appeals ADR—Mediation and Ombudsman Assistance**

Although the Senate Finance Committee approved legislation in December 2015 designed to reform and streamline the multi-tiered process for resolving administrative appeals of Medicare payment decisions, the bill never came to a final vote in the Senate or House and died at the end of the 114th Congress. S. 2368, sponsored by the committee’s chairman Orrin Hatch (R-UT), would have amended Title XVIII of the Social Security Act to increase coordination and oversight of Medicare claims review contractors, implement new strategies to address the growing number of review contractor determination appeals, reduce review burdens on providers, and give review contractors the tools necessary to better protect the Medicare Trust Fund.

Section 9(g) of the bill would have required the Secretary to establish one or more alternative dispute resolution processes, including mediation, whereby at the Secretary of Health and Human Services’ discretion, individuals or entities entitled to a redetermination, reconsideration, review or hearing of a Medicare decision may have the option to enter into ADR with the Centers for Medicare & Medicaid Services in an effort to resolve the controversy. During the ADR process, the request for review with respect to the claims covered by the ADR would be suspended, and in the event of a settlement, the party challenging the Medicare decision would be required to withdraw all requests for hearing or review for the claims covered by the settlement. The HHS Secretary would have discretion to establish the program in a cost-effective manner, including consideration of thresholds and available resources. In addition, the Secretary would establish a process to coordinate with appropriate law enforcement officials and with the Centers for Medicare & Medicaid Services to avoid the inadvertent settlement or resolution of cases that involve fraud or other criminal activity.

Section 11 of the legislation would have required the HHS Secretary to create within the Centers for Medicare & Medicaid Services a new “Medicare Reviews and Appeals Ombudsman” to assist providers and suppliers. Although current law requires the Secretary to appoint a Medicare Beneficiary Ombudsman, that office was created to identify and address systemic issues that affect Medicare beneficiaries, not to assist providers, suppliers, or Medicare contractors in resolving complaints and other issues.

The new Medicare Reviews and Appeals Ombudsman to be created by S. 2368 would be required to: (1) identify, investigate, and help resolve complaints and inquiries involving Medicare review or appeals processes; (2) identify trends in complaints and inquiries regarding the current review and appeals systems and advise the Secretary on ways to improve the efficiency of those systems as well as communications with beneficiaries, providers of services, and suppliers; (3) design a system to objectively measure and evaluate reviewer responsiveness to provider and Ombudsman inquiries; (4) provide administrative and technical assistance to appellants; (5) publish data regarding the number of Medicare review determinations appealed, each appeal's outcome, and aggregate appeal
statistics; (6) help educate and train providers and review contractors; (7) communicate and coordinate with the Medicare Beneficiary Ombudsman; and (8) other duties determined to be appropriate by the Secretary. No comparable House legislation was introduced in the 114th Congress.

16. Ombudsman Legislation

A number of bills designed to establish or reform ombudsman positions in certain federal agencies were also considered, but ultimately rejected, by the 114th Congress.

a. EPA Municipal Ombudsman

On September 15, 2016, the Senate approved bipartisan legislation, S. 2848, which would have reauthorized the Water Resources Development Act and authorized 25 Army Corps of Engineers water infrastructure projects in 17 states. In addition, Section 7203 of the bill would have established an Office of the Municipal Ombudsman within the EPA Administrator’s Office. The main duties of the Ombudsman would be to provide technical assistance to municipalities seeking to comply with the requirements of laws implemented by the EPA and to provide information to the EPA Administrator to help that person ensure that agency policies are implemented by all offices of the EPA, including regional offices. In December 2016, Congress passed a modified version of the legislation without the ombudsman provisions, and that measure was signed into law by President Obama as P.L. 114-322.

b. Veterans Choice Program Ombudsman

The 114th Congress also considered, but declined to enact, legislation that would have created a new Choice Program Ombudsman within the Department of Veterans Affairs’ Office of Inspector General. S. 2871, introduced by Sen. John Thune (R-SD), would have instructed the Inspector General to select a Choice Program Ombudsman from among employees of the Office of Inspector General to manage complaints regarding the provision of hospital care and medical services. The Ombudsman also would have been required to submit quarterly reports to the House and Senate Veterans’ Affairs Committees regarding the total number of complaints received, the total number of complaints that have been resolved or that are still pending, and findings or recommendations for resolving systemic problems with the provision of hospital care and medical services under Section 101 of the Veterans Access, Choice, and Accountability Act of 2014, P.L. 113-146, 38 U.S.C. § 1701. Although S. 2871 was referred to the Senate Veterans’ Affairs Committee, no further action was taken on the measure.

c. HHS Ombudsperson on Women’s Health

In September 2015, Rep. Suzanne Bonamici (D-OR) introduced H.R. 3652, which was designed to provide women with affordable access to comprehensive health care including preventive services, improve maternal health, and ensure uniformity and consistency of women’s health care throughout the nation. Section 7 of the bill would have established an “Office of the Ombudsperson on Women's Health” in HHS to handle complaints involving HHS regarding women's health services
and to study the adequacy of health plan provider networks for women's health services. A Senate companion bill, S. 674, was introduced by Sen. Patty Murray (D-WA). Although H.R. 3652 was referred to the House Energy and Commerce Committee and S. 674 was referred to the Senate Health, Education, Labor and Pensions Committee, neither measure advanced and both died at the end of the 114th Congress.

d. Medicare and Medicaid Ombudsman

H.R. 2325, introduced in the last Congress by Rep. Susan Brooks (R-IN), would have amended Title XVIII of the Social Security Act to direct the Secretary of HHS to provide for a Pharmaceutical and Technology Ombudsman within the Centers for Medicare and Medicaid Services. The Ombudsman would have been instructed to receive and respond to coverage, coding, or payment complaints or requests from manufacturers of pharmaceutical, biotechnology, medical device, or diagnostic products that are covered under the Medicare or Medicaid programs or for which coverage is being sought. H.R. 2325 was referred to the House Energy & Commerce and Ways & Means Committees, but no further action was taken on the measure during the 114th Congress.

e. Federal Air Marshall Service Ombudsman

H.R. 81, introduced by Rep. Sheila Jackson Lee (D-TX) at the beginning of the 114th Congress, would have increased the number of federal air marshals for inbound international flights by at least 1,750 over 2011 levels, expanded their training, and established an Office of the Ombudsman in the Federal Air Marshall Service. The Ombudsman would have been required to “carry out programs and activities to improve morale, training, and quality of life issues in the Service, including through implementation of the recommendations of the Inspector General of the Department of Homeland Security and the Comptroller General.” H.R. 81 was referred to the House Homeland Security Committee, but no further action was taken on the bill. Rep. Jackson Lee introduced similar legislation, H.R. 64, during the 113th Congress, but that measure also failed to advance.

f. TSA Ombudsman

H.R. 80, the Transportation Security Administration Ombudsman Act, would have established an Office of the Ombudsman in the Transportation Security Administration (“TSA”) of the Department of Homeland Security to assist TSA employees who have complaints about the agency. The bill, introduced by Rep. Sheila Jackson Lee, also would have required the Ombudsman to: (1) conduct outreach to TSA employees, including publicizing a toll-free telephone number to report complaints; (2) evaluate each claim objectively; (3) provide information, advice and assistance to complainants, and where appropriate, initiate informal, impartial fact-finding and inquiries on complaints or on the Ombudsman’s own initiative; (4) inform each complainant of the outcome of each fact-finding inquiry and the Ombudsman’s recommendations; (5) work with the TSA Administrator to address issues identified through fact-finding and inquiries; (6) maintain confidentiality in connection with the complaints and inquiries, including the identities of the complainants and witnesses; and (7) submit annual reports to the appropriate congressional committees.
Although H.R. 80 was referred to the House Homeland Security Committee, no further action was taken on the measure during the 114th Congress. Similar legislation, H.R. 84, was introduced in the 113th Congress by Rep. Jackson Lee, but that measure also failed to advance.

g.  **VHA Management and Accountability Ombudsman**

The 114th Congress also considered but declined to enact several bills that would have created two separate ombudsmen within the Veterans Health Administration (“VHA”) designed to protect both patients and VHA employees.

H.R. 502, introduced by Rep. Derek Kilmer (D-WA), would have established a five-year pilot program designed to improve the management and accountability of the VHA. Section 4 of the bill would have also created an Office of the Management and Accountability Ombudsman within the Department of Veterans Affairs (“VA”) for the purpose of helping VHA employees to resolve problems with the management, administration, and delivery of care within the agency. The Ombudsman would be appointed by the President and report directly to the VA Secretary, but the Secretary could not prevent or prohibit the Ombudsman from initiating, carrying out, or completing his or her responsibilities. The Ombudsman would also: (1) receive and address reports from employees; (2) conduct inspections of VHA medical facilities; (3) work with the Secretary to create pilot programs that give VHA employees incentives to suggest ways to improve the management and operations of the VHA; (4) request that the VA Inspector General conduct inspections, investigations, or audits, as necessary; and (5) provide annual reports to the House and Senate Committees on Veterans’ Affairs that outline the Ombudsman’s objectives and set forth reform recommendations.

H.R. 3978, related legislation introduced by Rep. Michelle Lujan Grisham (D-NM), would have created a VHA Office of the Ombudsman. Although the structure, independence, and reporting requirements of the VHA Ombudsman would be similar in many ways to those of the VHA Management and Accountability Ombudsman, the VHA Ombudsman would focus on resolving patient problems, rather than helping VHA employees. In addition, unlike H.R. 502, H.R. 3978 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. 502 was referred to the House Veterans’ Affairs and Budget Committees and H.R. 3978 was referred to the House Veterans’ Affairs Committee, there was no further action on either measure during the 114th Congress.

h.  **FAA Community Ombudsman**

The previous Congress also considered, but declined to pass, legislation creating a series of FAA ombudsmen.

H.R. 3965, introduced by Rep. Ruben Gallego (D-AZ), and S. 2761, introduced by Sen. Elizabeth Warren (D-MA), would have required the Administrator of the Federal Aviation Administration
(“FAA”) to modify the implementation of the Next Generation Air Transportation System to limit the negative impacts the new system would have on populated areas near affected airports. Section 3 of the bills would have also required the Administrator to appoint an FAA Community Ombudsman for each region of the FAA. These ombudsmen would act as liaisons between affected communities and the Administrator regarding such problems as aircraft noise, pollution, and safety. In addition, the ombudsmen would monitor the impact that the Next Generation Air Transportation System would have on communities near airports, make recommendations to the Administrator for addressing those concerns and improving the use of community comments in Administration decision-making processes, and report to Congress periodically on the adverse impacts faced by communities near airports and on the Administration’s responsiveness to concerns raised by the affected communities.

Although H.R. 3965 was referred to the House Transportation and Infrastructure Committee and S. 2761 was referred to the Senate Commerce, Science, and Transportation Committee, no further action was taken on either bill before the end of the 114th Congress.

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.

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.