

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

■ 1. The general authority for part 4 and the specific authority for § 4.94 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1415, 1431, 1433, 1434, 1624, 2071 note; 46 U.S.C. 501, 60105.

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Section 4.94 also issued under 19 U.S.C. 1441; 46 U.S.C. 60504;

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■ 2. In § 4.94, amend the list of countries in paragraph (b) by adding, in appropriate alphabetical order, “Malta” to read as follows:

§ 4.94 Yacht privileges and obligations.

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(b) * * *

Malta

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Susan S. Thomas,

Executive Assistant Commissioner, Office of Trade, U.S. Customs and Border Protection.

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FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1404

RIN 3076–AA31

Requests for Arbitration Panels

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Final rule.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) published an interim final rule on August 4, 2026, and republished on August 28, 2026, that amended its arbitration services regulations to clarify when the Office of Arbitration may decline to issue an arbitration panel, make a direct appointment, or provide related services. This document responds to the comments, clarifies the scope of the rule’s threshold inquiry, adds procedural provisions governing notice, written disposition, request dates, and fees, and adopts the interim final rule as a final rule.

DATES: This final rule is effective October 29, 2026. The amendments to 29 CFR 1404.9, 1404.10, 1404.11, and 1404.12 made by the interim final rule have been in effect since August 4, 2026.

ADDRESSES: The interim final rule, the comments received, and this final rule are available on FMCS’s public website

at www.fmcs.gov. The comments received are also available for public inspection, by appointment, at the Office of General Counsel, Federal Mediation and Conciliation Service, One Independence Square, 250 E St. SW, Washington, DC 20427.

FOR FURTHER INFORMATION CONTACT: Anna Davis, General Counsel, Federal Mediation and Conciliation Service, (202) 606–3737, adavis@fmcs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. FMCS’s Arbitration Services and the Interim Final Rule

FMCS maintains a Roster of Arbitrators and, through its Office of Arbitration (OA), furnishes panels of names of Roster arbitrators, makes direct appointments, and provides related services to parties to collective bargaining agreements under 29 CFR part 1404, which FMCS issues under Title II of the Labor Management Relations Act of 1947, 29 U.S.C. 171–183. See 29 CFR 1404.1. Arbitrators listed on the Roster are not FMCS employees; once an arbitrator is selected or appointed, the arbitrator’s relationship is solely with the parties. 29 CFR 1404.4(c).

FMCS has no power to compel parties to appear before an arbitrator, to enforce an agreement to arbitrate, to compel parties to arbitrate any issue, to influence or set aside an arbitrator’s decision, or to compel, deny, or modify the payment of an arbitrator’s compensation. 29 CFR 1404.9(c). OA may decline to furnish a panel or make an appointment where a request is overly burdensome or impracticable, and may decline to service a request from a party based on the party’s prior non-payment of arbitrator fees or other behavior that constrains the spirit or operation of the arbitration process. 29 CFR 1404.9(d). FMCS “retains its authority and responsibility to assure that the needs of the parties using its services are served” and may establish procedures for the preparation of panels and the appointment of arbitrators to that end. 29 CFR 1404.4(d).

Before the interim final rule, § 1404.9(b) provided that a request for a panel of seven arbitrators, “whether joint or unilateral, will be honored,” while providing that requests for a panel of other than seven names, for a direct appointment, or for special qualifications or other special service would be honored only if jointly submitted or authorized by both parties, and that OA takes no position on the status of the agreement to arbitrate, the arbitrability of the dispute, or the terms

of the parties’ contract by issuing a panel or appointing an arbitrator. Section 1404.10 provided that OA will not decide the merits of a claim by either party that a dispute is not subject to arbitration.

On August 4, 2026, FMCS published an interim final rule with request for comments at 91 FR 49273. The interim final rule restructured § 1404.9(b) into four paragraphs. Paragraph (b)(1) retained the rule that, upon request, OA will refer a randomly selected panel of seven arbitrators to parties to an agreement to arbitrate or to engage in fact-finding, or where labor arbitration or fact-finding may be provided by statute.

Paragraph (b)(2) provides that a request for a panel may be joint or unilateral unless part 1404, applicable law, or the parties’ agreement requires joint authorization for the requested service, and retained the requirement of joint authorization for panels of other than seven names, direct appointments, special qualifications, and other special services.

Paragraph (b)(3) provides that OA may conduct 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; that OA may request from the parties the agreement, statutory provision, regulation, court order, written authorization, or other information necessary to make that determination; and that, following the inquiry, FMCS may issue the panel or appointment, decline to provide the requested service, hold the request in abeyance, or take other administratively appropriate action.

Paragraph (b)(4) provides that OA’s issuance of a panel or appointment, 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. The interim final rule made conforming amendments to § 1404.10 (arbitrability), § 1404.11(b) and (c) (nominations of arbitrators and additional panels), and § 1404.12(b) and (c) (selection and appointment), and updated the nondiscrimination sentence in § 1404.11(b). 91 FR at 49274–75, 49277–78.

The interim final rule took effect on August 4, 2026, with comments due September 3, 2026. On August 27, 2026, the docket for the rule on www.regulations.gov displayed as

closed to comments before the comment period had ended. To ensure that no interested person was denied the opportunity to comment, FMCS republished the interim final rule in full on August 28, 2026, at 91 FR 55473, directed that comments be submitted to FMCS's Office of General Counsel by email or mail, and extended the comment period to September 28, 2026. The regulatory text and preamble of the republished rule were identical to those published on August 4. FMCS accepted every comment received on or before September 28, 2026.

FMCS found good cause under 5 U.S.C. 553(b)(B) to issue the rule without prior notice and comment and under 5 U.S.C. 553(d)(3) to make it effective upon publication, because the sentence in former § 1404.9(b) stating that every joint or unilateral request "will be honored" could be read to require OA to furnish panels and make appointments regardless of whether doing so was consistent with applicable law, a court order, or FMCS's authority, and because delay would perpetuate uncertainty about FMCS's obligations when presented with requests raising threshold legal objections. 91 FR at 49276. FMCS invited comment on all aspects of the rule and stated that, after considering timely comments, it would revise, withdraw, or confirm the rule in a subsequent document.

B. The Circumstances That Gave Rise to the Rule

Section 7103(b)(1) of Title 5 authorizes the President to exclude an agency or subdivision from coverage under chapter 71 of Title 5, the Federal Service Labor-Management Relations Statute, upon determining that the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work and that chapter 71 cannot be applied to it in a manner consistent with national security requirements and considerations. Executive Order 14251, *Exclusions From Federal Labor-Management Relations Programs*, 90 FR 14553 (Apr. 3, 2025), and Executive Order 14343, *Further Exclusions From the Federal Labor-Management Relations Program*, 90 FR 42683 (Sept. 3, 2025), exercised that authority with respect to numerous agencies and subdivisions. Executive Order 14251 further directed excluded agencies, upon termination of their collective bargaining agreements, to terminate their participation in pending grievance proceedings under 5 U.S.C. 7121. Determinations under section 7103(b)(1) are committed to the President's judgment, and the courts

have declined to review them under the Administrative Procedure Act. *See A.F.G.E. v. Reagan*, 870 F.2d 723, 727–28 (D.C. Cir. 1989); *Dep't of Defense v. F.L.R.A.*, 685 F.2d 641, 650 (D.C. Cir. 1982) (holding that section 7103(b)(1) "is for the President alone to invoke"). Legal interpretations and directions issued by the President are controlling on the officers and employees of the Executive Branch. Exec. Order 14215, § 7, 90 FR 10447, 10449 (Feb. 24, 2025).

When an agency is excluded under section 7103(b)(1), chapter 71 does not apply to it. The agency has no statutory duty to bargain, its employees have no statutory right to a negotiated grievance procedure, and the statutory authorization for binding grievance arbitration in section 7121(b)(1)(C)(iii), which the commenters correctly identify as the source of a union's right to invoke arbitration unilaterally, does not reach it. During 2025 and 2026, many excluded agencies terminated their collective bargaining agreements. The validity of the Executive Orders and of particular terminations has been and remains the subject of litigation in several courts. As of the date of this rule, the Executive Orders remain in effect, and FMCS ensures compliance with applicable court orders related to the Executive Orders through seeking federal agencies' consent as the source of authority for the proceeding itself.

Beginning in the spring of 2026, OA received a growing number of unilateral requests for panels, additional panels, and appointments in matters in which the responding Federal agency asserted that it had been excluded from chapter 71, that the applicable agreement had been terminated, and that it could not lawfully participate in the requested arbitration. Requesting parties, in turn, cited the "will be honored" sentence of former § 1404.9(b) as obligating FMCS to furnish the panel and appoint the arbitrator regardless of the agency's exclusion. On April 22, 2026, FMCS's General Counsel issued a guidance memorandum to the Office of Arbitration, *Aligning FMCS's Arbitration Services with Executive Orders 14251 and 14343*, which FMCS posted on its public website. The memorandum directed that, for agencies identified in the Executive Orders, OA confirm the agency's consent before issuing a panel, hold the request in abeyance if consent was not given, preserve the request's submission date, and charge no fee until the request could be processed. The memorandum stated that FMCS's practice as to agencies not affected by the Executive Orders was unchanged. The regulatory language of former § 1404.9(b) was at

the center of a subsequent legal challenge to that memorandum. The interim final rule followed.

II. Comments Received and FMCS's Responses

A. Overview

FMCS received five comments during the comment period, each from one or more labor organizations representing Federal employees. The comments are posted on FMCS's public website, and FMCS refers to them below by number in the order received: Comment 1 (September 10, 2026), submitted jointly by three national labor organizations; Comment 2 (September 20, 2026), submitted by a local of a national labor organization; Comment 3 (September 23, 2026), submitted by an officer of a local union representing employees of a Federal medical facility; Comment 4 (September 28, 2026), submitted jointly by two national labor organizations; and Comment 5 (September 28, 2026), submitted by a coalition of Federal-sector labor organizations joined by twenty-three affiliated organizations.

All five comments oppose the rule. Comments 1, 4, and 5 ask FMCS to withdraw it. Comment 2 asks FMCS to withdraw it or, at minimum, to limit the threshold inquiry to situations involving a clear and controlling legal prohibition or court order. Comment 3 asks FMCS to revise the rule and proposes eight specific changes directed principally at the scope, timing, transparency, and reviewability of the threshold inquiry.

FMCS has considered each comment in full. For the reasons set out below, FMCS concludes that the comments do not identify a basis for withdrawing the rule. They do, however, identify respects in which the scope of the threshold inquiry and the process that accompanies it should be stated more precisely in the regulatory text, and FMCS has made the changes described in section III of this preamble in response. Before addressing the comments individually, FMCS addresses four issues that run through all of them.

B. Issues Common to the Comments

1. *The rule does not authorize FMCS to decide arbitrability.* Every commenter contends that the threshold inquiry is, in substance, an arbitrability determination that Congress assigned to arbitrators. Comments 1, 4, and 5 rely on 5 U.S.C. 7121(a)(1), which requires every negotiated grievance procedure to provide for the settlement of grievances "including questions of arbitrability," and on the deference that the Federal Labor Relations Authority (the

Authority) and the courts accord an arbitrator's construction of the agreement. See *Nat'l Weather Serv. Emps. Org. v. F.L.R.A.*, 966 F.3d 875, 881–82 (D.C. Cir. 2020).

FMCS does not dispute any of that law. It does not apply to the question the rule addresses. “Arbitrability,” in the sense in which chapter 71, the Authority, and the courts use the term, is whether a particular grievance may be heard by the arbitrator: whether it falls within the scope of the negotiated procedure, whether it was timely filed and processed, whether it is excluded by a statutory exception in section 7121(c), whether the grievant elected another forum, and similar questions of contract and statute that govern the dispute between the parties. The rule leaves every one of those questions to the arbitrator. Section 1404.10 continues to provide that OA will not decide the merits of a claim that a dispute is not subject to arbitration; § 1404.9(b)(4) provides that no action OA takes on a request constitutes a decision on the arbitrability of any dispute; and this final rule adds to § 1404.9(b)(3) an express statement that a party's contention that a grievance lacks merit, is untimely, or is not arbitrable does not, by itself, establish that FMCS may not provide the requested service.

The threshold inquiry concerns a different question: whether FMCS, an agency of the Executive Branch, may lawfully take the administrative action requested of it. That question arises where a court has stayed or enjoined the arbitration or the obligation to arbitrate; where the President has excluded the responding agency from chapter 71 under 5 U.S.C. 7103(b)(1), the agreement has been terminated, and the agency has, as the President directed, terminated its participation in the proceeding; or where part 1404 itself requires joint authorization for the service requested. None of those is a question of whether the grievance is arbitrable under the parties' agreement. An arbitrator cannot answer any of them with respect to FMCS, because, as Comment 5 emphasizes at length, FMCS is not a party to the agreement, not a party to the proceeding, and not subject to the arbitrator's jurisdiction. An arbitrator's award that a grievance is arbitrable binds the parties; it does not and cannot determine whether a Federal agency that is not before the arbitrator may lawfully furnish a service.

The commenters' position, taken to its conclusion, is that FMCS must issue a panel and appoint an arbitrator in every case, including where a court has enjoined the arbitration, because the effect of the injunction is a question for

the arbitrator. No commenter accepts that conclusion. Comment 2 states that if “an actual court order or clear law prohibits FMCS from providing a panel, FMCS obviously must follow the law.” Comment 3 agrees that “a binding order applicable to a request cannot be ignored,” that FMCS “cannot ignore an applicable legal bar or a court order,” and that “a genuinely applicable prohibition should be honored.” Comments 1, 4, and 5, for their part, nowhere contend that FMCS must furnish a panel in the face of a court order forbidding the arbitration. Once that is conceded, the disagreement is not about whether FMCS may inquire into its own authority before acting but about how narrowly that inquiry is defined and what process accompanies it. Those are the matters FMCS has addressed in this final rule.

2. *No commenter identifies any law that requires FMCS to furnish a panel on unilateral request, and the commenters' own statutory analysis confirms that the language characterized as an obligation existed only in FMCS's regulation.* Comment 5 argues, in detail, that neither Title II of the Labor Management Relations Act nor the Administrative Dispute Resolution Act (ADRA) reaches Federal-sector grievance arbitration, and that chapter 71 assigns FMCS a role only in the resolution of bargaining impasses under 5 U.S.C. 7119. Comment 4 likewise observes that neither chapter 71 nor FMCS's enabling act mentions FMCS in connection with grievance arbitration. Comment 5 states that FMCS “appears in none of” the provisions of chapter 71 governing grievances, arbitrability, review of awards, or unfair labor practices.

FMCS agrees that chapter 71 imposes no obligation on FMCS with respect to grievance arbitration. Section 7121 requires agencies and exclusive representatives to negotiate a grievance procedure ending in binding arbitration; it does not direct them to obtain the arbitrator from FMCS, and many agreements do not. Parties are free to select any arbitrator or arbitration procedure acceptable to them. 29 CFR 1404.8. FMCS furnishes names from its Roster as a service, for a fee, to parties who choose to use it. The commenters' demonstration that no statute requires FMCS to provide that service is a demonstration that the language characterized as an obligation to honor every unilateral request existed in one place only: the sentence of former § 1404.9(b) that the interim final rule removed. What has been characterized as a regulatory commitment that FMCS made, FMCS may amend, subject to the

requirements of the Administrative Procedure Act (APA). The commenters do not identify a statute that forbids the amendment, because there is none.

Comment 5's observation that FMCS has, in different documents over the years, cited different provisions of the Labor Management Relations Act as the basis for its Roster does not alter this conclusion. Whether FMCS's furnishing of Roster services to Federal-sector parties rests on the declaration of policy in 29 U.S.C. 171(b), which makes governmental facilities available for “voluntary arbitration,” or on 29 U.S.C. 173(f), which authorizes FMCS to make its services available to Federal agencies and directs it to consult with the interagency body designated under 5 U.S.C. 573 in maintaining rosters of neutrals and arbitrators, each provision authorizes the service and neither obligates it. The phrase “voluntary arbitration” in section 171(b), and the title of subpart A of part 1404 (“Arbitration Policy”), reflect the premise on which FMCS has always operated: that it facilitates arbitration to which the parties have lawfully agreed. Neither provision contemplates that FMCS will constitute a tribunal for a proceeding that the law does not authorize.

3. *Where chapter 71 applies and an agreement is in effect, section 7121 supplies the authorization for binding arbitration; the rule's discussion of consent and sovereign immunity concerns the circumstance in which chapter 71 does not apply.* Comments 4 and 5 devote considerable attention to the interim final rule's citation of 5 U.S.C. 572(a) and (c) and to its discussion of sovereign immunity. Comment 5 argues that ADRA governs an agency's discretionary election of alternative procedures in its own administrative programs and has nothing to do with a grievance procedure that Congress required the parties to negotiate; that consent under chapter 71 is given when the agreement is executed; and that section 7121, which the interim final rule itself cited, is the statutory authorization that the sovereign immunity principle requires. Comment 4 argues that FMCS has not explained how providing a panel would violate the Constitution.

FMCS agrees with the commenters that, where chapter 71 applies and a collective bargaining agreement with a negotiated grievance procedure is in effect, section 7121(b)(1)(C)(iii) is the statutory authorization for binding arbitration, that authorization permits either party to invoke arbitration alone, and the agency's consent is supplied by the agreement it negotiated. 91 FR at

49274. In that circumstance, FMCS does not require, and under this rule will not seek, any renewed or case-specific consent from the responding agency before issuing a seven-name panel on a unilateral request. Comment 5 reads the interim final rule as applying an ADRA consent requirement to every Federal-sector grievance. It does not. To remove any doubt, FMCS states here that it does not read 5 U.S.C. 572 to require a Federal agency covered by chapter 71 to consent, case by case, to grievance arbitration under an agreement in effect.

The interim final rule's discussion of consent and sovereign immunity addresses the circumstance in which chapter 71 does not apply. Chapter 71's arbitration provisions are, by their terms, components of the chapter. Section 7121 requires grievance procedures ending in binding arbitration in agreements negotiated under the chapter; section 7122 provides for exceptions to, and the finality of, awards rendered in arbitration "under this chapter"; and the chapter defines a "collective bargaining agreement" as one "entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. 7103(a)(8), 7121, 7122.

Those provisions are not freestanding delegations of arbitral power; they are elements of an integrated statutory scheme whose rights and remedies exist only as Congress created them. *United States v. Fausto*, 484 U.S. 439, 445 (1988); *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 531–33 (1989). An arbitrator acting under a negotiated grievance procedure exercises a statutory delegation whose content Congress defined. *Cornelius v. Nutt*, 472 U.S. 648, 660–63 (1985), not an authority arising from the parties' private agreement. Section 7103(b)(1) authorizes the President to exclude an agency "from coverage under this chapter." When the President does so, sections 7121 and 7122 no longer apply to the agency, and an agreement that survives as a document no longer carries the statutory character the chapter gave it.

With chapter 71 removed, the governing principles are those of sovereign immunity and the limited authority of Federal officers. The United States may be subjected to a binding adjudication only where Congress has consented, and that consent must be "unequivocally expressed in statutory text." *Lane v. Peña*, 518 U.S. 187, 192 (1996); accord *United States v. Sherwood*, 312 U.S. 584, 586 (1941). No officer can supply that consent by contract, conduct, or acquiescence. *United States v. Shaw*, 309 U.S. 495,

500–01 (1940); *Minnesota v. United States*, 305 U.S. 382, 388–89 (1939); *United States v. Mitchell*, 463 U.S. 206, 215–16 (1983). And an award payable from the Treasury requires an appropriation made by law, for which neither an agency's agreement nor its conduct can substitute. U.S. Const. art. I, § 9, cl. 7; *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424–32 (1990).

Congress's enactment of 5 U.S.C. 575, which authorizes agencies to use binding arbitration only where all parties consent in a written agreement that specifies a maximum award, entered by an official with authority to settle the matter, and subject to guidance issued by the agency head in consultation with the Attorney General, and which supplies its own enforcement and review provisions, 5 U.S.C. 575, 580, 581, reflects the settled understanding that an agency may submit to binding arbitration only where a statute authorizes it, and that Congress legislates expressly when it intends arbitral awards to be enforceable against the sovereign. See *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995).

Section 7121 is such a statute for agencies covered by chapter 71. When the President excludes an agency under section 7103(b)(1), that authorization no longer reaches the agency, and the agreement through which the agency gave its consent has, in the cases that gave rise to this rule, been terminated. In that circumstance, a request that FMCS furnish a panel and appoint an arbitrator to hear a grievance against the excluded agency is a request that FMCS constitute a tribunal over a Federal agency that no statute subjects to it. Comment 5's argument that ADRA does not reach such a dispute, if correct, does not help the commenters; it means that there is even less authority for the proceeding than the interim final rule contemplated.

Nor can the arbitration article of a terminated chapter 71 agreement simply be relabeled as an ADRA submission: such articles ordinarily specify no maximum award, were not adopted under agency-head guidance issued in consultation with the Attorney General, and purport to make arbitration a standing condition invocable unilaterally rather than a consensual submission of defined issues. An excluded agency that elects to arbitrate must therefore do so under ADRA or another statutory authority on that authority's own terms, and OA may ask the parties to identify that authority. Nothing in the rule, finally, prevents an excluded agency and a labor

organization from jointly requesting FMCS's mediation or other nonbinding services, see 5 U.S.C. 571(3), which FMCS remains available to provide.

Comment 4 asks how providing a panel in that circumstance would implicate the Constitution. The interim final rule's reference to constitutional limits was to Article II. An Executive Branch agency has no authority to facilitate a proceeding that would subject another Executive Branch agency to binding adjudication without statutory authorization, and no authority to act contrary to a determination the President has made under a statute that commits that determination to him.

The Office of Legal Counsel has explained that, under the Take Care Clause, "where a statute or other law operates to require the government to submit to binding arbitration, the government must submit." 19 Op. O.L.C. at 224. The corollary follows: where no statute requires or authorizes submission, Executive Branch officials may not submit the United States to binding arbitration on the strength of a contract alone, and FMCS may not lend its process to that end. An exclusion under section 7103(b)(1), moreover, asserts no constitutional authority to override the statute; it is the exercise of an authority Congress itself conferred, which places the President where his authority is at its maximum. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Where the President has determined under section 7103(b)(1) that chapter 71 does not apply to an agency and has directed that agency to cease participating in grievance arbitration, FMCS, which is bound by that determination to the same extent as the excluded agency, may not treat its own regulation as requiring it to furnish the means by which the proceeding goes forward. The commenters' disagreement with the Executive Orders is a disagreement with the President, which the courts will resolve in the litigation now pending. It is not a reason for FMCS to administer its Roster as though the Orders did not exist.

4. *The commenters' objections to the scope and process of the inquiry have been addressed in this final rule.* The most substantial criticism in the comments is not that FMCS may never decline a service that it cannot lawfully provide but that the regulatory text, as written, could permit OA to decline or hold a request on the basis of an ordinary objection to the grievance, could leave a request in abeyance indefinitely without explanation, and

could leave the requesting party without its fee, without its place in line, and without a stated path to reconsideration. Comment 3 develops these concerns most fully; Comment 5 describes matters in which, before the rule issued, OA raised questions that the commenter characterizes as contractual or jurisdictional rather than as questions of FMCS's authority.

FMCS has considered these criticisms and agrees that the regulatory text should state the limits of the inquiry and the process that accompanies it. This final rule therefore revises § 1404.9(b)(3) to provide that the inquiry is limited to whether FMCS may lawfully provide the requested service; that a party's contention that a grievance lacks merit, is untimely, or is not arbitrable under the agreement, or a party's disagreement with a grievance or unwillingness to participate in the arbitration, does not by itself establish that providing the service would be inconsistent with law, a court order, or FMCS's authority; and that OA will afford each party a reasonable opportunity to respond to information submitted by the other. It adds § 1404.9(b)(5), providing that OA will notify the parties in writing of any decision to decline or hold a request and of the basis for such a decision; that a request held in abeyance retains its original date of receipt; that OA will reconsider a held request upon a party's submission of information bearing on the basis for the hold and will periodically review all held requests; and that a party may obtain a refund or credit of the fee paid for a request that is declined or held. It revises § 1404.12(b) to provide that a party's failure to submit ranked preferences does not by itself establish that an appointment would be inconsistent with law. These changes are discussed in section III.

C. Comment 1

Comment: The comment contends that the rule is procedurally improper because none of the statutory bases for omitting notice and comment applies; that "impracticable" requires an emergency, "unnecessary" applies only to minor or technical rules, and "contrary to the public interest" applies only where advance notice would itself cause harm, citing *Am. Pub. Gas Ass'n v. D.O.E.*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023), *U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979), and *Utils. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754–55 (D.C. Cir. 2001); that FMCS cites no examples of confusion and assigns thousands of arbitrators each year under a rule in

place since 1979; that the rule is inadequately reasoned under *D.H.S. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020), *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), and *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), because it offers no data, does not explain the alleged confusion, and does not account for the reliance of unions that incorporated FMCS's procedures into their agreements; that the rule is a post hoc rationalization of the April 22, 2026 memorandum; and that the rule is internally inconsistent because deciding that sovereign immunity or an Executive Order forecloses a panel is deciding the parties' rights and will render CBA provisions null.

Response: The procedural objections are addressed in section II.H. As to the asserted absence of confusion, the comment conflates the volume of FMCS's ordinary business with the question the rule addresses. The great majority of the panels OA issues each year involve private-sector parties or Federal-sector parties as to whom no question of FMCS's authority arises, and the rule does not change how those requests are processed. The confusion the interim final rule identified arose in a specific and, by mid-2026, recurring circumstance: unilateral requests for panels and appointments in matters involving agencies that the President had excluded from chapter 71 and that had terminated the applicable agreement, in which the requesting party invoked the "will be honored" sentence as obligating FMCS to proceed. That the sentence was so invoked is not speculation; the regulatory language was central to litigation challenging the April memorandum, and the comments in this rulemaking invoke it in the same way. A regulation that is being asserted as a mandate to take an action the agency believes it lacks authority to take is a regulation whose meaning is in dispute, and FMCS was entitled to resolve that dispute by amending it.

The comment's reliance argument is addressed in response to Comment 5 and in section II.H. FMCS notes here that the interim final rule did consider reliance interests, 91 FR at 49276, and that this final rule adds provisions—preservation of the request date, written notice, reconsideration, and refund or credit—that respond directly to the reliance the comment describes.

The asserted internal inconsistency rests on the premise addressed in section II.B.1. A determination that FMCS may not lawfully furnish a service is a determination about FMCS. It does not purport to decide, and under § 1404.9(b)(4) does not decide, whether

the parties' agreement is valid or what their rights under it are; those questions remain for the Authority and the courts, and a party that believes the other has breached the agreement by refusing to arbitrate may say so in the forum with jurisdiction to decide it. The comment's assertion that the rule "will render CBA provisions null" is incorrect for agreements in effect between parties covered by chapter 71: for those parties, as section II.B.3 explains, FMCS will issue a seven-name panel on unilateral request as before. For agreements that an excluded agency has terminated, the question whether the provisions remain enforceable is being decided in litigation to which FMCS is not a party, and FMCS will act in accordance with the result.

As to the characterization of the rule as a post hoc rationalization of the April 22, 2026, memorandum, FMCS addresses that contention in response to Comment 5. FMCS adds that an agency that confronts a new and recurring question, issues guidance to its staff on how to process the matters before it, and then codifies the governing standard through rulemaking that invites and responds to public comment has followed the ordinary course, not evaded it.

D. Comment 2

Comment: The comment opposes giving FMCS authority to refuse or delay panels on the basis of a threshold inquiry. It contends that, for years, FMCS provided the panel and left arbitrability to the arbitrator; that FMCS cannot both disclaim deciding arbitrability and reserve authority to refuse a panel; that the rule adds a gatekeeper between workers and the process they negotiated, generates additional disputes and expense that taxpayers bear, and is part of a pattern of narrowing Federal employees' workplace protections, including those of the more than half a million veterans in the Federal civilian workforce; and that, if a court order or clear law prohibits FMCS from providing a panel, FMCS must follow it, but merely raising a legal or arbitrability objection should never become a tool for delay. The comment asks FMCS to withdraw the rule or, at minimum, to limit the threshold inquiry to situations involving a clear and controlling legal prohibition or court order.

Response: FMCS appreciates the comment's recognition that FMCS must follow a court order or law that prohibits it from providing a panel, and agrees with the comment's central practical point: an objection to the merits or arbitrability of a grievance

should not become a tool for delay. The revisions to § 1404.9(b)(3) in this final rule adopt that principle in the regulatory text. The inquiry is limited to whether FMCS may lawfully provide the service, and a party's objection to the grievance, its disagreement with the grievance, or its unwillingness to participate does not by itself establish that FMCS may not. FMCS has not adopted the comment's alternative formulation ("clear and controlling") as the regulatory standard, because whether a legal prohibition is "clear" is itself a judgment, and the standard in the rule, whether providing the service would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority, is the standard that governs every action an Executive agency takes. FMCS expects that, in practice, the two formulations will rarely diverge: a request that does not involve a court order, an agency excluded from chapter 71, or a service that part 1404 requires to be jointly authorized will be processed as it always has been.

The comment's concern about additional cost and bureaucracy is addressed in section II.G.6 and in section IV. FMCS notes that, where FMCS lacks authority to provide a service, the cost of the resulting dispute is not created by FMCS's declining to provide it; it is created by the underlying legal dispute between the parties, which would exist, and would have to be resolved somewhere, whether or not a panel issued. Nothing in the rule affects the representational rights of Federal employees, including veterans, under chapter 71 where it applies.

E. Comment 3

Comment: The comment, submitted by an officer of a local union representing employees of a Federal medical facility, asks FMCS to revise the rule so that an ordinary, properly authorized unilateral request for a seven-name panel is processed promptly and a party's disagreement with a grievance or unwillingness to participate does not, by itself, prevent the other party from obtaining a neutral. The comment acknowledges that revised § 1404.9(b)(2) preserves unilateral requests for standard panels and that FMCS cannot ignore a court order but contends that the breadth of § 1404.9(b)(3), the absence of deadlines, and the absence of any requirement of a written explanation could allow a general objection by the responding agency to trigger an indefinite hold.

The comment describes two pending grievances at the commenter's facility, concerning environmental differential

pay and weather and safety leave during a March 2026 winter storm, to illustrate the costs of delay to employees, the agency, and the veterans the facility serves, while expressly disclaiming any contention that FMCS declined a panel in either matter or that the rule caused delays that preceded it. The comment discusses the First Circuit's May 16, 2026, order in *A.F.G.E. Local 2305 v. Dep't of Veterans Affs.*, No. 26–1321, which the commenter describes as distinguishing reinstatement of the VA agreement from specific enforcement of its grievance and arbitration procedures, and asks FMCS to identify the actual scope of any order on which it relies. The comment asks FMCS to explain whether the April 22, 2026, memorandum remains operative, observes that a preserved filing date does not appoint an arbitrator, and questions whether the alternatives the interim final rule identifies (the Authority, the courts, or another provider) are available in practice. The comment then proposes eight specific changes.

Response: FMCS appreciates the care with which the comment distinguishes between what the rule's text permits and what the commenter fears it could permit in practice and has adopted the substance of several of its proposals. FMCS responds to the eight proposals in order.

First, the comment asks FMCS to state expressly that an ordinary seven-name panel request authorized by statute or agreement will be processed when made by either party unless FMCS identifies a specific, presently applicable legal prohibition on providing the service, and to clarify that the responding party's lack of contemporaneous consent is not, standing alone, such a prohibition where a grievance has been invoked under an applicable negotiated procedure. FMCS has adopted this proposal in substance. Section 1404.9(b)(2) already provides that a request for a seven-name panel may be unilateral unless part 1404, applicable law, or the agreement requires joint authorization. Revised § 1404.9(b)(3) now provides that a party's disagreement with a grievance or unwillingness to participate in the arbitration does not by itself establish that FMCS may not provide the service, and section II.B.3 of this preamble states that FMCS will not seek case-specific consent from an agency covered by chapter 71 under an agreement in effect. Where the responding agency has been excluded from chapter 71 and the agreement has been terminated, the basis for declining or holding the request is the exclusion and

termination, not the agency's unwillingness to participate, and OA's written notice under new § 1404.9(b)(5) will say so.

Second, the comment asks FMCS to confine the inquiry to FMCS's authority to provide the requested service, to require an objecting party to identify the authority on which it relies, and to provide that ordinary factual, contractual, timeliness, and merits defenses are not decided through the screen and that an objection does not automatically suspend a request merely because it uses words such as "jurisdiction" or "arbitrability." FMCS has adopted this proposal in substance in revised § 1404.9(b)(3). FMCS has not added a regulatory requirement that an objecting party submit a formal statement of authority, because OA may already request the agreement, statute, regulation, order, authorization, or other information it needs, and because, in the cases that gave rise to the rule, the relevant authority (the Executive Order excluding the agency and the agency's notice of termination) is a matter of public record. FMCS agrees, however, that the burden of identifying the asserted bar lies in the first instance with the party asserting it, and that OA will not treat an objection as warranting abeyance merely because of the terms in which it is cast.

Third, the comment asks FMCS to establish short default time limits for objections, responses, and decisions, suggesting five, five, and ten business days, and to prohibit abeyance "until further notice" without a date for reconsideration. FMCS agrees that a request should not remain in abeyance without explanation or any stated path forward, and new § 1404.9(b)(5) requires written notice of the basis for a hold, reconsideration upon the submission of information bearing on that basis, and periodic review of every held request. FMCS has not adopted fixed deadlines in the regulatory text. The threshold questions that have arisen under the rule typically turn on the status of an Executive Order exclusion, a termination, or a court order that is the subject of ongoing litigation, and a fixed deadline for decision would, in many such cases, force OA to decline a request that it would otherwise hold pending a judicial ruling, to the detriment of the requesting party. OA will act on threshold questions as promptly as the circumstances permit and will state in its written notice what development would permit it to proceed.

Fourth, the comment asks that OA provide a short written disposition to both parties whenever it declines,

suspends, or conditions service, identifying the service requested, the controlling authority, how it applies, the status of the original request date, and what would permit reconsideration. FMCS has adopted this proposal in new § 1404.9(b)(5), which requires written notice to the parties of the action taken and the basis for it, and which provides for preservation of the request date and for reconsideration. OA's written notices will identify the responsible FMCS official.

Fifth, the comment asks for a defined reconsideration route, periodic review of holds, notice when a cited impediment changes, and preservation of the original receipt date and position without a new fee. New § 1404.9(b)(5) adopts each of these elements.

Sixth, the comment asks FMCS to clarify that the one-party ranking process in § 1404.12(b) continues to operate when the other party simply declines to rank, and that joint authorization is not imported into standard unilateral panels through the screening provisions. FMCS has adopted this proposal. Revised § 1404.12(b) provides that a party's failure to submit its ranked preferences does not by itself establish that an appointment would be inconsistent with applicable law, a court order, or FMCS's authority. The limitation in § 1404.12(b) operates only where OA has determined under § 1404.9(b)(3) that the appointment itself may not lawfully be made, and the written notice required by § 1404.9(b)(5) will identify that distinct basis.

Seventh, the comment asks FMCS to publish deidentified implementation data concerning joint and unilateral Federal-sector requests, threshold inquiries, the categories of impediment asserted, time in inquiry or abeyance, and dispositions. FMCS has not adopted a regulatory reporting requirement, which would entail recordkeeping and systems changes whose cost the interim final rule did not contemplate. FMCS agrees, however, that information about how the rule is being applied would assist the public and FMCS alike, and FMCS will endeavor to make aggregate information about threshold inquiries under § 1404.9(b)(3) available on its website.

Eighth, the comment asks FMCS to consider the alternative of issuing a standard panel with an express reservation that the service expresses no view on consent, contract validity, arbitrability, or the merits, whenever no specific legal bar to the administrative act is established. For requests that do not present a question of FMCS's authority, that is what the rule as

revised provides: the panel issues, and § 1404.9(b)(4) supplies the reservation. For requests that do present such a question, because the responding agency has been excluded from chapter 71 and has terminated the agreement, or because a court has stayed or enjoined the arbitration, the alternative does not answer the concern. The disclaimer in § 1404.9(b)(4) describes what FMCS's action does not decide; it cannot supply authority that the law withholds, and a panel issued "with reservation" to constitute a tribunal over an agency that no statute subjects to it is still that.

As to the comment's remaining points: FMCS agrees that the scope of any court order on which OA relies must be identified with care, and new § 1404.9(b)(5) requires OA to state the basis for its action in writing. FMCS does not express a view on the First Circuit's May 16, 2026, order, which concerns litigation to which FMCS is not a party; FMCS's obligation is to act consistently with applicable court orders as they apply to any request before OA. As to the April 22, 2026, memorandum, issued before the rule and will be conformed to this final rule; to the extent it is inconsistent with the regulatory text as revised, the regulation controls. FMCS agrees that a preserved filing date does not appoint an arbitrator and has not suggested otherwise; the preservation of the date, now codified, protects the requesting party's position for the day on which the impediment is removed. The availability and adequacy of alternative forums is addressed in response to Comment 5.

F. Comment 4

Comment: The comment contends that the rule is inconsistent with chapter 71 because section 7121(a)(1) assigns questions of arbitrability to the negotiated procedure and to arbitrators, Congress deliberately moved away from the agency-controlled advisory arbitration of Executive Order 10988, and Congress provided a post-award review process before the Authority and the courts of appeals that leaves no risk an agency's objection will go unheard; that neither chapter 71 nor FMCS's enabling act gives FMCS a role in arbitrability, and FMCS has conceded that its role is administrative and facilitative; that the threshold inquiry is an arbitrability determination because it requires FMCS to assess one party's legal objection and, on that basis, to foreclose the other party's access to arbitration; that the interim final rule discloses no standard for the inquiry; that FMCS lacked good cause because eliminating uncertainty is not good cause, citing *Mack Trucks, Inc. v.*

E.P.A., 682 F.3d 87, 93–95 (D.C. Cir. 2012), and *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018), and FMCS's prior rulemakings used notice and comment; that the rule is substantive rather than clarifying; that there is no evidence of confusion, and FMCS has not addressed its decades-long practice, including its 2010 rejection of a proposal to have OA determine whether an agreement requires a joint request; that the rule is internally contradictory; that FMCS failed to consider that no prior exclusion under section 7103(b), including President Carter's in 1979, prompted any change in FMCS's regulations, and that the rule reaches disputes in which the Executive Orders play no part; and that the sovereign immunity rationale fails because FMCS has not explained the constitutional violation, is not the body to decide sovereign immunity, and did not consider whether other statutory authorities permit arbitration to proceed. The comment also contends that the interim final rule's suggestion that a refusal to arbitrate may be pursued as an unfair labor practice is a "nonstarter" because a party cannot pursue a charge over a failure to strike names from a panel that does not exist.

Response: The comment's principal contention, that the threshold inquiry is an arbitrability determination assigned by section 7121(a)(1) to arbitrators, is addressed in section II.B.1. FMCS adds the following: The comment's history is accurate: Congress replaced the advisory arbitration of Executive Order 10988, under which the agency had the last word, with binding arbitration that either party may invoke, and it provided for review of awards by the Authority and the courts of appeals. Each of those provisions governs the relationship between the agency and the exclusive representative. Each operates within chapter 71, and each depends on chapter 71 applying to the agency: section 7122, by its terms, governs awards rendered in arbitration "under this chapter," and the agreements to which section 7121 applies are, by statutory definition, those negotiated "pursuant to the provisions of this chapter." 5 U.S.C. 7103(a)(8), 7122(a).

The comment does not address what happens when, by the President's determination under section 7103(b)(1), the agreement is not covered by chapter 71. In that circumstance, there is no section 7121 procedure, no section 7122 review, and no section 7123 petition; the carefully constructed scheme the comment describes has, as to that agency, been withdrawn by the statute itself. The comment's argument that FMCS is "placing its policy preference

over that of Congress” has it backwards. Congress chose to give the President the authority to exclude agencies from chapter 71 for national security reasons and to make that determination unreviewable. FMCS’s rule gives effect to that choice; the comment asks FMCS to disregard it.

The comment’s assertion that the inquiry “discloses no standard” is addressed by the regulatory text, which states the standard: whether providing the service would be inconsistent with applicable law, a court order, or FMCS’s statutory or regulatory authority. This final rule narrows that standard further by providing what does not satisfy it.

As to FMCS’s prior practice, the comment is correct that FMCS has furnished panels on unilateral request since 1979, and that, in 2010, FMCS declined to adopt a proposal under which OA would have examined whether the parties’ agreement required joint requests and declined to proceed if the request had such a requirement and a party objected. 75 FR 30704, 30705 (June 2, 2010). FMCS declined that proposal because it would have placed OA in the position of interpreting collective bargaining agreements. The present rule declines that role for the same reason: a party’s contention that a grievance is not arbitrable under the agreement does not by itself warrant declining or holding a request. What the present rule addresses, and what the 2008 proposal did not, is the circumstance in which a question arises about FMCS’s own authority to act. Nothing in FMCS’s history suggests that it ever understood its regulation to require it to furnish panels where the law forbade it; the sentence the interim final rule removed was simply not tested against that circumstance until 2026.

The comment’s observation that no prior exclusion under section 7103(b), including those in 1979, prompted a change to FMCS’s regulations identifies no flaw in the rule. Prior exclusions, as the comment’s own citation reflects, were adopted at the inception of the statute or involved agencies and subdivisions in which collective bargaining agreements with negotiated grievance procedures were not in effect or were few. The 2025 Executive Orders excluded agencies and subdivisions employing a substantial share of the Federal workforce, many of them parties to longstanding agreements, and directed those agencies to terminate the agreements and their participation in pending grievance proceedings. The question whether FMCS must furnish panels and appointments for proceedings against those agencies did

not arise in 1979 and arose repeatedly in 2026. An agency is not required to amend its regulations in anticipation of a circumstance that has not arisen, and it is not precluded from amending them when the circumstance arises.

The comment’s objection that the rule reaches disputes in which the Executive Orders play no part is addressed in response to Comment 5. FMCS adds that the comment does not identify any dispute outside the Executive Orders in which, under the rule as revised, OA would have a basis to decline or hold a request, other than one involving a court order staying or enjoining the arbitration or a service that part 1404 requires to be jointly authorized, and FMCS does not understand the comment to contend that OA must disregard either.

The sovereign immunity arguments are addressed in section II.B.3. As to the contention that FMCS is not the body to decide questions of sovereign immunity, FMCS does not decide them. It decides whether, given the determinations that the President has made and the orders that courts have entered, it may lawfully furnish a service. Every agency makes that judgment about its own conduct every day; it is not an adjudication. As to the contention that FMCS failed to consider whether other statutory authorities would permit arbitration to proceed, the regulatory text expressly contemplates that a requesting party may identify a statutory provision, regulation, court order, or written authorization that permits the service, and OA will consider any such authority a party submits. The comment itself identifies none.

Finally, the comment’s contention that a refusal to arbitrate cannot be raised as an unfair labor practice because there is no panel from which to strike names misreads the interim final rule. The unfair labor practice to which the interim final rule referred is an agency’s refusal to comply with the arbitration provisions of an agreement in effect, 5 U.S.C. 7116(a)(1), (5), and (8), which is complete when the agency refuses to participate, whether or not a panel has issued. Whether that charge lies against an agency that contends it has been excluded from Chapter 71 is, as Comment 3 correctly notes, one of the disputed questions in the pending litigation, and FMCS expresses no view on it. FMCS’s point was and is a narrower one: FMCS declining to furnish a service it cannot lawfully provide does not extinguish whatever rights the requesting party has against the other party, and those rights are enforced in the forums Congress provided for that purpose, not by FMCS.

G. Comment 5

Comment: The comment, submitted by a coalition of Federal-sector labor organizations and twenty-three affiliated organizations that together represent more than 550,000 Federal and postal employees, is the most extensive FMCS received. It contends that the rule takes arbitrability from the arbitrator and that the disclaimer in § 1404.9(b)(4) cannot be reconciled with the authority in § 1404.9(b)(3) to demand the parties’ agreement; that FMCS’s statutory authorities do not reach the rule, because Taft-Hartley excludes the United States as an employer, ADRA governs an agency’s discretionary use of alternative procedures in its own administrative programs, 29 U.S.C. 173(f) concerns FMCS’s own employees acting as neutrals, consent under chapter 71 is given at execution of the agreement, and section 7121 is itself the statutory authorization that sovereign immunity requires; that FMCS cites no decision of the Authority, no court of appeals decision construing section 7121, and no arbitral authority, and has given inconsistent accounts of the basis for its Roster; that the rule compromises FMCS’s neutrality; that the rule’s cost analysis ignores that most Federal-sector agreements name FMCS as the sole source of arbitrators, that parties pay the fee in advance, that, for some grievances (including reduction-in-force grievances), the negotiated procedure is the exclusive administrative forum, that contractual deadlines run during abeyance and FMCS cannot bind arbitrators on timeliness, and that interest under the Back Pay Act compounds daily during delay; that the rule overrides the aggrieved party’s election under 5 U.S.C. 7116(d) and directs parties to an unfair labor practice channel that lacked a Senate-confirmed General Counsel from 2017 until July 2026; that the rule is pretext, because FMCS changed its practice in April 2026, before any published policy existed, in matters that no Executive Order reaches, and the rule’s text contains no Executive Order trigger; and that the August 28 republication, by moving comments from www.regulations.gov to FMCS, removed public comment from a government-wide docket without explanation.

The comment describes four matters (Matters A through D) in which, it states, OA raised compliance questions on its own initiative, conditioned appointment on a union’s submission of legal authority, questioned a bargaining-unit composition issue in a matter involving an agency not covered by any Executive Order, declined to certify a

panel because the agreement was silent on what should occur when one party refuses to participate, and, after asking an agency whether it consented, held a request in abeyance for lack of consent. The comment asks FMCS to withdraw the rule.

Response: FMCS has considered the comment in full and responds to its principal contentions in turn. Several are addressed in section II.B and are not repeated here.

1. *Arbitrability and the parties' agreement.* The contention that the rule takes arbitrability from the arbitrator is addressed in section II.B.1. The comment's narrower point, that § 1404.9(b)(3) cannot authorize OA to request the parties' agreement while § 1404.9(b)(4) disclaims any decision about it, overlooks that OA has always consulted the parties' agreement for purposes that have nothing to do with its validity. Section 1404.12(b) directs OA to apply the ranked-preference process where the agreement "permits each party to separately notify OA of its ranked order of preference, or is silent on the manner of selecting arbitrators"; § 1404.11(c) directs OA to furnish additional panels on unilateral request "if authorized by the applicable collective bargaining agreement"; and § 1404.9(b)(2), both before and after the interim final rule, conditions special services on the agreement's terms. OA reads the agreement to learn what service the parties have asked it to perform. It may also need the agreement to determine whether a court order that refers to a specific agreement applies to the request before it. None of that is a decision that the agreement is or is not valid, and § 1404.9(b)(4) says so.

2. *Statutory authority.* The comment's analysis of Taft-Hartley, ADRA, and chapter 71 is addressed in sections II.B.2 and II.B.3. FMCS adds two points: First, the comment's observation that Taft-Hartley's definition of "employer" excludes the United States establishes that FMCS's duty under 29 U.S.C. 173(a) to mediate disputes in industries affecting commerce does not extend to Federal agencies as employers. It does not establish that FMCS lacks authority to make its Roster available to Federal-sector parties, a service FMCS has provided for more than four decades without objection from any commenter and of which the present commenters have availed themselves, and it does not establish that any statute requires FMCS to provide it.

Second, the comment's observation that FMCS cited no decision of the Authority or of a court of appeals construing section 7121 reflects the nature of the question. The rule does not

construe section 7121; it addresses what FMCS may do when section 7121 does not apply. The comment likewise cites no decision of the Authority, any court, or any arbitrator holding that FMCS must furnish a panel for a proceeding against an agency that the President has excluded from chapter 71. The comment's own observation that consent under chapter 71 is given at the execution of the agreement confirms the point: a collective bargaining agreement is, by statutory definition, one entered into "pursuant to the provisions of this chapter," 5 U.S.C. 7103(a)(8), and the consent it embodies is consent to a statutory procedure. When the chapter ceases to apply to the agency, so does the procedure to which the agency consented.

3. *Neutrality.* The comment contends that the rule seats FMCS as the party that decides whether one side gets a hearing, that, in every matter the comment describes, FMCS decided against the party seeking arbitration, and that FMCS's standing as a neutral will suffer. FMCS takes its neutrality seriously; it is the foundation of the agency's work.

Neutrality, however, is impartiality between labor and management as to the merits of their disputes. It is not indifference to whether the law permits FMCS to act. An agency that furnishes the means for a proceeding the law does not authorize is not neutral; it has taken a side on a contested legal question by acting as though the question were settled. FMCS recognizes that, in the matters that have arisen under the Executive Orders, the party seeking arbitration has been the union and the party asserting a legal bar has been the agency, and that FMCS declining to proceed has therefore affected unions. That reflects the structure of the Executive Orders, not a preference of FMCS. The procedural provisions added by this final rule, written notice of the basis for any hold, an opportunity for each party to respond, periodic review, and refund or credit of the fee, are designed to ensure that OA's handling of threshold questions is transparent to both parties and that the party affected by a hold understands precisely why, and what would change the result.

4. *The parties who name FMCS as sole source; fees paid in advance.* FMCS recognizes that many Federal-sector agreements designate FMCS as the source of arbitrators. That designation reflects the parties' choice to use a service that FMCS provides as a matter of regulation, and it does not confer on the parties a right to have FMCS perform an act that the law does not permit. FMCS cannot make itself able to

provide a service by having been named in an agreement, any more than a court can acquire jurisdiction by being named in a forum-selection clause. The comment's point about fees is well taken, and this final rule adopts, in § 1404.9(b)(5), the fee relief that the April memorandum contemplated, and that OA has offered in practice, but that the interim final rule's text did not include.

The comment is also correct that there is no appendix A to part 1404. The appendix that formerly contained the fee schedule was removed in 2022, *Rescission of the Arbitration Policy; Schedule of Fees*, 87 FR 69165 (Nov. 18, 2022), and FMCS's current fees, which took effect October 1, 2023, are published on its website. The interim final rule's statement that the rule does not alter "the fee schedule in appendix A to part 1404" should have referred to FMCS's published schedule of fees, and this final rule makes conforming technical amendments to §§ 1404.7 and 1404.9(g).

5. *Exclusive forums; reductions in force.* The comment observes that for a bargaining unit employee covered by an agreement that includes reduction-in-force procedures, the negotiated procedure is the exclusive administrative forum for a grievance over those procedures. That is correct where chapter 71 applies and the agreement is in effect, and, in that circumstance, FMCS will issue a panel on unilateral request. The comment's concern arises only where the agency has been excluded from chapter 71. But the exclusivity on which the comment relies is itself a function of section 7121(a)(1) and of the employee's coverage by an agreement under it; when neither applies, the employee's reduction-in-force appeal rights under 5 CFR part 351 are unaffected by any agreement. The comment thus describes a circumstance in which either the negotiated procedure is available and FMCS will furnish the panel, or the negotiated procedure is not the exclusive forum. The rule does not leave any employee without a forum.

6. *Deadlines, delay, and the Back Pay Act.* The comment contends that contractual deadlines run during abeyance, that FMCS cannot bind an arbitrator on timeliness, and that delay increases the interest payable under the Back Pay Act, 5 U.S.C. 5596(b)(2), at the agency's expense. FMCS agrees that it cannot bind arbitrators or the Authority on questions of timeliness. New § 1404.9(b)(5) codifies the preservation of the original date of receipt, which was previously a matter of guidance only, so that a party that has timely

submitted its request to FMCS has a record of having done so. Whether an agreement's deadline for "requesting a panel" is satisfied by a timely request that FMCS has not yet acted on is a question of contract that the comment's own argument assigns to the arbitrator; FMCS notes only that the comment identifies no case in which an arbitrator has penalized a party for FMCS's processing time, and FMCS would expect any such contention to be received with skepticism.

As to Back Pay Act interest, interest accrues on an award of back pay from the date of the personnel action regardless of the forum or the time the proceeding takes, and it is paid only where the employee prevails. Interest against the United States, moreover, is recoverable only where Congress has expressly provided for it, *Libr. of Cong. v. Shaw*, 478 U.S. 310, 314–18 (1986), and the Back Pay Act waives immunity only where an "appropriate authority" finds an unjustified or unwarranted personnel action, 5 U.S.C. 5596(b)(1). OPM's regulation recognizes an arbitrator as an appropriate authority when acting "in a grievance or arbitration proceeding," 5 CFR 550.803, which presupposes a forum that is itself lawfully constituted. An arbitrator whose authority rests on nothing but a terminated agreement with an agency excluded from chapter 71 does not occupy that office, and an award by such an arbitrator would not be payable from appropriated funds in any event. *Richmond*, 496 U.S. at 424–28.

The comment's argument that delay increases the Government's liability assumes a proceeding that will go forward and an award that will issue. Where FMCS has authority to furnish the panel, the rule as revised produces no delay; where it does not, no award will issue through FMCS's process whether FMCS acts promptly or not, and the employee's remedy, if any, lies elsewhere. FMCS has nonetheless considered the comment's point that delay has costs for the parties and for the Government, and the periodic review and reconsideration provisions in § 1404.9(b)(5) are intended to ensure that a request does not remain in abeyance longer than the impediment that caused the hold.

7. *Section 7116(d) and the unfair labor practice channel.* The comment contends that, by directing parties to the Authority, the rule overrides the aggrieved party's election of forum under 5 U.S.C. 7116(d), and that the unfair labor practice channel has not functioned reliably for most of the past decade. FMCS does not direct any party anywhere. The interim final rule

observed that FMCS declining to furnish a service does not affect the parties' ability to pursue remedies before the Authority, a court, or another tribunal with jurisdiction, and gave the unfair labor practice process as one example. 91 FR at 49276. Whether a particular charge lies, whether the election in section 7116(d) has been made, and whether the Authority's General Counsel will issue a complaint are matters for the Authority, and the comment's account of the Authority's General Counsel vacancy, which the comment states ended in July 2026, concerns an agency that FMCS does not supervise. FMCS's point is the limited one stated in response to Comment 4: FMCS's action on a request does not extinguish any right the requesting party has against the other party.

8. *Pretext and the April 22, 2026, memorandum; Matters A through D.* The comment contends that the rule is a pretext for a screening authority FMCS began exercising in April 2026 for undisclosed reasons, and describes four matters in support. FMCS does not comment on the particulars of individual matters, which the comment has anonymized and which may be the subject of litigation, except to note the following. In Matter A, as the comment itself states, FMCS processed the panel request and left to the parties how to proceed. In Matter B, OA asked a single question, received an answer the same afternoon, and proceeded the same day; the comment's own description of the question indicates that it concerned whether the subdivision involved fell within the exclusion in Executive Order 14251 for subdivisions whose primary duty is information resources management, and OA asked it because an Executive Order exclusion would bear on OA's authority to proceed, not because OA proposed to decide a unit-composition question reserved to the Authority.

FMCS acknowledges that the communications the comment describes in Matters B and C should have identified their author and stated their basis, and new § 1404.9(b)(5) requires written notice of the basis for any decision to decline or hold a request. As to Matter C, FMCS agrees with the comment that an agency's contention that it had no duty to bargain, and therefore that the grievance was not arbitrable, is a question for the arbitrator and not a basis for OA to withhold a panel, and this final rule revises § 1404.9(b)(3) to say so. As to Matter D, OA's inquiry whether an agency covered by the Executive Orders consented to the arbitration was not a solicitation of an objection; where the

agency has been excluded from chapter 71 and the agreement terminated, the agency's consent is the only potential remaining source of authority for the proceeding, and whether it has been given is the threshold question itself. OA's communication in that matter stated its basis, preserved the request date, and offered a refund or credit, each of which this final rule now codifies.

The rule is not a pretext. The sequence the comment describes, in which requests involving excluded agencies began to arrive in the spring of 2026, OA sought guidance, the General Counsel issued it in April, and FMCS codified the governing standard by rule in August, is the sequence by which an agency ordinarily responds to a new and recurring question. The rule's text does not contain an "Executive Order trigger" because the principle it codifies—that FMCS may not furnish a service that would be inconsistent with law, a court order, or its own authority—is not limited to the Executive Orders, and FMCS cannot anticipate every circumstance in which a court order or a change in law would preclude a service. The Executive Orders are the occasion for the rule, not the measure of it. This final rule nonetheless responds to the comment's concern about breadth by stating, in the regulatory text, what does not warrant declining or holding a request.

9. *The republication.* The comment contends that the August 28 republication moved public comment from a government-wide docket to the office that wrote the rule, without explanation. The explanation is the one the republication gave: a technical error. Rather than risk that an interested person would be turned away, FMCS republished the rule in full, directed comments to its Office of General Counsel by email and mail, extended the period to September 28, and committed to post all comments on its public website. FMCS accepted every comment received through either channel, including those submitted to www.regulations.gov before the docket closed. All five comments FMCS received, including Comment 5, have been posted on FMCS's website, and FMCS confirms its receipt of each. The comment identifies no person who was unable to comment and no comment that was not received.

H. Procedural Objections

Comments: Comments 1, 4, and 5 contend that FMCS lacked good cause under 5 U.S.C. 553(b)(B) to issue the rule without prior notice and comment and under 5 U.S.C. 553(d)(3) to make it effective upon publication. They argue

that the good cause exception is narrowly construed and reserved for emergencies, citing *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87 (D.C. Cir. 2012), *Am. Pub. Gas Ass'n v. D.O.E.*, 72 F.4th 1324 (D.C. Cir. 2023), *U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207 (5th Cir. 1979), *N.J. Dep't of Env'tl. Prot. v. E.P.A.*, 626 F.2d 1038 (D.C. Cir. 1980), and *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001); that an agency's desire to eliminate uncertainty is not good cause, citing *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018); that FMCS cited no instance of confusion; that FMCS's prior amendments to part 1404 used notice and comment; that the rule is substantive rather than clarifying; and that four months of unchanged operation under the April memorandum is not an emergency. Comment 5 adds that the original rule was dated the same day FMCS answered a complaint challenging the April memorandum. Comment 4 also notes that FMCS's statement of good cause recites all three statutory grounds.

Response: FMCS has considered these objections and concludes that the interim final rule was procedurally proper. In any event, the procedure FMCS followed—publication of the rule with a request for comments, republication with an extended period when a technical problem arose, and this final rule responding to every comment received and revising the rule in response—has afforded the commenters the opportunity to participate that they seek, and none identifies an argument it was prevented from making or any respect in which FMCS's consideration of its comment was impaired.

1. Rules of agency procedure and practice. The interim final rule invoked the good cause exception in section 553(b)(B). FMCS notes that the rule is also, independently, a rule of “agency organization, procedure, or practice” within the meaning of 5 U.S.C. 553(b)(A), to which the notice-and-comment requirement does not apply. Part 1404, subpart C, is entitled “Procedures for Arbitration Services.” Section 1404.9 governs the procedures by which parties request, and OA processes, lists and panels. The rule does not alter any party's rights under chapter 71 or under any agreement; it addresses how FMCS processes requests for a service it provides.

The commenters contend that the rule is substantive because declining a service has consequences for the requesting party. A rule of agency procedure does not become substantive because its application affects the persons subject to it; the question is

whether the rule “encodes a substantive value judgment” on the matters the agency regulates or instead governs the manner in which the agency conducts its own proceedings. *JEM Broad. Co. v. F.C.C.*, 22 F.3d 320, 326–28 (D.C. Cir. 1994); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987). FMCS has itself treated amendments to part 1404 as rules of agency procedure and practice exempt from notice and comment on that basis. 87 FR 69165, 69166 (Nov. 18, 2022). The rule makes no judgment about the merits of any grievance, the validity of any agreement, or the rights of any party; it addresses the circumstances in which FMCS will perform an administrative act, which is a matter of FMCS's own procedure and practice. FMCS does not rest this final rule on section 553(b)(A) alone, because it has, in any event, provided notice and an opportunity for comment and has responded to the comments received, but the commenters' characterization of the rule as substantive is not one FMCS accepts.

2. Good cause. The commenters characterize FMCS's basis for good cause as a desire to eliminate “legal uncertainty” or “confusion” in the abstract. It was neither. By the summer of 2026, OA was receiving unilateral requests for panels and appointments in proceedings against agencies that the President had excluded from chapter 71 and that had terminated the applicable agreements; the requesting parties cited former § 1404.9(b) as obligating FMCS to proceed; and that regulatory language had become the basis of litigation against FMCS. FMCS was thus confronted, request by request, with a choice between furnishing panels and appointing arbitrators for proceedings it had concluded it lacked authority to facilitate, and declining to do so under a regulation that, read literally, said every request “will be honored.”

Neither course was acceptable for the months a notice-and-comment proceeding would require. Furnishing the panels would have required FMCS to act contrary to the President's determinations and, in FMCS's judgment, without lawful authority; declining them under the unamended regulation would have invited exactly the charge the commenters now level—that FMCS was acting contrary to its own rule. Prior notice and comment were impracticable because the requests could not be held in suspense without decision for that period, and contrary to the public interest because every panel issued in the interim would have constituted a tribunal that FMCS had concluded no statute authorized. The commenters' authorities involved

agencies that sought to avoid comment on policy choices committed to their discretion or that created their own urgency through delay. FMCS did neither. The circumstance that required the amendment—the exclusion of agencies employing a substantial share of the Federal workforce and the termination of their agreements—was created by Executive Orders that FMCS did not issue, and the amendment was made as soon as the recurring nature of the problem became apparent. Comment 5's observation that the rule was signed on the day FMCS answered a complaint challenging the April memorandum confirms, rather than undermines, that the dispute over the regulatory language was concrete and immediate.

Comment 4 correctly notes that FMCS's statement recited all three grounds in section 553(b)(B). FMCS's finding rested principally on impracticability and the public interest, for the reasons just stated. FMCS also notes that where, as here, the rule is one of agency procedure and practice, notice and comment are “unnecessary” in the statutory sense.

3. Prior rulemakings. That FMCS amended part 1404 through notice and comment in 1978, 1997, 2008, and 2019 shows that FMCS uses notice and comment when circumstances require. None of those rulemakings was conducted while FMCS was receiving requests that it had concluded it could not lawfully honor. The existence of prior notice-and-comment rulemakings on other occasions is not evidence that good cause was lacking on this one.

4. Immediate effectiveness. The same considerations supported FMCS's finding of good cause under section 553(d)(3) to make the rule effective on publication. FMCS adds that the amendments made by this final rule, which add procedural protections for requesting parties and provide for refunds and credits, relieve restrictions within the meaning of 5 U.S.C. 553(d)(1) and may be made effective on publication on that basis as well.

5. Cure and the absence of prejudice. Even if the commenters were correct that FMCS lacked good cause, the APA directs that “due account shall be taken of the rule of prejudicial error.” 5 U.S.C. 706. An interim final rule accompanied by a request for comments satisfies the APA's notice requirement where the agency subsequently issues a final rule after considering the comments received; the APA does not require a separate notice of proposed rulemaking. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 685–86 (2020). The commenters filed comprehensive comments within

an extended comment period, FMCS has considered them in full, this document responds to each, and FMCS has revised the rule in response to several of the points they raise. No commenter identifies anything it would have said in response to a notice of proposed rulemaking that it did not say in response to the interim final rule.

6. *Request for withdrawal and a new proposal.* FMCS declines to withdraw the rule and issue a notice of proposed rulemaking. The commenters have had and used a comment period of more than seven weeks on every aspect of the rule. A second comment period on the same amendments would serve no purpose the first did not, and the commenters identify none beyond a generalized interest in public participation that the interim final rule's request for comments satisfied. FMCS will, of course, consider any petition for rulemaking directed to the rule as revised.

III. Changes Made in This Final Rule and Adoption of the Interim Final Rule as Final

Having considered the comments, FMCS adopts the interim final rule published at 91 FR 49273 on August 4, 2026, and republished at 91 FR 55473 on August 28, 2026, as a final rule with the following changes.

Section 1404.9(b)(3). FMCS revises paragraph (b)(3) to add three sentences. The first provides that the inquiry under the paragraph is limited to whether FMCS may lawfully provide the requested service. The second provides that a party's contention that a grievance lacks merit, is untimely, or is not arbitrable under the parties' agreement, or a party's disagreement with a grievance or unwillingness to participate in the arbitration, does not by itself establish that providing the requested service would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority. The third provides that OA will afford each party a reasonable opportunity to respond to information submitted by the other party. These additions codify the limits that the interim final rule's preamble described and that the commenters asked FMCS to state in the regulatory text. They do not narrow FMCS's authority to decline a service that it may not lawfully provide; they confirm that an objection to the grievance itself is not a basis for doing so.

Section 1404.9(b)(5). FMCS adds a new paragraph (b)(5) governing the process that follows a decision to decline a requested service or to hold a request in abeyance. OA will notify the

parties in writing of the action taken and the basis for it. A request held in abeyance retains its original date of receipt. OA will reconsider a held request upon a party's submission of a court order, agreement, authorization, or other information bearing on the basis for the hold, and will periodically review requests held in abeyance. A party that paid a fee for a request that OA declines or holds in abeyance may, on request, receive a refund or a credit toward future FMCS arbitration services. These provisions codify, and extend to all requests, commitments that FMCS's April 22, 2026, memorandum made as a matter of guidance for requests involving agencies identified in the Executive Orders and that the commenters correctly observed did not appear in the interim final rule's text, together with the written-notice, reconsideration, and review provisions proposed in Comment 3.

Section 1404.12(b). FMCS adds a sentence providing that a party's failure to submit its ranked preferences does not by itself establish that an appointment would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority. The limitation added to § 1404.12(b) by the interim final rule applies only where OA has determined under § 1404.9(b)(3) that the appointment may not lawfully be made.

Sections 1404.7 and 1404.9(g). FMCS makes technical amendments to replace references to a schedule of fees "in the appendix to this part," which no longer exists, with references to the schedule of fees published by FMCS. These amendments make no change to any fee.

The amendments to §§ 1404.9, 1404.10, 1404.11, and 1404.12 made by the interim final rule have been in effect since August 4, 2026, and remain in effect as revised by this document. The April 22, 2026, memorandum will be conformed to the rule as revised; to the extent of any inconsistency, the regulation controls.

IV. Regulatory Analyses

A. Administrative Procedure Act

The amendments made by this final rule are effective on publication. The amendments add procedural protections for parties requesting FMCS arbitration services and provide for the refund or credit of fees, and therefore relieve restrictions within the meaning of 5 U.S.C. 553(d)(1). FMCS also finds good cause under 5 U.S.C. 553(d)(3) to make the amendments effective on publication, because they clarify and narrow a rule that is already in effect and delaying their effectiveness would

postpone, without any countervailing benefit, protections that respond to the comments received. The amendments are a logical outgrowth of the interim final rule and the comments on it.

B. Severability

FMCS intends the provisions of this final rule to be severable. If any provision of this rule, or the application of any provision to any person or circumstance, is held invalid, FMCS intends that the remainder of the rule and its application to other persons or circumstances remain in effect to the fullest extent permitted by law. In particular, FMCS intends that the threshold-inquiry provisions of § 1404.9(b)(3) and (4) and the conforming provisions of §§ 1404.10 through 1404.12 remain in effect independently of the procedural provisions of § 1404.9(b)(5), and that each ground on which OA may decline or hold a request (inconsistency with applicable law, with a court order, or with FMCS's statutory or regulatory authority) operate independently of the others.

C. Regulatory Review

FMCS has examined this final rule under Executive Orders 12866 and 13563. The rule adopts, with limited changes that add procedural protections and relieve restrictions, an interim final rule that clarified FMCS's procedures for processing requests for arbitration services and imposed no new compliance obligations on any person. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. This rule is not an Executive Order 14192 regulatory action because it imposes no more than de minimis costs; to the extent the refund and credit provisions have any cost effect, they reduce costs to the public.

FMCS has considered the costs and benefits of the rule, including the costs identified by the commenters. The commenters contend that the interim final rule understated the costs of delay to parties whose requests are held in abeyance, including the cost of preparing responses to threshold inquiries, the running of contractual deadlines, the accrual of interest on back pay, and the expense of pursuing alternative remedies. FMCS has considered each of these. As explained in section II, the rule as revised produces no delay in the processing of requests that does not present a question of FMCS's authority, which are the overwhelming majority of requests OA receives; and, where a request does

present such a question, the cost of the resulting delay is attributable to the underlying legal dispute between the parties, which FMCS did not create and cannot resolve, rather than to FMCS's declining to proceed. The procedural provisions added by this final rule reduce the costs the commenters identify by requiring written notice of the basis for any hold, preserving the request date, providing for reconsideration and periodic review, and refunding or crediting fees. FMCS expects the cost to FMCS of implementing those provisions to be minimal and to be absorbed within existing OA resources. The benefits of the rule are those identified in the interim final rule: clarity regarding FMCS's obligations when presented with requests raising threshold legal questions, assurance that FMCS administers its services consistent with law, and, as revised, a transparent and reviewable process for the small number of requests that present such questions.

D. Regulatory Flexibility Act

Because FMCS issued the interim final rule without prior notice and comment under the good cause exception in 5 U.S.C. 553(b)(B), and because the rule is one of agency procedure and practice under 5 U.S.C. 553(b)(A), the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, for an initial or final regulatory flexibility analysis do not apply. In any event, the General Counsel of FMCS certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The rule governs FMCS's own procedures for processing requests for arbitration services, imposes no new compliance, reporting, or recordkeeping obligations on any entity, and does not alter any fee. To the extent a small entity, such as a local labor organization, requests FMCS arbitration services, the rule may affect whether FMCS provides the requested service only in the limited circumstance in which FMCS determines that doing so would be inconsistent with applicable law, a court order, or FMCS's authority, and, in that circumstance, the entity may obtain a refund or credit of its fee.

E. Federalism

FMCS has analyzed this final rule under Executive Order 13132 and has determined that it will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule governs

FMCS's own procedures and does not preempt State law or impose any obligation on State or local governments.

F. Civil Justice Reform

This final rule has been reviewed under section 3(a) and (b)(2) of Executive Order 12988 and meets the applicable standards. The rule states the circumstances in which FMCS may decline or hold a request for arbitration services, states what does not warrant that action, and provides for written notice and reconsideration, thereby minimizing ambiguity and the potential for litigation.

G. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more, adjusted annually for inflation, in any one year. Accordingly, no written statement under the Unfunded Mandates Reform Act, 2 U.S.C. 1532, is required.

H. Paperwork Reduction Act

This final rule does not impose a new collection of information within the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, because it does not require standardized reporting or recordkeeping by the public. Information that a party may submit in response to a threshold inquiry under § 1404.9(b)(3) is submitted in the course of an individual request for services and does not constitute a collection of information. If FMCS later revises Form R-43 or establishes a standardized submission requirement to implement threshold inquiries, FMCS will evaluate whether approval from the Office of Management and Budget is required.

I. Congressional Review Act

FMCS will submit this final rule to Congress and the Comptroller General in accordance with 5 U.S.C. 801. The Office of Information and Regulatory Affairs has determined that this rule is not a "major rule" within the meaning of 5 U.S.C. 804(2).

List of Subjects in 29 CFR Part 1404

Administrative practice and procedure, Arbitration, Labor management relations.

For the reasons stated in the preamble, the Federal Mediation and Conciliation Service adopts as final the interim final rule published August 4, 2026, at 91 FR 49273 and republished August 28, 2026, at 91 FR 55473, that

amended 29 CFR part 1404, with the following changes:

PART 1404—ARBITRATION SERVICES

- 1. The authority citation for part 1404 continues to read as follows:

Authority: 29 U.S.C. 172 and 29 U.S.C. 173 *et seq.*

Subpart B—Roster of Arbitrators; Admission and Retention

- 2. Revise § 1404.7 to read as follows:

§ 1404.7 Listing fee.

All arbitrators will be required to pay an annual fee for listing on the Roster. The amount of the fee is set forth in the schedule of fees published by FMCS.

Subpart C—Procedures for Arbitration Services

- 3. Amend § 1404.9 by:
 - a. Revising paragraph (b)(3);
 - b. Adding paragraph (b)(5); and
 - c. Revising paragraph (g).

The revisions and addition read as follows:

§ 1404.9 Procedures for requesting arbitration lists and panels.

* * * * *

(b) * * *

(3) OA may conduct 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. The inquiry under this paragraph (b)(3) is limited to whether FMCS may lawfully provide the requested service. A party's contention that a grievance lacks merit, is untimely, or is not arbitrable under the parties' agreement, or a party's disagreement with a grievance or unwillingness to participate in the arbitration, does not by itself establish that providing the requested service would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority. OA may request from the parties the agreement, statutory provision, regulation, court order, written authorization, or other information necessary to determine whether OA may provide the requested service, and will afford each party a reasonable opportunity to respond to information submitted by the other party. Following such inquiry, FMCS may issue the panel or appointment, decline to provide the requested service, hold the request in abeyance, or take

other administratively appropriate action.

* * * * *

(5) If OA declines to provide a requested service or holds a request in abeyance under paragraph (b)(3) of this section, OA will notify the parties in writing of the action taken and the basis for it. A request held in abeyance retains its original date of receipt by OA. OA will reconsider a request held in abeyance upon a party's submission of a court order, agreement, written authorization, or other information bearing on the basis for the abeyance, and will periodically review requests held in abeyance. A party that has paid a fee for a request that OA declines or holds in abeyance may, upon request, receive a refund of the fee or a credit toward future FMCS arbitration services.

* * * * *

(g) OA will charge a fee for all requests for lists, panels, and other major services. Payments for these services must be received with the request for services before the service is delivered and may be paid by either labor or management or both. A schedule of fees is published by FMCS.

■ 4. Amend § 1404.12 by revising paragraph (b) to read as follows:

§ 1404.12 Selection by parties and appointment of arbitrators.

* * * * *

(b) Where the parties' collective bargaining agreement permits each party to separately notify OA of its ranked order of preference, or is silent on the manner of selecting arbitrators, FMCS will ask each party to advise OA of its order of preference by numbering each name on the panel and submitting the numbered list in writing to OA. Upon receiving the rank order from one party, OA will notify the other party that it has fourteen (14) days in which to submit its selections. Where both parties respond, the name that has the lowest combined number will be appointed. If the other party fails to respond, the first party's choice will be honored. This paragraph is subject to § 1404.9(b) and does not require OA to make an appointment where OA determines that the appointment would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority. A party's failure to submit its ranked preferences does not by itself establish that an appointment would be inconsistent with applicable law, a court order, or FMCS's statutory or regulatory authority.

* * * * *

Dated: October 27, 2026.

Anna Davis,

General Counsel, Federal Mediation and Conciliation Service.

[FR Doc. 2026-22083 Filed 10-28-26; 8:45 am]

BILLING CODE 6732-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2026-1075]

RIN 1625-AA00

Safety Zone; Firework Display; Cumberland River, Hendersonville, TN

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone for certain navigable waters of the Sanders Ferry, near Hendersonville, TN. This safety zone is necessary to protect personnel, vessels, and the marine environment from potential hazards during a fireworks show at various times from October 29, 2026, through October 31, 2026. This rulemaking prohibits entry of vessels or persons into this safety zone during enforcement periods unless specifically authorized by the Captain of the Port, Ohio Valley or their designated representative.

DATES: This rule is effective from 7:15 a.m. local time on October 29, 2026, through 5:30 p.m. local time on October 31, 2026.

ADDRESSES: To view available documents, go to <https://www.regulations.gov> and search for USCG-2026-1075.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, contact MST3 Zachary T. Epps, Sector Ohio Valley Waterways Management Division, U.S. Coast Guard; telephone (206) 815-7006, or email STL-SMB-MSDNASHVILLE@USCG.MIL.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background and Authority

On July 17, 2026, an organization notified the Coast Guard that it will

sponsor two fireworks displays launched from a barge on the Cumberland River near Sanders Ferry Park in Hendersonville, Tennessee. The first fireworks display (including a 15-minute safety buffer before and afterwards) is scheduled to occur on October 29, 2026, from approximately 7:15 a.m. until 8:15 a.m., Central Time. The second fireworks display is scheduled to occur on October 31, 2026, from approximately 4:45 p.m. until 5:30 p.m., Central Time. On October 16, 2026, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Cumberland River, Hendersonville, TN (91 FR 65698). In that NPRM, we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this fireworks display.

Under the authority in 46 U.S.C. 70034, the COTP has determined that this rule is necessary to protect personnel, vessels, and the marine environment from potential hazards associated with the fireworks. No vessel or person will be permitted to enter the safety zone without obtaining permission from COTP or their designated representative.

Because of the hazards associated with this event, the Coast Guard finds that under 5 U.S.C. 553(d)(3), good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because it is impracticable and contrary to the public interest. We must establish this safety zone by October 29, 2026, to protect personnel, vessels, and the marine environment.

III. Discussion of Comments and the Rule

During the comment period that ended on October 23, 2026, we received two comments. Two commenters identified inconsistencies in the NPRM concerning the dates and times of the planned fireworks displays and associated safety-zone enforcement periods. Specifically, the commenters noted that the NPRM contained conflicting references to October 30 and October 31 for the second enforcement period, as well as inconsistent morning enforcement periods for October 29. One commenter also requested clarification regarding the difference between the overall effective period and the periods when the safety zone would be actively enforced; the basis for pre- and post-display safety buffers; the applicable local time zone; notice to mariners; and procedures for requesting entry into the safety zone.

In response to these comments, the Coast Guard has revised the