

Lawmakers Seeking to Ban “Unfair” Arbitration Agreements

by Bettina Eckerle

Lawmakers, led by Sen. Al Franken, D-Minn., are calling on SEC Chairmen Mary Jo White, to ban what they call “unfair” arbitration agreements. They have specifically asked the SEC to use its authority under Section 921 of the Dodd-Frank Act to prohibit mandatory arbitration clauses in broker-investor contracts.

“Minnesotans planning for retirement or saving for their children’s college funds rely on the advice of their brokers to help them make smart investment choices,” Franken said in a letter signed by 36 members of the Senate and House. “However, when brokers engage in fraudulent or illegal behaviors that lose investors’ savings, mandatory arbitration clauses limit investors’ ability to protect their rights under the law.”

The letter also cited FINRA’s recent enforcement action against Charles Schwab as an example for why such action is urgently needed. As we discussed in a [prior post](#), the firm’s customer agreements came under fire for including a mandatory class-action waiver. FINRA’s enforcement division alleged that FINRA’s rules prohibit class-action waivers by brokerage and investment banking firms. However, an arbitration panel dismissed part of the complaint, ruling that while Schwab’s contract did in fact violate FINRA rules, FINRA may not enforce them because they are in conflict with the Federal Arbitration Act.

Although the SEC has not yet officially responded to the letter, lawmakers appear to have at least some support from the agency. SEC Commissioner Luis Aguilar stated in a recent speech that he does not support mandatory arbitration as “it denies investors the right to choose between arbitration and the traditional judicial process at the very beginning of their relationship with their brokers and advisors.”

As always, if you have questions or comments, please call, [e-mail](#) or tweet me [@NYBusinessLaws](#).

Eckerle Law offers legal advice in a variety of transactional and regulatory matters and serves companies’ plenary business law needs. Its founder, Bettina Eckerle, is a veteran of Debevoise & Plimpton and Wachtell, Lipton, Rosen & Katz. She also served as the General Counsel of two companies en route to IPO. Please visit the [Eckerle Law website](#) for more details.