

From: [Suzanne Summerlin](#)
To: [Register](#)
Cc: [Anna Davis](#)
Subject: [EXTERNAL] Re: Requests for Arbitration Panel, RIN 3076-AA31
Date: Monday, September 28, 2026 9:34:46 AM
Attachments: [Final FWA FMCS Comment RIN 3076-AA31 Summerlin \(1\).pdf](#)

Apologies, the attachment is now attached.

From: Suzanne Summerlin <suzanne@summerlinlabor.com>
Date: Monday, September 28, 2026 at 9:32 AM
To: register@fmcs.gov <register@fmcs.gov>
Cc: Anna Davis <adavis@fmcs.gov>
Subject: Requests for Arbitration Panel, RIN 3076-AA31

Attached please find the comment of the Federal Workers Alliance and the twenty-three undersigned labor organizations listed at Appendix A, submitted in response to the interim final rule, Requests for Arbitration Panels, RIN 3076-AA31, 91 Fed. Reg. 55473 (Aug. 28, 2026). The comment is timely filed.

The undersigned organizations collectively represent over 550,000 federal and postal workers. Many of the collective bargaining agreements they administer designate FMCS as the sole source of arbitrators for grievance arbitration. The comment addresses the Rule's effect on those agreements, the statutory authorities the Rule invokes, and four matters in which FMCS applied the practice the Rule would codify.

I write separately to note one procedural matter addressed at Section IX.G. The August 28 republication moved submission of comments from regulations.gov to this office. Because comments no longer reach a government-wide docket where submissions post automatically as received, I respectfully request written confirmation of receipt, and confirmation that this comment will be posted to the FMCS public website along with the date of posting.

Please direct any questions regarding this submission to me.

Sincerely,

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FEDERAL WORKERS ALLIANCE
COLLECTIVELY REPRESENTING OVER 550,000 FEDERAL AND POSTAL WORKERS

COMMENT ON INTERIM FINAL RULE

Requests for Arbitration Panels, 91 Fed. Reg. 55473 (Aug. 28, 2026)
RIN 3076-AA31
29 C.F.R. Part 1404

Submitted by the Federal Workers Alliance
and the undersigned labor organizations listed at Appendix A

September 28, 2026

I. Introduction

FMCS should withdraw this interim final rule (the “Rule”).

Congress required federal agencies and unions to negotiate grievance procedures ending in binding arbitration, and gave either party the right to invoke that arbitration alone. It assigned the question whether a particular grievance is arbitrable to the arbitrator. It gave FMCS no role that allows it to intervene or disrupt that process. What FMCS has is a roster of private arbitrators, offered as a fee-based service, from which it furnishes names on request. For forty-seven years FMCS has furnished those names to whichever party asked.

The agency changed its behavior earlier this year and has since attempted to codify that change in this Rule. The Rule permits FMCS to examine the parties’ collective bargaining agreement, decide whether the arbitration may lawfully proceed, and withhold the panel if it concludes otherwise, with no opportunity for review.

The justification does not hold. FMCS reaches past Chapter 71 to Taft-Hartley, a private sector statute that excludes the United States as an employer, and to the Administrative Dispute Resolution Act (ADRA), which governs an agency’s discretionary use of alternative procedures in its own administrative programs. It cites two sovereign immunity decisions about whether the

United States may be sued for money. It cites no decision of the Federal Labor Relations Authority, no court of appeals decision construing Section 7121, and no arbitral authority. FMCS has given three different accounts of where its own authority over the Roster comes from, in three separate documents, in three years.

The Rule, as written and currently administered, conflicts with Chapter 71 and the collectively bargained agreements executed under it. Where an agreement names FMCS as the only source of arbitrators, the parties are captive to a decision by a non-party to their contract. Contractual deadlines run whether or not FMCS acts. In cases involving back pay, interest compounds daily from the date of the personnel action and is paid by the agency out of its budget. The Rule seats a mediation agency in the position of adjudicator on the issue of arbitrability.

Finally, the Rule is pretext. FMCS changed how it enacts its policies and procedures in early April 2026, before any published policy existed, in matters no Executive Order reaches, applying criteria it has never published. Only afterward did it issue a Rule, effective immediately and without notice and comment, whose codified text contains no Executive Order trigger and is broad enough to authorize everything it had already done.

One procedural note: This Rule was first published on August 4, 2026, with comments due September 3. 91 Fed. Reg. 49273. On August 27, the regulations.gov docket displayed as closed to comments, six days early. On August 28, FMCS republished the Rule in full, attributed the republication to “a technical error,” and extended the comment period to September 28. 91 Fed. Reg. 55473. The Rule did not change. What changed is that comments no longer go to a government-wide public docket.

II. Interest of the Commenters

The Federal Workers Alliance (FWA) is a coalition of federal sector labor organizations whose affiliates represent employees throughout the executive branch. The undersigned organizations negotiate and administer collective bargaining agreements under 5 U.S.C. Chapter 71. Many of those agreements designate FMCS as the sole source of arbitrators for grievance arbitration proceedings. The ability of the undersigned to enforce the agreements they have bargained, and the ability of the employees they represent to obtain a hearing on a grievance, therefore depend on FMCS performing the ministerial function this Rule abandons.

This comment was prepared by Suzanne Summerlin, legal co-chair of the FWA Lawyers Committee, who submits it on behalf of the undersigned. Ms. Summerlin has represented labor organizations in federal sector labor and employment matters since 2012 and practices before the Federal Labor Relations Authority (the Authority) and FMCS-listed arbitrators. In 2023, she was nominated to serve as General Counsel of the Federal Labor Relations Authority and her nomination was favorably reported by the Senate Committee on Homeland Security and Governmental Affairs, but was not reached for a floor vote before the end of that Congress. Practitioners representing FWA affiliates have reported difficulties obtaining arbitration panels to the Lawyers Committee since the spring of 2026.

The matters described in Section IX are set out either on Ms. Summerlin's personal knowledge or as reported to her by other practitioners, as indicated. The parties to those matters have authorized the description of FMCS's communications. The identities of the parties and the case numbers are omitted. FMCS can locate in its records every matter described here. The undersigned will provide the underlying correspondence to stakeholders on request.

III. How Federal Sector Grievance Arbitration Works

Congress did not leave federal sector grievance arbitration to the parties' discretion. It required that every collective bargaining agreement contain a negotiated grievance procedure, that the procedure provide for the settlement of grievances "including questions of arbitrability," and that any grievance not satisfactorily settled be subject to binding arbitration. 5 U.S.C. 7121(a)(1), (b)(1)(C)(iii). For some disputes covered by an agreement, that procedure is "the exclusive administrative procedure[] for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1).

Congress also made arbitration invocable by one party acting alone. Binding arbitration "may be invoked by either the exclusive representative or the agency." 5 U.S.C. 7121(b)(1)(C)(iii). The reason is apparent from the structure. A procedure that required both parties to agree at each step would be defeated at will by whichever party preferred that no hearing occur. The party resisting arbitration is ordinarily the party accused of violating the agreement. Congress made arbitration mandatory and then removed the ability of a resisting party to prevent it. Because if not, the procedure Congress required would exist on paper and stop functioning the moment it was invoked.

Congress then said who decides whether a particular grievance is arbitrable. That question belongs to the arbitrator the parties select. Section 7121(a)(1) requires the procedure to address "questions of arbitrability." Additionally, collective bargaining agreements routinely include express language preserving questions of arbitrability to the arbitrator.

FMCS's role in this scheme is ministerial. It maintains a roster of private arbitrators and, on request and for a fee, furnishes a randomly selected panel of seven names. The arbitrators are not FMCS employees. They are "private citizens, not employees of FMCS," who "are paid by

the parties for hearing and deciding the issues submitted under a collective bargaining agreement.” Request for Arbitration Panel, 90 Fed. Reg. 21481 (May 20, 2025). FMCS is present in a Chapter 71 arbitration because the parties name it in their agreement, or because they otherwise chose to use its Roster service. It is not the adjudicator. It is not the reviewing body. It is not a party.

FMCS has understood its function this way for forty-seven years. Its regulations have provided that a unilateral panel request will be honored since 1979, in materially identical terms in 1979, 1997, and 2019. 44 Fed. Reg. 13008, 13009 (Mar. 9, 1979); 62 Fed. Reg. 34170, 34173 (June 25, 1997); 84 Fed. Reg. 16205, 16208 (Apr. 18, 2019). Each version added that issuing a panel signifies no position by FMCS on the status of the arbitration agreement, the arbitrability of the dispute, or the terms of the parties’ contract.

IV. The Rule Takes Arbitrability From the Arbitrator

The Rule authorizes FMCS to conduct what it calls a “limited threshold inquiry” into whether providing a panel “would be inconsistent with applicable law, a court order, or FMCS’s statutory or regulatory authority.” 29 C.F.R. 1404.9(b)(3). In conducting that inquiry FMCS may demand from the parties “the agreement, statutory provision, regulation, court order, written authorization, or other information necessary” to decide. FMCS may then issue the panel, decline, hold the request in abeyance, or “take other administratively appropriate action.”

The Rule permits FMCS to read the parties’ collective bargaining agreement, consider whether the law permits this arbitration to proceed, and decide whether an arbitrator may be appointed to adjudicate the grievance. That is a determination of arbitrability. It is the determination Congress assigned to the negotiated procedure, and that the parties assigned to their arbitrator.

FMCS anticipates this objection and tries to answer it by disclaimer. The Rule provides that FMCS's issuance of a panel, refusal to issue one, or decision to hold a request in abeyance "does not constitute a decision on the validity of any collective-bargaining agreement, the merits of any grievance, the arbitrability of any dispute, or the rights or obligations of the parties under any agreement or law." 29 C.F.R. 1404.9(b)(4).

Where FMCS declines a request, the negotiated grievance procedure stops cold. The arbitration does not move forward. The party seeking a hearing does not get one, and the reason is that FMCS examined the agreement and the law and concluded that it should not.

This disclaimer is also in tension with the provision immediately preceding it. Section 1404.9(b)(3) authorizes FMCS to demand the parties' agreement in order to decide whether it may serve them. Section 1404.9(b)(4) states that whatever FMCS decides is not a decision about that agreement. Both cannot be true. Either the agreement bears on the outcome, in which case FMCS is construing it, or it does not, in which case there is no reason to demand it.

Instructively, FMCS has maintained the opposite position for decades, and still does in its regulations. Section 1404.10 has long provided that the Office of Arbitration "will not decide the merits of a claim by either party that a dispute is not subject to arbitration." The Rule preserves that sentence and appends a carveout permitting the very inquiry the sentence forbids. 29 C.F.R. 1404.10.

The Rule's own account of alternatives confirms the point. FMCS states that it "considered adopting a rule under which FMCS would decide arbitrability disputes before issuing a panel, but rejected that alternative because FMCS's role is administrative and facilitative." 91 Fed. Reg. 55476. FMCS was right to reject it. But the rejected alternative is what the record in Section IX shows FMCS doing. In one matter FMCS read a collective bargaining

agreement, found it silent on what should occur when one party refuses to participate in selection, and withheld the panel on that basis. In another, FMCS conditioned processing on confirmation of a bargaining unit composition question under 5 U.S.C. 7112(b)(6), which lies within the exclusive jurisdiction of the Authority and which neither party had raised. Neither matter involved an Executive Order.

Congress assigned these questions carefully, and it did not assign any of them to FMCS. Arbitrability goes to the arbitrator under Section 7121(a)(1) and under the parties' agreement. Unit composition goes to the Authority under Section 7112. Review of an award goes to the Authority under Section 7122. An unfair labor practice allegation that a party refused to arbitrate goes to the Authority under Section 7116. FMCS appears in none of these provisions. The Rule purports to insert it into all of them.

V. The Rule Rests on Statutes That Do Not Apply

Having claimed a power Chapter 71 does not give it, FMCS looks elsewhere for authority. It looks in two places, and neither grants FMCS the ability to enact this Rule.

A. Taft-Hartley does not reach federal agencies as employers.

Congress created FMCS in 1947 as part of the Labor Management Relations Act, commonly known as Taft-Hartley. 29 U.S.C. 172. It gave the Service one statutory duty: "in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation." 29 U.S.C. 173(a).

Section 501(3) of Taft-Hartley provides that "employer," "employee," "commerce," and "labor disputes" carry the same meaning in the Act as in the National Labor Relations Act, 29 U.S.C. 142(3), and the NLRA provides that "employer" "shall not include the United States or

any wholly owned Government corporation.” 29 U.S.C. 152(2). Congress enacted that framework in 1947, thirty-one years before it established the present federal sector framework in Title VII of the Civil Service Reform Act of 1978.

What Taft-Hartley says about arbitration appears in its declaration of policy: settlement “may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration.” 29 U.S.C. 171(b). That is authority to make a facility available, not withhold it.

Chapter 71 does assign FMCS a federal sector role, expressly and in one place. Section 7119(a) directs FMCS to “provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses.” That is mediation, which is what FMCS does, and it concerns bargaining impasses rather than grievances.

The contrast with grievance arbitration is instructive. For interest arbitration of a bargaining impasse, Congress required the third-party approval of the Federal Service Impasses Panel (FSIP): the parties “may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.” 5 U.S.C. 7119(b)(2). Congress plainly knew how to condition an arbitration on a third party’s approval. Where it chose to do so, it gave that approval to FSIP. For grievance arbitration it conditioned nothing.

B. ADRA does not reach this dispute.

The Rule’s consent requirement comes from the Administrative Dispute Resolution Act (ADRA). The preamble states that FMCS’s services are “subject to provisions in 5 U.S.C. 572(a) and 572(c) making clear that alternative dispute-resolution procedures are voluntary and require mutual consent.” 91 Fed. Reg. 55474.

The bridge FMCS uses is Section 203(f) of Taft-Hartley, which Congress added in 1990 as part of ADRA. It provides that FMCS “may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5,” and describes those functions as assisting parties to disputes “related to administrative programs,” training persons in alternative dispute resolution, and “furnishing officers and employees of the Service to act as neutrals.” 29 U.S.C. 173(f). That provision grants FMCS authority to deploy *its own staff* as neutrals for *other federal agencies*. It does not describe the Roster of private labor arbitrators furnished to parties for a fee pursuant to a negotiated grievance procedure.

The ADRA reaches disputes arising in “administrative programs,” which Section 571(3) defines as federal functions involving “the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation.” A grievance between an agency and the exclusive representative of that agency’s own employees, arising under an agreement Congress required the agency to negotiate, is not such a program.¹

C. FMCS fails to cite any applicable authority for the Rule.

FMCS’s own account of its authority is not consistent. Part 1404 states that it issues “under Title II of the Labor Management Relations Act of 1947.” 29 C.F.R. 1404.1. FMCS’s Paperwork Reduction Act notices identify 29 U.S.C. 171(b), the Taft-Hartley declaration of policy, as the basis for the Roster. Its 2023 notice increasing arbitration fees asserts instead that

¹Examples of such programs include the Social Security Administration’s disability benefits adjudication under the Social Security Act (42 U.S.C. 405(b)), the Environmental Protection Agency’s enforcement and cost-recovery negotiations for Superfund cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9622(e)), and OSHA’s whistleblower retaliation investigations against private employers under Section 11(c) of the Occupational Safety and Health Act (29 U.S.C. 660(c)).

“29 U.S.C. 173(f) authorizes FMCS to establish and collect fees for arbitration services.”² Section 173(f) says nothing about fees. Neither does any other subsection of Section 173. The only reference to arbitrators anywhere in Section 173(f) is a direction that FMCS consult with the interagency alternative dispute resolution body “in maintaining rosters of neutrals and arbitrators,” and then only “to carry out the services authorized in this subsection.” That is a consultation requirement attached to the ADRA program.

Neither answer supports the Rule. If the Roster is a Title II service resting on Section 171(b), as Part 1404 and the Paperwork Reduction Act notices both say, then the ADRA never enters the analysis. If the Roster instead rests on Section 173(f), then whatever FMCS does under that provision is an ADRA service, and the consent premise of Section 572 reaches only disputes related to administrative programs as Section 571(3) defines them. A grievance under a negotiated grievance procedure is not one.

Either way, ADRA has no work to do here. Citation to it by the FMCS is irrational. ADRA governs an agency’s discretionary election of alternative procedures in its own administrative programs. Congress required these parties to negotiate a grievance procedure and required that procedure to end in binding arbitration. Nothing about that is discretionary, and nothing about it is an administrative program.

D. Consent under Chapter 71 is given at execution of the CBA.

The Rule’s preamble notes that Section 7121 “separately governs negotiated grievance procedures and provides that unresolved grievances under such procedures are subject to binding arbitration invoked by either the exclusive representative or the agency.” 91 Fed. Reg. 55474. Having said so, it applies the ADRA consent premise anyway, and offers no reason why a

²Both this Rule and the 2023 fee notice were signed by the same FMCS General Counsel, Anna Davis.

voluntariness principle drawn from a statute governing an agency's discretionary election should govern a statute that requires the procedure, requires that it end in binding arbitration, and permits either party to invoke it alone.

Consent is not missing from Chapter 71. It is the outcome of the good faith bargaining that ends in the execution of a collectively bargained agreement required by Congress. Section 7121(b)(1)(C)(iii) lets either party invoke arbitration alone precisely so that neither can block the other. FMCS has taken the deal the parties consensually bargained for away and allows the objecting agency a veto Congress expressly withheld.

E. The sovereign immunity rationale answers itself.

The preamble asserts that “the doctrine of sovereign immunity requires statutory authorization before an agency can engage in binding arbitration,” and cites two decisions concerning whether the United States may be sued absent a waiver of immunity. It then identifies the required authorization in a footnote as 5 U.S.C. 572 and 5 U.S.C. 7121. 91 Fed. Reg. 55475 & n.2.

Section 7121 is therefore, on FMCS's own account, the congressional authorization sovereign immunity requires, and it supports every arbitration conducted under a negotiated grievance procedure. The preamble answers its own objection and does not acknowledge having done so. Nor does it explain how immunity doctrine bears on a contractual procedure before a neutral the parties jointly selected, or identify the constitutional violation referenced in its closing assertion that “FMCS cannot facilitate constitutional violations.”

F. The Rule cites no authority from the field it regulates.

The Rule identifies no decision of the Authority, no decision of any court of appeals construing Section 7121, and no arbitral authority. FMCS did not amend the authority citation for

Part 1404, which continues to read 29 U.S.C. 172 and 29 U.S.C. 173 et seq. And it left untouched Part 1425, where its Civil Service Reform Act functions are separately codified.

VI. The Rule Compromises FMCS's Neutrality

FMCS is a mediation agency. Everything it does depends on its neutrality. Parties bring it their disputes for that reason. It has no enforcement power, no adjudicative power, and nothing to offer except the confidence of the people who use it.

The Rule spends that. It seats FMCS as the party who decides whether one side gets a hearing at all. And in every instance documented in Section IX, FMCS has decided against the party seeking arbitration and in favor of the party resisting it. In one matter, FMCS did not wait to be asked. It contacted the responding agency of its own accord and invited the agency to object when there's no indication it would have otherwise said anything.

The damage is not confined to federal-sector arbitration. A union that has watched FMCS withhold a panel at an agency's request, under criteria FMCS would not disclose, in communications FMCS would not sign, has reason to ask what it is getting when FMCS assigns a mediator to its next negotiation. Congress built this agency to be trusted by both sides of the table. Trust of that kind is difficult to build and simple to lose, and a regulation that makes FMCS a gatekeeper for one side is one quick way to lose it.

FMCS gains nothing from this, and has everything to lose. Under the Rule it acquires the burden of resolving contested legal questions it has no institutional capacity to resolve, no record on which to resolve them, and no expertise in the statute that governs them. The fee-paying customers that the FMCS relies upon for revenue will stop using its services if they cannot be relied upon to be delivered consistently and neutrally.

VII. What the Rule Costs the Parties and the Public

The Rule treats abeyance as a neutral holding position. Its cost analysis states that parties “remain free to pursue any other procedure or remedy available under law or their agreement,” and the reliance discussion repeats that parties may proceed before the Authority, a court, or “another tribunal with jurisdiction.” 91 Fed. Reg. 55476. In a large share of federal sector bargaining relationships, that is simply not accurate.

A. The parties are captive to a non-party.

The substantial majority of collective bargaining agreements in the federal sector require the parties to obtain the arbitrator from FMCS, and allow no alternative source. Substituting a different provider at this juncture would require the mutual agreement of parties that are already engaged in a dispute, with one party refusing to participate in the arbitration at all.

The consequence is that the parties become captive to the decision of this non-party. FMCS did not negotiate the agreement. It is not bound by it. It bears no consequence if the agreement is breached, and it answers to neither side. Under Chapter 71, that agreement is the product of the good faith bargaining Congress requires. Yet under this Rule, whether the parties’ bargain operates turns on a determination FMCS makes unilaterally, on a record of its own choosing, subject to no standard the Rule specifies and no review the Rule provides.

B. The parties pay in advance.

In 2023, FMCS increased the fee for an online panel request from \$35 to \$100. Section 1404.9(g), which the Rule does not amend, requires that payment “be received with the request for services before the service is delivered.” A party therefore pays before it learns whether FMCS will process the arbitrator selection. It is only after the party pays \$100 and gets a panel

that the Rule inserts itself and says the FMCS may demand information, decline, or hold the matter in abeyance indefinitely.

Under its April 2026 guidance, FMCS offered parties whose requests were held in abeyance a refund or an account credit. That assurance, like the assurance regarding timeliness, does not appear in the codified text. The Rule says nothing about refunds.³

C. For some grievances there is no other forum.

For some disputes the negotiated grievance procedure is the exclusive course of redress. Section 7121(a)(1) makes it “the exclusive administrative procedure[] for resolving grievances which fall within its coverage,” subject to narrow exceptions in subsections (d), (e), and (g).⁴ Section 7512 lists the adverse actions it covers and then provides that the subchapter “does not apply to . . . a reduction-in-force action under section 3502 of this title.” 5 U.S.C. 7512(B).

The MSPB has codified the consequence. Its regulations provide that “[f]or an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board,” and the exceptions it identifies are discrimination under Section 2302(b)(1), actions under Section 4303, and adverse actions under Section 7512. 5 C.F.R. 1201.3(c)(1). Reductions in force are not among them.

So where a union has bargained RIF procedures into its agreement, a bargaining unit employee separated in a RIF has one administrative forum. The arbitrator the parties select under their agreement is the only place that grievance can be administratively resolved.

³What the Rule does say about fees is that it “does not alter the fee schedule in appendix A to part 1404.” On information and belief, there is no appendix A to part 1404. FMCS rescinded the appendix containing its fee schedule in 2022.

⁴Subsection (e) permits an employee to elect between the Merit Systems Protection Board and the negotiated procedure only for matters covered by Sections 4303 and 7512. A reduction in force is neither.

D. FMCS cannot pause contractual or statutory deadlines.

In some instances, abeyance is fatal to the grievance. Agreements routinely impose hard time limits for requesting a panel and completing selection, and those limits frequently carry an express forfeiture consequence. In Matter A below, the agreement provides that failure to comply with the panel request timeline results in the arbitration proceeding being withdrawn with no right to refile.

Those deadlines run whether or not FMCS acts, and FMCS cannot bind an arbitrator or the Authority on questions of timeliness. FMCS issued guidance in April 2026 that stated timeliness would be preserved during abeyance, without any legal support for that assurance. Regardless, the codified Rule contains no such provision. The FMCS has no power to bind arbitrators or the FLRA to its determinations of timeliness.

E. Delay is expensive, and charged to agency budgets

More often the delay does not end a case. It does, however, make the case more expensive, and the additional expenses increase the total cost borne by all parties, including agencies and, ultimately, taxpayers. The Rule fails to acknowledge this.

Under the Back Pay Act, an employee who prevails on a claim for pay, allowances, or differentials is entitled to interest running from “... the period beginning on the effective date of the withdrawal or reduction involved,” at the rate in effect under 26 U.S.C. 6621(a)(1), and it “shall be compounded daily.” 5 U.S.C. 5596(b)(2)(B)(i)-(iii); see 5 C.F.R. 550.806. Interest does not begin at the issuance of an award. It begins at the personnel action and accrues every day until payment, and it is paid out of the agency’s own funds. 5 U.S.C. 5596(b)(2)(C).

A grievance implicating the Back Pay Act, and many do, does not sit still while it waits. Where the grievant would ultimately prevail, each day of delay adds compounding interest to a

liability the government will pay in the end, and adds to the fee exposure that accompanies protracted proceedings. Delay of this kind is not cost-neutral. It is cost-generating, and the cost is borne by the taxpayer, along with the attorney time and member resources the parties spend litigating the delay itself.

The Rule's Expected Impact discussion accordingly has the direction of its effect backwards. It concludes that the Rule imposes no significant costs because parties retain other remedies. 91 Fed. Reg. 55476. It does not consider that the Rule delays resolution in a system where delay is priced by statute, compounds daily, and is charged to the agency's budget. It does not mention contractual deadlines, and it does not mention the Back Pay Act at all.

VIII. The Rule Overrides a Statutory Election and Directs Parties to a Channel That Has Historically Not Functioned

Congress anticipated that the same conduct might be both a contract violation and an unfair labor practice, and it decided who chooses between the two forums. Section 7116(d) provides that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." The election belongs to the aggrieved party.

The Rule takes it away. FMCS is not merely declining to provide a service. It is reallocating a choice Congress assigned to someone else. And for exclusive subjects like the reduction-in-force grievances described above, there is no choice to reallocate. Section 7116(d) governs issues that can be raised as unfair labor practices, and a claim that an agency violated bargained RIF procedures is a contract claim rather than a statutory one. Where Section 7121(a)(1) already makes the negotiated procedure exclusive, there is no second forum to be redirected to.

The reliance discussion states that allegations a party failed to comply with a CBA arbitration provision “may be presented to the Federal Labor Relations Authority as an unfair labor practice pursuant to 5 U.S.C. 7116.” 91 Fed. Reg. 55476. Two things follow. First, that is an acknowledgment that the refusal FMCS now gives effect to is itself an alleged unfair labor practice, which the Rule resolves in the refusing party’s favor. Second, FMCS made no inquiry into whether the channel it recommends is reliably available.

For the better part of the past decade it has not been. Only the FLRA’s General Counsel may issue an unfair labor practice complaint. 5 U.S.C. 7104(f)(2)(B), 7118(a)(1). The Authority had no Senate-confirmed General Counsel from January 2017 until July 2026. An acting official served periodically, but the position was entirely vacant for the majority of the past decade. The Authority’s own annual performance report for fiscal year 2019 states that absent a General Counsel, no unfair labor practice complaints and no ULP appeal decisions issued. Its fiscal year 2022 report recorded a backlog of 494 complaint cases and 386 appeals awaiting action.

Practitioners adapted in the only way available. Unions moved away from the statutory channel and raised alleged unfair labor practices through the negotiated grievance procedure instead. A General Counsel has recently been confirmed and has inherited a substantial backlog. The point is not that the statutory channel will never work. It is that FMCS offered that channel as the answer to the objection without examining it, at a moment when the negotiated procedure has been the only available route for almost ten years.

IX. FMCS’ Actions Do Not Support the Rule’s State Rationale

The preamble attributes the Rule to Executive Orders 14251 and 14343 and to the resulting likelihood that FMCS will receive panel requests where a party asserts that participation is prohibited. 91 Fed. Reg. 55474. The text of the Rule is far wider. It contains no

Executive Order trigger, no agency-consent requirement, and no limiting principle. It authorizes a threshold inquiry wherever a request might be “inconsistent with applicable law, a court order, or FMCS’s statutory or regulatory authority,” and permits FMCS to demand whatever information it considers necessary.

The scope of the Rule does not match the explanation offered for it. It does match what FMCS had already been doing for months before the Rule issued.

The four matters below, two drawn from the files of the preparer of this comment and two reported by practitioners representing affected labor organizations, all arising over the course of this past year, are the basis for that statement.

A. Matter A.

The union invoked arbitration in December 2025. Under the parties’ agreement, the union then had six months to request an FMCS panel. Failure to meet that deadline would result in the arbitration being withdrawn with no right to refile.

On April 6, 2026, with roughly two months remaining, the union used the FMCS portal to pay \$100 and generate a panel of arbitrators. The agency declined to participate in selection of the arbitrator, citing an Executive Order. The union selected unilaterally under an express provision of the CBA permitting it to do so.

On April 7, 2026, before any published policy existed, the FMCS Office of General Counsel raised compliance on its own initiative and conditioned appointment of the arbitrator on the union’s submission of contrary legal authority. FMCS put the burden on the union to justify a selection its CBA already entitled it to. The union submitted that authority on April 8. FMCS acknowledged receipt and stated it was reviewing on April 14. An internal policy memorandum issued on April 22.

On April 23, FMCS' substantive response to the union's submission consisted of a link to that memorandum. The policy postdates the conduct by more than two weeks, and the memorandum was written after the union's submission and offered in place of a response to it.

On April 24, 2026, FMCS stated that "after FMCS has processed the panel request, FMCS will leave it to the parties as to how best to proceed." The FMCS never ruled on the objection it had raised and demanded briefing on.

B. Matter B.

On February 11, 2026, a union requested grievance mediation. FMCS responded the next day that it would require a joint request affirming that both parties were agreeable. The parties supplied one. Mediation was held April 1, 2026 and did not resolve the dispute. The parties then jointly requested a panel, and on April 13, 2026 they jointly notified FMCS that they had mutually selected an arbitrator from it and asked her to begin scheduling a hearing.

On April 15, 2026, FMCS interjected. Someone from FMCS wrote that it "just need[ed] to confirm that the [grant development] office does not have 'information resources management' as their primary duty," stating only that "[w]e have guidelines to follow." When asked to produce those guidelines, FMCS said they were "internal guidelines from our OGC office" and did not provide them. The communications were unsigned. Asked who was sending them, the author identified herself by surname alone, without a first name or title. The agency answered the question that afternoon, confirming that information resources management was not its primary duty, and FMCS replied that it would "move forward."

The question FMCS raised concerns bargaining unit composition under 5 U.S.C. 7112(b)(6), a matter within the exclusive jurisdiction of the Authority. Neither party had raised it. The agency is not covered by either Executive Order the preamble relies on. The parties had

agreed on everything, including the arbitrator, and FMCS interposed the objection on its own initiative, under criteria it declined to produce, in communications that identified no author until FMCS was asked and then gave only a surname.

C. Matter C.

A practitioner representing an affected labor organization reported the following on April 21, 2026. The union had a failure-to-bargain arbitration pending against an agency covered by neither Executive Order. The agency took the position that it had no duty to bargain because its parent department had directed the action at issue, and that the grievance therefore was not arbitrable. On that basis it declined to participate in arbitrator selection. The union requested a panel from FMCS. FMCS responded that because the parties' collective bargaining agreement did not expressly state what was to occur in that situation, it could not certify the panel or the arbitrator assignment. That communication was also unsigned.

Whether the agency's asserted defense excuses it from arbitrating is a question of arbitrability, which the parties' agreement and the Statute commit to the arbitrator. FMCS resolved it instead, by reading the agreement, finding it silent, and treating silence as a reason to withhold the panel. No Executive Order was involved.

D. Matter D.

A colleague reported the following. A panel request was filed on May 4, 2026. Two days later, on May 6, FMCS wrote to both parties. It explained that a representative of the agency had contacted FMCS to ask whether anyone from the agency had consented to arbitration in the matter; that FMCS "confirmed that it had no record of any consent" from the agency; and that FMCS then "asked [the agency representative] if [the agency] consented to arbitration in this case." The representative answered that it did not, citing the April 22, 2026 memorandum.

FMCS wrote: “Because [the agency] does not consent to arbitration, there is no mutual consent between the parties, and FMCS cannot provide an arbitration panel at this time,” citing 29 U.S.C. 173(f), 5 U.S.C. 572(a), and 29 C.F.R. 1404.9(c). FMCS stated that it would “hold this case in abeyance until further notice,” that the filing date would be preserved if the agency later consented, and that the requesting party could take a refund of its fee or a credit toward its account.

Two features of that exchange bear on this rulemaking. FMCS did not receive an objection and act on it. It asked the agency whether it consented, obtained the answer no, and then treated that answer as dispositive. And the authorities FMCS gave are the ADRA provisions discussed in Section V, together with 29 C.F.R. 1404.9(c), which enumerates what FMCS has no power to do and confers no screening authority at all.

E. What the record shows.

Two of these four matters involve agencies or units outside the Executive Orders entirely. One began before the policy existed. In one, FMCS resolved a question of contract interpretation. In another, a question of unit composition reserved to the Authority. Matters B and C are the alternative FMCS says it rejected, in operation.

An explanation that does not account for the agency’s own conduct is not reasoned decisionmaking. On this record the Executive Order rationale reads as a pretext for a screening authority FMCS had already begun exercising for reasons it has not disclosed.

F. The procedural history compounds the concern.

FMCS’ conduct began no later than April 7, 2026 and was formalized on April 22, 2026. FMCS invoked good cause under 5 U.S.C. 553(b)(B) on the ground that its own regulation “could be misread,” and made the Rule effective immediately. Four months of unchanged

operation is not an emergency, and a provision that has said the same thing across three rulemakings and forty-seven years is not one that needed clarifying. The original Rule was dated July 31, 2026, the same date FMCS answered a federal complaint challenging the April memorandum, and it deletes the regulatory language on which that challenge centers.

G. The republication.

On August 27, 2026, the regulations.gov docket for this Rule displayed as closed to comments, six days before the September 3 deadline the Rule had set. On August 28, FMCS republished the Rule in full, attributed the republication to “a technical error,” and extended the comment period to September 28. 91 Fed. Reg. 55473.

The republished Rule is identical to the original in every substantive respect. The regulatory text is unchanged. The preamble is unchanged, including the good cause findings, the sovereign immunity discussion, and the reliance interest analysis.

What changed is where comments go. The August 4 version directed commenters to the Federal eRulemaking Portal and stated that comments “will be posted on the internet at regulations.gov as they are received, without change.” 91 Fed. Reg. 49273. The August 28 version directs comments to an FMCS email address, or by mail to the Office of General Counsel, and states that comments will be posted “via FMCS’s public website.” 91 Fed. Reg. 55473. Regulations.gov is not mentioned.

The effect is that public comment on this Rule no longer reaches a government-wide docket where submissions are posted automatically as received. Comments are now received by the office that wrote the Rule and posted, if at all, on that office’s own website at its discretion. FMCS offers no explanation for the change and does not identify it as a change.

X. Recommendations

FMCS should withdraw the interim final Rule.

XI. Conclusion

FMCS is a mediation agency that keeps a list of arbitrators and furnishes names from it for a fee. In a grievance arbitration under Section 7121 it is present because the parties agreed to use it as a part of the negotiated grievance procedure. The Rule converts that role into a gate.

It does so by claiming authority over a question Congress assigned to the arbitrator, on the strength of statutes FMCS does not administer and that do not reach Chapter 71 grievance arbitration, through an inquiry FMCS insists is not a determination while it determines the outcome. It leaves parties to a statutorily required procedure captive to the decision of a non-party to their agreement. Where delay does not extinguish the right outright, it postpones a liability that compounds daily and increases the cost of litigation for all involved, including the taxpayer. And it costs FMCS the neutrality on which its mission depends.

The explanation offered for all of this does not account for FMCS's own conduct.

The undersigned organizations respectfully request that FMCS withdraw the Rule.

Respectfully submitted,

FEDERAL WORKERS ALLIANCE
and the undersigned labor organizations

By: Suzanne Summerlin
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APPENDIX A

SIGNATORY ORGANIZATIONS

The following labor organizations join in this comment:

American Federation of Teachers, AFL-CIO (AFT)
Antilles Consolidated Education Association (ACEA)
Federal Education Association, National Education Association (FEA-NEA)
Federal Fire Fighters Joint Council, IAFF
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAMAW)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Organization of Masters, Mates and Pilots (MM&P)
International Plate Printers, Die Stampers and Engravers Union of North America (IPPDSEU)
Metal Trades Department, AFL-CIO (MTD)
National Association of Agriculture Employees (NAAE)
National Association of Government Employees, SEIU (NAGE)
National Education Association (NEA)
National Federation of Federal Employees, International Association of Machinists and Aerospace Workers (NFFE-IAMAW)
National Weather Service Employees Organization (NWSEO)
Patent Office Professional Association (POPA)
Printing Packaging Production Workers Union of North America (PPPWU)
Professional Aviation Safety Specialists, AFL-CIO (PASS)
Seafarers International Union/NMU (SIU)
Service Employees International Union (SEIU)
SPORT Air Traffic Controllers Organization (SATCO)
United Power Trades Organization (UPTO)

The Federal Workers Alliance is a coalition of federal sector labor organizations representing employees throughout the executive branch.