

From: [Caroline Trabucco](#)
To: [Register](#)
Subject: [EXTERNAL] Requests for Arbitration Panel, RIN 3076-AA31 - Comments by AFGE & AFSCME
Date: Monday, September 28, 2026 6:25:44 PM
Attachments: [RIN 3076-AA31 AFGE AND AFSCME Comments to FMCS IFR on Requests for Arbitrations Panels.pdf](#)

Good evening,

Please find attached comments by the American Federation of Government Employees (AFGE) and the American Federation of State, County, and Municipal Employees (AFSCME) on FMCS's Interim Final Rule, RIN 3076-AA31 "Requests for Arbitration Panels," 91 Fed. Reg. 55473 (Aug. 28, 2026).

Respectfully,

Caroline M. Trabucco
Assistant General Counsel
American Federation of Government Employees
Office of the General Counsel
80 F Street NW
Washington, DC 20001
202 655 7652

This message may contain confidential attorney-client privileged information and/or confidential attorney work product. Only an intended recipient of this message is authorized to view, retain, or otherwise use its contents, including any attachments and/or metadata. If you are not the intended recipient, please notify the sender immediately and delete this message without reading, printing, or otherwise preserving or disseminating its contents.

CAUTION: **This email originated EXTERNALLY - Please think before clicking on any links, opening attachments or replying.**



Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Dr. Kendrick B. Roberson
NVP for Women & Fair Practices

September 28, 2026

Anna Davis
Federal Mediation and Conciliation Service
250 E St. SW
Washington, DC 20219

**Re: RIN 3076-AA31, Comments by AFGE and AFSCME Concerning
FMCS Interim Final Rule on Requests for Arbitration Panels
91 Fed. Reg. 55473 (August 28, 2026)**

Dear Ms. Davis:

The American Federation of Government Employees, AFL-CIO (“AFGE”) and the American Federation of State, County and Municipal Employees (“AFSCME”) (collectively, the “Unions”), strongly oppose the regulatory changes made by the Federal Mediation and Conciliation Service (“FMCS”) in its interim final rule (“IFR”), *“Requests for Arbitration Panels.”* The IFR is inconsistent with Title VII of the Civil Service Reform Act of 1978 (“CSRA”), Pub. L. No. 95-454, 92 Stat. 1111, the Federal Service Labor-Management Relations Statute (“FSLMRS”), 5 U.S.C. §§ 7101–7135 and is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”), Pub. L. No. 79-404, 60 Stat. 237, codified at 5 U.S.C. § 551, *et seq.* The Unions oppose the interim final rule.

I. The Interim Final Rule is Inconsistent with the FSLMRS Because it Improperly Grants FMCS the Power to Make Arbitrability Determinations.

Congress granted arbitrators, not FMCS, the authority to make arbitrability determinations. Section 7121(a)(1) of the FSLMRS expressly provides that, “[e]xcept as provided in paragraph (2) of this subsection, any collective bargaining agreement *shall provide* procedures for the settlement of grievances, *including questions of arbitrability.*”¹ The plain meaning of this statutory language is that the process for determining whether a grievance is arbitrable, including whether a particular dispute is excluded from arbitration by law or whether the parties agreed to submit the subject matter of a particular dispute to arbitration, is a mandatory ingredient of the negotiated grievance and arbitration scheme established by the FSLMRS. *See generally Nat’l Weather Serv. Emp. Org. v. Fed. Lab. Relations Auth.*, 966 F. 3d 875, 881-82 (D.C. Cir. 2020) (Congress granted arbitrators a high degree of deference on questions of contract interpretation). Congress also deliberately withheld from agencies the power to pre-determine the arbitrability of a grievance dispute. There is, for example, no federal sector analog in the FSLMRS or elsewhere to the provision in the District of Columbia Revised Uniform Arbitration Act which allows for pre-arbitration court proceedings to determine

¹ 5 U.S.C. § 7121(a)(1) (emphasis added).



arbitrability. *See* D.C. Code § 16-4407(b). Instead, objections to the arbitrability of a federal sector grievance must be presented to an arbitrator in the first instance.

Congress also established a detailed, post-arbitration process through which an agency may seek review of an arbitrator's unfavorable arbitrability determination. Under this appellate process, it is the Federal Labor Relations Authority ("FLRA") that may set aside an arbitrator's award if it is contrary to "law, rule, or regulation." 5 U.S.C. § 7122(a)(1). But again, an agency must first present its objections to the arbitrator.² And should an agency be dissatisfied with the outcome of its case before the FLRA, it may seek judicial review through a petition to a United States court of appeals.³ There is thus no risk that an agency's timely raised objection to the arbitrability of a grievance or an arbitrator's determination with respect to that objection will go unheard. Nowhere, however, does the FSLMRS give FMCS a role in determining arbitrability; let alone the power to decide which cases may proceed to arbitration, and which may not.

Congress's intent that arbitrators be responsible for making initial arbitrability determinations is further evident from the federal sector labor-relations scheme that preceded the FSLMRS. Executive Order 10988, for example, provided only for advisory arbitration. This arrangement gave agencies the last word in arbitrability disputes.⁴ But, building on other changes to the federal sector labor-relations scheme, Congress made a conscious decision to move away from an agency-led decision-making process to a process that relied on external, neutral third-party arbitrators for the resolution of arbitrability disputes. This is in part why the FLRA and the courts defer to an arbitrator's interpretation of the collective bargaining agreement, "because it is the arbitrator's construction of the agreement for which the parties have bargained."⁵

Against this backdrop, moreover, the fact that neither the FSLMRS nor FMCS's enabling act⁶ grant FMCS authority to make arbitrability determinations is telling. FMCS, by its own admission, is a facilitator of services: "FMCS's authority is administrative and facilitative."⁷ A facilitator is not a decisionmaker. Further, there is no risk of misinterpretation of FMCS's role, as the IFR suggests—without evidence. FMCS's regulations governing the issuance of arbitration panels are long-standing and make clear on their face, the issuance of a panel is not an endorsement of any aspect of any party's argument.⁸ In sum, the FSLMRS placed initial arbitrability determinations in the hands of arbitrators. Neither the FSLMRS nor FMCS's enabling act gave FMCS the power to hold otherwise. FMCS's rationale for abandoning its long-standing regulation is also unsupported by record evidence and contrary to the plain language of

² *See* 5 C.F.R. § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Administrative Law Judge or arbitrator.").

³ 5 U.S.C. § 7123(a)(1); *see also* *U.S. Dep't of the Treasury, Customs Serv. v. FLRA*, 43 F.3d 682 (D.C. Cir. 1985) (asserting jurisdiction to determine whether the FLRA exceeded its own jurisdiction).

⁴ *See Employee-Management Cooperation in the Federal Service*, 27 Fed. Reg. 551, 554 (Jan. 19, 1962).

⁵ *U.S. Dep't of Labor; OSHA and Nat'l Council of Field Labor Locals*, 34 F.L.R.A. 573, 576 (1990).

⁶ *See* 29 U.S.C. §§ 171–183, *passim*.

⁷ 91 Fed. Reg. at 55473. *See also* Fed. Mediation & Conciliation Serv., Memorandum on Aligning Federal Mediation and Conciliation's Arbitration Services with Executive Orders 14251 and 14343 (Apr. 22, 2026), at 2 ("FMCS's role in this process is largely ministerial: coordinating the selection of an arbitration panel.").

⁸ *See* 29 C.F.R. § 1404.10 ("O[ffice of] A[rbitration] will not decide the merits of a claim by either party that a dispute is not subject to arbitration.").

the regulation at issue. The IFR is therefore inconsistent with the FSLMRS, *ultra vires*, and arbitrary and capricious.

Finally, FMCS's protestations to the contrary notwithstanding, there can be no meaningful dispute that giving FMCS the power to make arbitrability determinations is precisely what the IFR does. For example, by empowering itself to decline requests for a panel of arbitrators via the imposition of a "limited threshold inquiry to determine whether issuing a panel, making a direct appointment, or providing related arbitration services would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority[.]"⁹ FMCS is arrogating to itself the power to (a) conduct a factual and legal inquiry into the nature and merits of one party's challenge to arbitration, and (b) based on that inquiry, foreclose a necessary step in the other party's ability to proceed to arbitration. That is an arbitrability determination. Moreover, while FMCS claims that its "action on such a threshold question does not adjudicate the parties' underlying contractual, statutory, or arbitrability dispute,"¹⁰ its so-called threshold inquiry does just that because it allows FMCS, based on its assessment of the merits of one party's objection, to indefinitely block an arbitration matter from proceeding. This, again, is a quintessential arbitrability determination, and it is no less so because it may occur at the outset rather than at some later point or before another entity.¹¹

The substance of the IFR and the substance of the "threshold" inquiries it sanctions is that FMCS may indefinitely prevent arbitrations by refusing to issue arbitration panels. And while the IFR fails to disclose what standard FMCS will apply to its arbitrability inquiries, the very fact that there must be some standard applied reinforces that the IFR is an attempt by FMCS to assert a level of control over arbitration that Congress not only withheld but affirmatively placed elsewhere: with arbitrators themselves. Consequently, the IFR is contrary to the text, purpose, and structure of the FSLMRS. It should be withdrawn.

II. The Interim Final Rule Fails to Establish Good Cause for its Issuance, Fails to Give Interested Parties a Meaningful Opportunity to Comment, Lacks Evidentiary Support and is Arbitrary and Capricious.

To begin with, FMCS has failed to establish good cause for issuing the IFR without notice and comment. The APA's good cause exception is "narrowly construed and only reluctantly countenanced," excusing "notice and comment in emergency situations, or where delay could result in serious harm." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (internal quotations omitted). It may only be invoked when an agency finds that notice and public comment would be "impracticable, unnecessary, or contrary to the public interest."¹² In its statement of regulatory compliance, FMCS appears to rely on the public interest exception,

⁹ 91 Fed. Reg. at 55474.

¹⁰ *Id.*

¹¹ The practical effect of the IFR also directly undermines FMCS's claim that "parties remain free to pursue available remedies before the FLRA, a court, or another tribunal with jurisdiction. For example, any allegations that a party failed to comply with any provision of a CBA, including any arbitration provision, may be presented to the [FLRA] as an unfair labor practice ["ULP"] pursuant to 5 U.S.C. [§] 7116." 91 Fed. Reg. at 55476. This is a nonstarter. An aggrieved party cannot even pursue a ULP over a failure to strike in the absence of a panel of arbitrators.

¹² 5 U.S.C. § 553(b)(B).

arguing that “delayed issuance of this clarification . . . would risk continued confusion” regarding FMCS’s authority.¹³ But courts have found that this exception may be invoked only in rare circumstances. This is so because when relying on the public interest prong, the test is not whether dispensing with notice and comment would be contrary to the public interest, but whether *providing* notice and comment would be contrary to the public interest. As such, “the public interest prong of the good cause exception is met only in the rare circumstances when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest.” *Mack Trucks*, 682 F.3d at 95. Taking FMCS at its word for the sake of this particular analysis, that the IFR merely clarifies the scope of FMCS’s authority, eliminating confusion and uncertainty alone cannot justify skipping notice and comment rulemaking: as the Ninth Circuit has explained, “an agency’s desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause.” *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018). Because FMCS can address the scope of its authority through the ordinary APA process, it cannot be said that notice and comment rulemaking would “defeat the purpose of the proposal” and harm the public in this case. *Mack Trucks*, 682 F.3d at 95. Further undermining any claim by FMCS that notice and comment is unnecessary is the fact that FMCS’s prior rulemaking and previous changes to its regulations governing the provision of arbitration services were done through ordinary notice and comment rulemaking.¹⁴

FMCS’s claim the IFR is a mere “clarification” of its authority, however, fails for several reasons. To begin with, the IFR is more than a mere clarification. The IFR is a substantive rule. It eliminates the FMCS’s longstanding practice of providing arbitration panels upon receiving a unilateral request and instead transforms the agency into an arbitration gatekeeper. As shown above, in doing so, the IFR asserts a power that Congress did not grant to FMCS. It usurps the statutory role of arbitrators in making arbitrability determinations and materially interferes with contractual rights of parties to collective bargaining agreements by permitting FMCS to effectively block arbitration proceedings.

Furthermore, there is no evidentiary support for FMCS’s assertion that the existing language or application of section 1404.9(b) is unclear or that clarification is needed to “prevent misinterpretation of current § 1404.9(b).”¹⁵ The supposed need for the IFR is entirely speculative and unsupported by any evidence. The IFR states that:

FMCS is issuing this interim final rule to clarify its arbitration services regulations and prevent misinterpretation of current § 1404.9(b). The current language could be read to require FMCS to honor every unilateral request for an arbitration panel

¹³ 91 Fed. Reg. at 55476.

¹⁴ See, e.g., *Arbitration Services*, 43 Fed. Reg. 53466 (Nov. 16, 1978) (proposing, among other things, to clarify then-existing policy at section 1404.2); *Arbitration Policy; Roster of Arbitrators; and Procedures for Arbitration Services*, 62 Fed. Reg. 11797 (Mar. 13, 1997) (proposing in part to end the practice of contract language interpretation by the Office of Arbitration Services in regards to furnishing services); *Arbitration Services*, 73 Fed. Reg. 45660 (Aug. 6, 2008) (proposing to revise 29 C.F.R. § 1404.9(b) to state that if the parties’ collective bargaining agreement requires that a panel request be jointly submitted, the Office of Arbitration “will not proceed with an arbitrator selection if one party communicates to FMCS that it does not concur in the request.”); *Arbitration Services*, 84 Fed. Reg. 614 (Jan. 31, 2019) (proposing to clarify redundant or confusing and/or ambiguous language through the regulation).

¹⁵ 91 Fed. Reg. at 55475.

even when providing a panel, making a direct appointment, or providing related arbitration services would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority.¹⁶

A similar claim is offered as a purported benefit of the IFR, that it will “improve clarity,” “reduce confusion,” and “make clear that FMCS’s existing panel procedures do not require FMCS to provide a panel or appointment where doing so would exceed FMCS’s authority or conflict with applicable law or court orders.”¹⁷ And although FMCS claims to have considered retaining the current text of section 1404.9(b), it rejected this alternative “because the phrase ‘whether joint or unilateral, will be honored’ may be read too broadly and create confusion about FMCS’s obligations.”¹⁸

But FMCS does not cite any genuine instance of confusion. Nor does it grapple with the fact that for decades, it has honored unilateral requests for arbitration panels and previously rejected a proposal to change that status quo. In 1979, for example, FMCS’s regulations provided that it “will refer a panel of arbitrators to the parties upon request” and that “[i]n the event that the request is made by only one party, the Service will submit a panel[.]”¹⁹ The same was true in 1997, where FMCS’s new regulations stated “[i]n the event, however, that the request is made by only one party, the OAS will submit a panel of arbitrators.”²⁰ And when FMCS proposed replacing this shall-issue regime with one that would require FMCS to examine whether the parties’ CBA “requires that the request for a panel of arbitrators be jointly submitted” and to not issue panels in such a circumstance if a party objected,²¹ it rejected that change after giving “careful review and consideration” to a comment that opposed the change because it “insert[ed] FMCS into the arena of administering and interpreting collective bargaining agreements.”²² FMCS’s failure to address its longstanding practice renders the new IFR arbitrary and capricious.

Absent evidence of confusion, FMCS relies instead on speculation. If the FMCS had encountered such confusion from stakeholders, surely the IFR would reflect even this anecdotal evidence. After all, the executive order ostensibly driving this regulatory change,²³ EO 14251, was issued eighteen months ago. FMCS, moreover, makes no effort to harmonize its reliance on EO 14251 with the fact the IFR has universal application. Rather than addressing a legitimate need, the IFR is simply an attempt by FMCS to place its policy preference over that of Congress. FMCS, for example, makes no effort to explain what, specifically, it is about the regulations as written that is ripe for misinterpretation, or how any particular provision could be misinterpreted.

Indeed, under the guise of improving clarity, the IFR only creates greater confusion due to its internal contradictions. The IFR’s insistence that FMCS now plays a “limited screening role” in determining whether arbitration panels are issued is directly contradicted by its assertion

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Arbitration Services*, 44 Fed. Reg. 13008, 13009 (Mar. 9, 1979).

²⁰ *Arbitration Policy; Roster of Arbitrators, Procedures for Arbitration Services*, 62 Fed. Reg. 34170, 34173 (June 25, 1997).

²¹ *Arbitration Services*, 73 Fed. Reg. 45660, 45661 (Aug. 6, 2008).

²² *Arbitration Services*, 75 Fed. Reg. 30704, 30705 (June 2, 2010).

²³ 91 Fed. Reg. at 55474.

that the agency “does not decide the validity of any collective-bargaining agreement, the merits of any grievance, the arbitrability of any dispute, or the parties’ rights or obligations under any agreement or law.”²⁴ As discussed in Part I, under the new rule, FMCS is in fact making arbitrability determinations. And an inquiry which bases the provision of an arbitration panel on the consideration of “the parties’ agreement,” “statutory provision[s],” and “regulation[s]” is in fact deciding “the parties’ rights or obligations under any agreement or law,” despite FMCS’s claims otherwise.²⁵ Internally contradictory reasoning is a hallmark of arbitrary and capricious decision-making. FMCS should instead respect its long-standing position that it does not decide the arbitrability of disputes or weigh in on party rights by continuing to issue arbitration panels upon unilateral request.

Even assuming *arguendo* FMCS’s assertion that its long-standing regulations could or may create confusion had evidentiary support, FMCS failed to consider at least two other important aspects of the problem with its decision to transform its role as an administrative provider of arbitration panels.

First, to the extent the IFR relies on EO 14251, FMCS failed to consider that no prior invocation of section 7103(b) of the FSLMRS by a president has necessitated a change in FMCS regulations. Not even in response to President Carter’s original invocation in 1979²⁶ did the FMCS feel the need to “clarify” its authority as “administrative and facilitative.”²⁷ Nor was it compelled at that time, or any other time, to assign for itself the power to make “threshold” determinations of which matters could proceed to arbitration. That the FMCS has done so here is not only unjustified, but the scope of the IFR permits the FMCS to reach disputes between parties in which EO 14251 may not even be a factor. In those cases, the IFR is poised to interfere with parties’ substantive rights without even a tangentially relevant cause.

Second, FMCS refers to the doctrine of sovereign immunity, insisting the IFR is necessary because FMCS “cannot facilitate constitutional violations.”²⁸ But this rationale also fails for several reasons. First, the FMCS has not explained how providing a panel of arbitrators to a union upon request would violate the Constitution. Second, it is not the role of FMCS to determine questions of sovereign immunity, as Congress did not delegate such power to FMCS. Finally, even assuming for the sake of argument that an agency’s exclusion from FSLMRS coverage would implicate sovereign immunity concerns, FMCS has failed to consider whether there are other statutory authorities through which arbitration could proceed.

For all of these reasons, the IFR is arbitrary and capricious and should be withdrawn.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Exclusions from the Federal Labor-Management Relations Program*, 44 Fed. Reg. 66565 (Nov. 19, 1979).

²⁷ 91 Fed. Reg. at 55473.

²⁸ *Id.* at 55474.

III. Conclusion

The IFR is contrary to the FSLMRS, was improperly issued without notice and comment, and is arbitrary and capricious in violation of the APA. Consequently, the IFR should be withdrawn.²⁹

Respectfully submitted,

/s/ Rushab B. Sanghvi
RUSHAB B. SANGHVI
General Counsel

/s/ Andres M. Grajales
ANDRES M. GRAJALES
Deputy General Counsel

/s/ Caroline M. Trabucco
CAROLINE M. TRABUCCO
Assistant General Counsel

American Federation of Government
Employees, AFL-CIO

/s/ Teague P. Paterson
TEAGUE P. PATERSON
General Counsel

/s/ Matthew Stark Blumin
MATTHEW STARK BLUMIN
Deputy General Counsel

/s/ Fernando R. Colón
FERNANDO R. COLÓN
Associate General Counsel

American Federation of State,
County, and Municipal Employees,
AFL-CIO

²⁹ By submitting these comments, the Unions do not forfeit or waive any arguments, claims, challenges, or rights that they may have, now or in the future, with respect to the IFR or the subject matter of the IFR.