

March 2, 2016

Dear Representative,

The undersigned organizations urge you to oppose HR 3798, the Due Process Restoration Act of 2015.¹ Contrary to its sponsor’s stated goal of “restor[ing] due process rights for all Americans,”² this bill would reinforce a two-tiered justice system. HR 3798 would make it more difficult for the Securities and Exchange Commission (SEC) to hold companies accountable when they break the law – even as those same firms frequently deny basic due process to their investors and customers through forced arbitration.

The aim of this legislation is clear: to extend special legal protections to those charged with securities law violations by the SEC. Like other federal agencies, the SEC has authority to bring administrative proceedings against entities that violate federal securities law, in addition to civil actions. HR 3798 would allow respondents SEC administrative proceedings to unilaterally terminate those proceedings, leaving the SEC to either re-file in federal court or drop the charges. It would also significantly raise the burden of proof in administrative proceedings to require the SEC show clear and convincing evidence that the company violated the law – a significantly greater burden than the civil standard of a preponderance of the evidence.

These special protections are unnecessary. Respondents in SEC hearings enjoy robust opportunities for discovery,³ a public hearing,⁴ and a decision made by a neutral administrative law judge with subject matter experience.⁵ When respondents are found to have violated the law, they are entitled to two full appeal processes, including a review in federal court.⁶

The extensive protections that already exist for respondents in SEC hearings stand in stark contrast to the efforts by many of these same companies to deprive their own investors and customers of legal protection. Many SEC-regulated companies that would benefit from this bill

¹ Americans for Financial Reform is an unprecedented coalition of more than 200 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups. A list of coalition members is available at <http://ourfinancialsecurity.org/about/our-coalition/>

² Press Release: Garrett Introduces Bill to Restore Due Process Rights for All Americans, (Oct. 22, 2015), <https://garrett.house.gov/media-center/press-releases/garrett-introduces-bill-to-restore-due-process-rights-for-all-americans>.

³ 17 C.F.R. §§ 201.230-201.234.

⁴ 17 C.F.R. § 201.301.

⁵ See, e.g., 5 U.S.C. §§ 554(d), 3501, 7521.

⁶ 17 C.F.R. § 201.410; 15 U.S.C. § 78y; 17 C.F.R. § 201.490; *Bebo v. Securities & Exchange Comm’n*, 799 F.3d 765 (7th Cir. 2015).

use forced arbitration in their standard form contracts – fine print used to block harmed parties from vindicating their rights in court, no matter how egregious the wrong. It is astoundingly hypocritical to seek still further extraordinary legal protections for companies accused of wrongdoing while the same companies refuse to grant their own customers the basic legal right to access the courts.

Unlike SEC administrative proceedings, forced arbitration lacks many of the fundamental guarantees of fairness that a court provides. Arbitrators do not have to be trained in the law. Decisions are generally not public and the right to appeal a bad decision is extremely limited.⁷ In the words of U.S. Supreme Court Justice Elena Kagan, arbitration is “a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”⁸

An amendment offered by Representatives Ellison (D-MN) and Lynch (D-MA) highlights this hypocrisy by rendering HR 3798’s special protections inapplicable to respondents that use forced arbitration against consumers and investors. We strongly urge members to support this amendment, which stands against stacking the deck even further in favor of financial institutions when they are charged with violating federal securities laws.

HR 3798 widens the gulf between everyday Americans and monied interests. To truly restore due process rights for all Americans, members should oppose HR 3798, and also, as we have previously urged, support legislation restricting the use of forced arbitration, including HR 1098, the Investor Choice Act, and HR 2087, the Arbitration Fairness Act.

Thank you for your consideration. For more information please contact Amanda Werner, Arbitration Campaign Manager at AFR and Public Citizen, at awerner@ourfinancialsecurity.org or 202-454-5119; or Sonia Gill, Civil Justice Counsel at Public Citizen, at sgill@citizen.org or 202-454-5135.

Sincerely,

Americans for Financial Reform
Public Citizen
Center for Justice and Democracy
Consumer Action
Consumers for Auto Reliability and Safety
Main Street Alliance
National Association of Consumer Advocates

⁷ See *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 (2013) (“courts may vacate an arbitrator's decision ‘only in very unusual circumstances’”).

⁸ *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2230 (2013) (Kagan, J., dissenting, in a 5-3 decision).