AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE
1050 Connecticut Avenue, NW - Suite 400
Washington, DC 20036
(202) 662-1760
FAX: (202) 662-1762

M E M O R A N D U M

TO: Council, ABA Section of Dispute Resolution

FROM: R. Larson Frisby

SUBJECT: Federal Legislative Update

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

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

Several of the most significant arbitration regulatory measures in recent years were contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), which was signed into law by President Obama in July 2010. Section 1028 of the Dodd-Frank Act requires the Consumer Financial Protection Bureau ("CFPB") to conduct a study regarding the use of pre-dispute arbitration agreements in consumer cases and authorizes (but does 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 grants 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

In May 2016, 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. Comments regarding the CFPB's proposed rule must be submitted by August 22, 2016.

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 have taken several steps in an attempt to prevent the rule from taking effect. On May 18, 2016, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit held a hearing regarding the proposed rule, and on June 22, 2016, Rep. Marlin Stutzman (R-IN) introduced legislation, H.R. 5569, which would amend the Dodd-Frank Act to repeal the authority of the CFPB to restrict arbitration. Although the bill was referred to the House Financial Services Committee, no further action has been scheduled on the measure.

Subsequently, on July 7, 2016, the House approved H.R. 5485, a fiscal year 2017 appropriations bill containing provisions that would curb the CFPB's authority by funding the agency through the annual congressional appropriations process rather than through transfers from the Federal Reserve. The bill would also convert the CFPB's leadership structure from a single Director to a five-person Board of Directors appointed by the President. Section 506 of the bill also states 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. The Senate companion bill, S. 3067, does not contain any similar language regarding the CFPB's proposed rule.

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.

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 dated May 23, 2013, 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.

Because mandatory securities arbitration remains popular with the Republican Majority in Congress and the business community in general, 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 of 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 *Five Things to Look for in 2016*, Securities Arbitration Commentator (December 29, 2015), http://www.sacarbitration.com/blog/consumer-arbitration-five-things-look-2016/ ; See also *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 Fairness Act

Congress continues to consider broad legislation known as the "Arbitration Fairness Act" that would invalidate all mandatory pre-dispute agreements to arbitrate employment, consumer, antitrust and civil rights disputes. H.R. 2087 and S. 1133, introduced last year by Rep. Hank Johnson (D-GA) and Sen. Franken, respectively, would ban all such pre-dispute arbitration agreements, but any agreement to arbitrate entered into after a dispute has arisen would continue to be enforceable 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 create a new Chapter 4 to Title 9 and not directly amend 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 invalidate 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, no further action has been scheduled and neither bill is expected to pass this year.

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.

3. Restoring Statutory Rights and Interests of the States Act

On February 4, 2016, Senate Judiciary Committee Ranking Member Patrick Leahy (D-VT) introduced legislation that would amend 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 also invalidate agreements to arbitrate that are prohibited by a federal or state statute, or the finding of a federal or state court, on grounds that the agreements are unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of public policy. In addition, the legislation would authorize the courts, rather than arbitrators, to determine whether the FAA applies to an agreement to arbitrate, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the contract containing the agreement. A companion bill, H.R. 4899, was introduced in the House on April 12, 2016 by Rep. Hank Johnson (D-GA). Although S. 2506 and H.R. 4899 were referred to the Senate Judiciary Committee and the House Judiciary Committee, respectively, no further action has been scheduled on either measure.

4. Arbitration of Securities Disputes

Legislation is also pending in Congress that would discourage the use of arbitration to resolve securities or investment disputes. H.R. 1098, introduced by Rep. Keith Ellison (D-MN) in February 2015, 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. 1098 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 21 Democratic Representatives have cosponsored the bill to date, the legislation has received no Republican support. Therefore, the bill is unlikely to advance in the 114th Congress.

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

On July 16, 2015, the U.S. Department of Health and Human Services' ("HHS") Centers for Medicare & Medicaid Services ("CMS") issued proposed regulations that would establish new

requirements for long-term care facilities, including certain limits on nursing home arbitration. See Department of Health and Human Services Proposed Rule on Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; File Code CMS-3260-P; RIN 0938-AR61; 80 Fed. Reg. 42168 (July 16, 2015). In response to the proposed rule, the ABA submitted written comments to CMS that identified several areas in which the proposed nursing home 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. CMS will be evaluating the comments submitted by the ABA and many other stakeholders as it moves to develop a final rule. According to HHS' semi-annual regulatory agenda released this past spring, final action is expected on the rule in September 2016.

6. Mandatory Arbitration for Servicemembers

Congress also is considering several different bipartisan bills that would make it more difficult to enforce mandatory arbitration agreements against certain U.S. servicemembers.

On May 10, 2016, the Senate Armed Services Subcommittee on Personnel approved S. 2814, the National Defense Authorization Act, which would authorize appropriations for the Defense Department for fiscal year 2017. Section 1615 of the bill would invalidate 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.

Several similar stand-alone bills—S. 2331, S. 2719, and H.R. 4161—were also introduced by Sen. Jack Reed (D-RI), Sen. Patty Murray (D-WA), and Rep. Walter Jones (R-NC), respectively. While all three measures would invalidate pre-dispute agreements to arbitrate SCRA disputes, S. 2331 and H.R. 4161 would also preserve the rights of servicemembers to bring class action suits under the SCRA.

In addition to these measures designed to enhance servicemembers' protections under the SCRA, separate legislation also has been introduced in Congress aimed at enhancing the employment and reemployment rights of servicemembers. S. 3042 and H.R. 5426, introduced on June 9, 2016 by Sen. Richard Blumenthal (D-CT) and Rep. David Cicilline (D-RI), respectively, would invalidate 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 provide that consent

shall not be considered voluntary when a person is required to agree to arbitrate as a condition of future or continued employment, advancement in employment, or receipt of any right or benefit of employment.

After the Senate Armed Services Personnel subcommittee approved S. 2814, Sen. McCain introduced a revised bill without the arbitration provisions, S. 2943, and that measure was then approved by the Senate on June 14, 2016 and by the House on July 7, 2016. Meanwhile, 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 no further action has been scheduled on any of these measures.

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.

7. Freedom of Information Act Reform

On June 30, 2016, President Obama signed bipartisan legislation, P.L. 114-185 (S. 337), which makes it easier for the public to obtain information from government agencies under the Freedom of Information Act ("FOIA") and that utilizes ADR to help resolve disputes. The new law will create a presumption of openness by prohibiting agencies from withholding information requested under FOIA unless the agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or disclosure is prohibited by law. Agencies will also be required to make many of the records they disclose available to the public in electronic format. In addition, the new law will require the Office of Government Information Services ("OGIS") to offer mediation services to resolve disputes between persons making FOIA requests and administrative agencies as a non-exclusive alternative to litigation. The measure also will require the heads of each federal agency to issue new regulations within 180 days after the bill was enacted to ensure that the FOIA reforms are adopted by the agency, and all of these new agency regulations must include procedures for engaging in dispute resolution through the FOIA Public Liaison OGIA.

8. Sunshine for Regulatory Decrees and Settlements Act

On January 7, 2016, the House approved legislation, H.R. 712, which 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. The bill's sponsor, Rep. Doug Collins (R-GA), and other supporters claim it is 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.

The legislation, known as the "Sunshine for Regulatory Decrees and Settlements Act," would require 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. It 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 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 also would require the defendant agency to publish proposed consent decrees or settlement agreements for no fewer than 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 bill would require government agencies to provide monthly reports of the total cost of unfunded mandates to the Office of Information and Regulatory Affairs.

After H.R. 712 was approved by the House, it was received in the Senate and referred to the Senate Judiciary Committee for further consideration. Although a similar Senate bill, S. 378, was introduced last year by Sen. Charles Grassley (R-IA) and referred to the Senate Judiciary Committee, no further action is scheduled on that measure. Similar legislation was approved by the House in 2014 but died in the Senate at the end of the 113th Congress, and President Obama previously threatened to veto the current legislation if it is passed by Congress this year.

9. <u>Settlements Under the Endangered Species Act</u>

Legislation is also pending in both the Senate and House that would amend 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 require the Secretary of the Interior to publish any complaint filed against the Department that alleges a failure to perform an act or duty related to an endangered or threatened species. The bills would also provide all affected parties—including businesses and state and local governments—with a reasonable opportunity to intervene in the suit. If the court grants a motion to intervene, it would be required to refer the matter to mediation or a magistrate judge in order to facilitate settlement discussions. The legislation would also allow the court to award litigation costs—such as attorneys' fees and expert witness fees—to any appropriate party as part of a final order, but such costs could not be awarded if the case is resolved by a consent decree or settlement agreement. The court would also be prohibited from approving a consent decree unless each state and county containing the relevant species is given notice and either approves of the settlement or fails to respond within 45 days.

Although the Senate Environment and Public Works Committee held a hearing on S. 293 on May 6, 2015, and H.R. 585 was referred to the House Judiciary and Natural Resources Committees, no further action has been scheduled on either measure.

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

On June 16, 2016, the House approved H.R. 5293, the Department of Defense Appropriations Act, which would provide $575.8 billion in discretionary funding for the Defense Department in fiscal year 2017. Section 8091 of the bill would prohibit 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 is also contained in Section 8092 of the Senate bill, S. 3000. Although Senate Majority Leader Mitch McConnell (R-KY) sought a full Senate vote on the bill on July 6 and July 14, 2016, those efforts failed to overcome a filibuster. Proponents are expected to try again after the Senate returns from its recess in early September.

Previously on July 31, 2014, President Obama signed a related executive order (E.O. 13673, "Fair Pay and Safe Workplaces") that requires prospective federal contractors to disclose certain labor law violations and prohibits 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 mandatory arbitration prohibition applies to those companies seeking to obtain 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 but does 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.

Legislation is also currently pending in Congress that would prohibit employers from requiring their employees to arbitrate rape claims. S. 852, sponsored by Sen. David Vitter (R-LA), provides that employment-related arbitration agreements shall not be enforceable with respect to tort claims arising out of rape. The bill would apply 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 are employees who are elected to state public office, as well as personal staff and policy-making appointees or immediate advisors of those officials. S. 852 was referred to the Senate Health, Education, Labor and Pensions Committee, but no further action has been scheduled.

11. Mandatory Arbitration of Cell Phone and Other Telecom Disputes

Legislation also is pending in Congress that would prohibit mandatory arbitration clauses in contracts for cell phone, landline telephone, or cable or satellite TV service. S. 2897, introduced by Sen. Richard Blumenthal (D-CT) on April 28, 2016, would ban all such pre-dispute arbitration agreements between consumers and providers, but agreements entered into after a dispute has arisen would continue to be enforceable. Like the proposed Arbitration Fairness Act referenced above, S. 2897 would create a new Chapter 4 to Title 9 and would not directly amend Chapter 1 of

that Title (i.e., the Federal Arbitration Act). The legislation, known as the "Justice for Telecommunications Consumers Act," was referred to the Senate Judiciary Committee, though no further action has been scheduled on the measure. No comparable House bill has been introduced to date.

12. Arbitration of College Enrollment Disputes

Congress is also considering legislation known as the "Court Legal Access and Student Support (CLASS) Act" that would invalidate all mandatory pre-dispute agreements to arbitrate controversies involving enrollment agreements between a student and a college. H.R. 2079 and S. 1122, introduced in April 2015 by Rep. Maxine Waters (D-CA) and Sen. Richard Durbin (D-IL), respectively, states that Chapter 1 of Title 9 of the U.S. Code relating to enforcement of arbitration agreements shall not apply to enrollment agreements between students and institutions of higher education. The bills would also amend Section 487(a) of the Higher Education Act of 1965, 20 U.S.C. § 1094(a), to prohibit such institutions that participate in federal student aid programs, 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 take 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 no further action has been scheduled on either measure.

13. Medicare Appeals ADR—Mediation and Ombudsman Assistance

On December 8, 2015, the Senate Finance Committee approved legislation designed to reform and streamline the multi-tiered process for resolving administrative appeals of Medicare payment decisions. S. 2368, sponsored by the committee's chairman Orrin Hatch (R-UT), would amend 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 require 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 require 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.

S. 2368 is now before the full Senate awaiting further action. So far, however, no comparable House legislation has been introduced in the 114th Congress.

14. Ombudsman Legislation

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

a. Long-Term Care Ombudsman Reform

On April 19, 2016, President Obama signed into law the Older American Reauthorization Act of 2016, P.L. 114-144 (S. 192). The bipartisan measure reauthorizes through 2019 programs under the Older Americans Act (P.L. 109-365), a landmark law that provides social and nutrition services for seniors and their caregivers. The legislation also contains language that reforms various ombudsman provisions within the existing Act.

Section 3 of the new law requires the Director of the Office of Long-Term Care Ombudsman Programs within HHS' Administration on Aging to collect and analyze best practices. In addition, Section 8 of the bill revises requirements for State Long-Term Care Ombudsmen, including: (1) requiring those ombudsmen to assist any resident of a long-term care facility, regardless of age; (2) making those ombudsmen responsible for the management, including the fiscal management, of their offices; (3) requiring them, when feasible, to continue to perform certain functions on

behalf of residents transitioning from a long-term care facility to a home care setting; and (4) requiring the State Ombudsman and any designated Local Ombudsmen entities to identify, investigate, and resolve complaints of any residents of a long-term care facility, including those residents with diminished decision-making capacity or no legal representation.

On January 26, 2015, the ABA sent a letter to Sens. Lamar Alexander and Patty Murray (D-WA) expressing support for the overall legislation and "applaud[ing] the provisions of the bill focusing on the independence and avoidance of conflicts for long-term care ombudsmen…[as] these characteristics are essential to an effective ombudsman program."

b. EPA Municipal Ombudsman

On April 28, 2016, the Senate Environment and Public Works Committee approved bipartisan legislation, S. 2848, which would reauthorize the Water Resources Development Act and authorize 25 Army Corps of Engineers water infrastructure projects in 17 states. Section 7203 of the bill would establish 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. S. 2848, cosponsored by Senate Environment and Public Works Chairman James Inhofe (R-OK) and Ranking Member Barbara Boxer (D-CA), now moves to the full Senate for further consideration, and Senate leaders expect the bill to pass with strong bipartisan support.

c. Veterans Choice Program Ombudsman

Congress is also considering legislation that would create a new Choice Program Ombudsman within the Department of Veterans Affairs' Office of Inspector General. S. 2871, introduced by Sen. John Thune (R-SD) on April 28, 2016, would instruct 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 would also be 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 has been scheduled.

d. HHS Ombudsperson on Women's Health

On September 30, 2015, Rep. Suzanne Bonamici (D-OR) introduced H.R. 3652, which is 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 establish 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 last year 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, no further action has been scheduled on either measure.

e. Medicare and Medicaid Ombudsman

H.R. 2325, introduced by Rep. Susan Brooks (R-IN) on May 14, 2015, would amend 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 be 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 has been scheduled on the measure.

f. Federal Air Marshall Service Ombudsman

H.R. 81, introduced by Rep. Sheila Jackson Lee (D-TX) last year, would increase the number of federal air marshals for inbound international flights by at least 1,750 over 2011 levels, expand their training, and establish an Office of the Ombudsman in the Federal Air Marshall Service. The Ombudsman would be 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, though no further action has been scheduled on the bill. Rep. Jackson Lee introduced similar legislation, H.R. 64, during the 113th Congress, but that measure failed to advance.

g. TSA Ombudsman

H.R. 80, the "Transportation Security Administration Ombudsman Act," would establish 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, would also require 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.

H.R. 80 was referred to the House Homeland Security Committee, though no further action has been scheduled. Similar legislation, H.R. 84, was introduced in the 113th Congress by Rep. Jackson Lee but failed to advance.

h. VHA Management and Accountability Ombudsman

Congress is also considering several bills that would create two separate ombudsmen within the Veterans Health Administration ("VHA") designed to protect both patients and VHA employees.

H.R. 502, introduced last year by Rep. Derek Kilmer (D-WA), would establish a five-year pilot program designed to improve the management and accountability of the VHA. Section 4 of the bill would also create 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 create 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 require each VA medical facility to have a local ombudsman, to be trained by the VHA Ombudsman, who would be responsible for resolving their patients' complaints.

Although H.R. 502 was referred to the House Veterans' Affairs and Budget Committees and H.R. 3978 was referred to the House Veterans' Affairs Committee, no further action has been scheduled on either measure.

i. FAA Community Ombudsman

H.R. 3965, introduced by Rep. Ruben Gallego (D-AZ), and S. 2761, introduced by Sen. Elizabeth Warren (D-MA), would require 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 also require the Administrator to appoint an FAA Community Ombudsman for each region of the FAA. The Ombudsman would act as a liaison between affected communities and the Administrator regarding such problems as aircraft noise, pollution, and safety. In addition, the Ombudsman 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 has been scheduled on either 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.

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.