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Subject: [EXTERNAL] Requests for Arbitration Panel, RIN 3076-AA31
Date: Thursday, September 10, 2026 11:09:27 AM
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Attached please find comments by the National Treasury Employees Union, the National Federation of Federal Employees, and the International Federation of Professional and Technical Engineers opposing FMCS's interim rule regarding arbitration panels.

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September 10, 2026

VIA ELECTRONIC MAIL

Federal Mediation and Conciliation Service
250 E Street, S.W.
Washington, D.C. 20427

**RE: Interim Rule re: Requests for Arbitration Panels
RIN 3076-AA31**

The National Treasury Employees Union (NTEU), the National Federation of Federal Employees (NFFE), and the International Federation of Professional and Technical Engineers (IFPTE) submits these comments opposing the Federal Mediation and Conciliation Service's (FMCS) interim rule published on August 4, 2026 (91 Fed. Reg. 49273) and republished on August 28, 2026 (91 Fed. Reg. 55473). The interim rule would change FMCS's regulations so that it would no longer be required to issue arbitration panels. The rule is both procedurally and substantively improper, for the reasons explained below.

NTEU represents employees in 38 federal agencies and departments. It has numerous collective bargaining agreements (CBAs) that provide for the parties to select arbitrators from FMCS, and NTEU has utilized FMCS's services consistent with those provisions. NFFE is a national labor union representing approximately 110,000 federal government workers across the United States. IFPTE is a national labor organization representing approximately 30,000 federal government workers in numerous states and agencies across the U.S.

I. FMCS's Interim Rule is Procedurally Improper under the APA.

FMCS has issued its rule as an "interim" rule and did not provide for advance notice and comment. FMCS cites "good cause under 5 U.S.C. 553(b)(B)" as justification for not allowing advance notice and comments. 91 Fed. Reg. 49276. FMCS parrots the statutory language that prior notice and public procedure would be "impracticable, unnecessary, and contrary to the public interest," and also states that any delay in issuing a new rule would cause "continued confusion." *Id.*

Courts have consistently held that exceptions to the Administrative Procedure Act's (APA) notice-and-comment requirements must be "narrowly construed and only reluctantly countenanced." *Am. Pub. Gas Ass'n v. DOE*, 72 F.4th 1324, 1339-40 (D.C. Cir. 2023) (internal citation omitted). The good cause exception in particular "is an important safety valve to be used

where delay would do real harm”—one that “should not be used ... to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.” *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979); *see also New Jersey, Dep’t of Environmental Protection v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980).

None of the statutory bases for when omitting prior notice and comment might be proper applies here. *See* 5 U.S.C. § 553(b)(B). “[I]mpracticable” means an emergency or urgent timeline which would make prior public notice impossible, such as where there are sudden safety hazards or fast-moving economic crises. *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001). FMCS cites no “emergency” here, and there is none. “Unnecessary” means when a rule is minor, technical, routine, or harmless. *See id.* at 755. That does not apply here. This interim rule will significantly affect federal sector unions, such as NTEU, NFFE, and IFPTE, who will be foreclosed from obtaining arbitrators in many circumstances which will grind certain arbitration processes to a halt. The interim rule will undermine existing CBA provisions which provide for parties requesting and obtaining arbitrators from FMCS. The statute’s “contrary to the public interest” language means a situation where advance warning of a rule would actively harm the public, such as when announcement of a proposed rule would enable some sort of financial manipulation that a rule is seeking to prevent. *See id.* FMCS does not explain or even pretend that any public harm exists here which would excuse notice and comment obligations.

FMCS also claims that foregoing advance notice and comment is necessary to avoid “confusion.” 91 Fed. Reg. 49276. FMCS cites no examples of anyone being confused by the previous FMCS rule or any data to support this argument. The previous rule requiring FMCS to honor panel requests has been in place for decades. *See* 44 Fed. Reg. 13008 (March 9, 1979) (revising 29 C.F.R. § 1404.10 to state that the service “*will refer*” a panel upon request) (emphasis added). FMCS assigns thousands of arbitrators a year. *See* FMCS, *Fiscal Year 2027 Congressional Budget Submission* app. A (2026), <https://www.fmcs.gov/wp-content/uploads/2026/04/2027-Congressional-Budget.pdf>. FMCS thus had ample time and opportunity to assemble evidence of public confusion about its prior regulation that would justify an about-face. But it provides no such evidence, and none exists.

II. FMCS’s Interim Rule Violates the APA Because it is Inadequately Supported and Ill-Reasoned.

The APA requires agencies when issuing new or changed rules to “engage in reasoned decisionmaking.” *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (cleaned up). *See also Sec’y of Labor v. Knight Hawk Coal, LLC*, 991 F.3d 1297, 1307 (D.C. Cir. 2021) (agencies must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The APA also requires agencies, when changing course, to consider reliance interests. *See Encino Motorcars, LLC v. Navarro*, 579 U. S. 211, 221-22 (2016).

FMCS ignores these well-settled administrative law principles. It offers no data or examples or other support for its radical change in how and when it grants panel requests. It does not explain the alleged “confusion” with the previous rule that has led to this FMCS action. It does not take into account reliance interests by federal sector unions that relied on the prior, longstanding FMCS regulation for years and incorporated it into their CBA provisions.

FMCS also carefully omits any mention of a memorandum that its General Counsel issued on April 22, 2026, entitled “Aligning Federal Mediation and Conciliation’s Arbitration Services with Executive Orders 14251 and 14343.” This memorandum barred unions representing federal sector workers from obtaining panels in certain situations. This interim rule is an obvious and improper *post hoc* rationalization to support what FMCS already decided to do in April.

The interim rule is also internally inconsistent. Under the interim rule, FMCS has empowered itself to conduct a “threshold inquiry into whether FMCS may lawfully provide the requested administrative arbitration service.” 91 Fed. Reg. 49275-76. As an example, FMCS states that it might decide if sovereign immunity presents a basis to deny a panel request. *Id.* at 49275. FMCS simultaneously claims that under the interim rule it will not be deciding the validity of any collective bargaining agreement or “the parties’ rights or obligations under any agreement or law.” *Id.*

This makes no sense. If FMCS decides after a “threshold inquiry” that sovereign immunity or an executive order or some law or court order indicates—in FMCS’s view—that a panel request should not be honored, FMCS will very much be deciding the “parties’ rights.” Parties will be shut out of arbitration proceedings. NTEU, for example, has many CBAs that have provisions allowing the parties to obtain arbitrators through FMCS. This interim rule will render those CBA provisions null; FMCS thus will be deciding the validity of CBAs. In addition, FMCS is supposed to be conducting a ministerial role of assigning arbitrators. It acknowledges that its role is supposed to be “administrative and facilitative.” *Id.* at 49276. This substantive “threshold” inquiry that the FMCS will now be undertaking conflicts with FMCS’s proper “administrative and facilitative” role. The interim rule’s many internal inconsistencies are the antithesis of “reasoned decisionmaking” and violate the APA.

The undersigned unions urge the FMCS to withdraw its interim rule in full.

Sincerely,



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