February 28, 2025

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), the American Financial Services Association ("AFSA"), and the Alliance for Automotive Innovation ("AAI"), we write in response to the AAA's invitation for public comment on the proposed amendments to the AAA Consumer Arbitration Rules and the AAA Employment Rules and Mediation Procedures.

As we discuss below, while some of these proposed changes are beneficial, others raise significant concerns for our respective members.

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Introduction

The Chamber, AFSA, and AAI thank the AAA for providing this opportunity to comment on the proposed new Consumer and Employment Arbitration Rules.

The U.S. Chamber of Commerce is the world's largest business association, with hundreds of thousands of direct members nationwide, and indirectly representing the interests of millions of businesses of every size, in every industry sector, and from every region of the country. The U.S. Chamber of Commerce Institute for Legal Reform ("ILR") is a program of the U.S. Chamber of Commerce dedicated to championing a fair legal system that promotes economic growth and opportunity. The U.S. Chamber of Commerce Litigation Center is the litigation arm of the U.S. Chamber of Commerce and fights for business at every level of the U.S. judicial system, on virtually every issue affecting business. The Chamber and its ILR and Litigation Center have written extensively and care deeply about arbitration issues.

The AFSA is the national trade association for the consumer credit industry, with members ranging in size from large international financial services firms to single-office, independently owned consumer finance companies. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The AAI is an automotive industry trade association whose members collectively manufacture more than 95% of all new cars and light trucks sold in the U.S. AAI's members include Ford Motor Company, General Motors, Stellantis/FCA, BMW, Ferrari, Honda, Hyundai, Isuzi, Jaguar, Kia, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Porsche, Subaru, Toyota, Volkswagen, and Volvo, as well as numerous global Tier I and Tier II automotive component suppliers, battery producers, and semiconductor makers.

Many Chamber, AFSA, and AAI members and affiliates depend on arbitration as a low-cost and efficient mechanism to resolve disputes of all types—including consumer and workplace disputes—in a fair and swift manner. The Chamber, AFSA, and AAI have long supported arbitration as a beneficial dispute resolution mechanism for all parties, including consumers and workers. Indeed, based on our experience and those of our respective members, arbitration allows businesses to reach fair resolutions of disputes with customers, clients, users, workers, and independent contractors, while avoiding the high cost of litigation in court. This in turn allows businesses to keep prices affordable and sustain economic growth.

We therefore appreciate the AAA's invitation for comments from stakeholders on the proposed rule changes. The guiding principles behind our comments are straightforward: Arbitration should be fair to all parties; it should allow for the resolution of disputes in a practical and cost-effective way that is at least as efficient as the resolution of individual claims in court; and it should honor party choice and procedural flexibility—characteristics that are the hallmarks of arbitration.

In Part I of these Comments, we address specific proposed changes to the Consumer and Employment Rules. As noted above, many of the proposed amendments are positive developments. But additional changes or clarifications are warranted to protect the efficiency and fairness of arbitration for all parties; we suggest revisions to the proposed rules based on the real-world experience of Chamber, AFSA, and AAI members and feedback we have received from them. Among other things:

- The standards governing when the Consumer and Employment Rules apply should be simpler and more predictable than set forth in the proposed rules. The proposed rules lack clarity about when the Consumer or Employment Rules apply to standalone arbitration agreements, submission agreements, and arbitration clauses in certain types of consumer-like and independent-contractor contracts.

- Filing requirements should include additional identifying information from claimants and signed certifications from claimants and their counsel. These requirements will help deter filings in the names of claimants who are unaware of the proceedings, do not have arbitration agreements with the business (because they actually are not its customers or workers), or simply do not exist (or are deceased). These problems have become pervasive.

- The proposed changes improperly curtail parties' ability to file dispositive motions. That impediment would make arbitrations more expensive and inefficient. Under the AAA's proposed changes, the parties will still have to argue those threshold legal issues to the arbitrator. But the change would make them to wait until the hearing to do so—forcing the parties, the arbitrator, and witnesses to waste resources preparing for and participating in a hearing that will (in many instances unnecessarily) cover all other legal and factual issues.

- The proposed Consumer Rules should not mandate documents-only desk arbitrations over a party's objection. To be sure, purely legal issues often can be resolved on the papers. But when a case turns on disputed factual issues, parties should be entitled to a hearing at which they can cross-examine the witnesses so the arbitrator can assess credibility. And in many mass arbitrations, claimants' counsel have sought desk arbitrations in an apparent effort to conceal the claimant's lack of involvement—or even that the claimant is fictitious or has no idea that an arbitration has been filed in his or her name. Accordingly, any party should have the right to request at least a telephonic or virtual hearing.

- The proposed new procedures for exchange of information will needlessly make arbitration more expensive and less fair. The rules instead should specify what must be exchanged in every case (witness lists and the documents on which the parties intend to rely), then authorize additional targeted discovery if approved by the arbitrator as necessary for a fair process. By contrast, the proposed rules appear to allow parties to conceal documents on which they intend to rely or to

allow for the same unrestricted document discovery that makes court proceedings so burdensome and expensive for consumers, workers, and businesses alike. And troublingly, the proposed rules also authorize arbitrators to propound their own discovery requests to the parties, which contravenes norms of party-led discovery and frustrates party efforts to agree to limit discovery to reduce the cost of dispute resolution.

In Part II, we address the important subject of mass arbitrations—an issue that the proposed amendments do not address directly and that cries out for further changes to AAA rules and fee schedules. In adopting the Mass Arbitration Supplementary Rules and new fee schedules for mass arbitrations in January 2024, the AAA took a constructive first step towards addressing the worst abuses in mass arbitration filings. But abusive mass arbitrations continue unabated. These campaigns seek to weaponize those AAA mass arbitration fee schedules and loopholes in the existing Mass Arbitration Supplementary Rules to extract settlements from businesses based almost entirely on the threat of aggregated AAA fees rather than the underlying merits of the claims. Many Chamber, AFSA, and AAI members have experienced these abuses firsthand. We strongly urge AAA to make additional changes to guard against to abusive mass arbitrations and to ensure that AAA arbitration remains a viable forum for consumer and workplace disputes.

We again appreciate the opportunity to submit these comments and thank AAA for its willingness to solicit feedback. Thank you for considering these comments.

I. Comments on Particular Proposed Changes to the Consumer and Employment Arbitration Rules.

A. Applicability of the rules

The proposed Consumer and Employment Rules each include a rewritten Rule R-1 intended to clarify when the AAA will apply those rules to a dispute. The desire to provide greater clarity is commendable, as is the effort to harmonize the wording and structure of the corresponding Consumer and Employment Rules. But the AAA should make further changes to clarify the applicability of these rules in certain frequently recurring situations.

***Consumer Rules*:** The current Consumer Rule R-1(a) states that the Consumer Rules will apply in four situations: (1) when the arbitration agreement selects the Consumer Rules; (2) when the agreement selects the superseded Supplementary Procedures for Consumer-Related Disputes; (3) when the agreement is in a consumer contract but does not select specific AAA rules; and (4) when the agreement is in a consumer contract but selects different rules. The new proposed Rule R-1(a) streamlines this list, but in an unclear way, as it indicates that the Consumer Rules apply whenever parties "have provided for arbitration by the American Arbitration Association ('AAA') or have an arbitration agreement within a consumer agreement." The intent may be to select the Consumer Rules for any arbitration initiated under an arbitration

clause in a consumer agreement (as defined by the new Rule R-1(b)), but the placement of the modifier "in a consumer agreement"—as well as the use of the conjunction "or"—in the proposed Rule R-1(a) makes the sentence ambiguous. In addition, the proposed language is ambiguous with respect to: (1) freestanding arbitration agreements that were executed in conjunction with a consumer agreement and (2) when parties wish to arbitrate a dispute arising out of a consumer transaction but have not entered into a pre-dispute arbitration agreement.

To avoid this confusion, **the AAA should revise the first sentence of Rule R-1(a) to read:**

> **The parties shall be deemed to have made the Consumer Arbitration Rules ('Rules') a part of their arbitration agreement or submission agreement when they have provided for arbitration by the American Arbitration Association ('AAA') and either: (1) the arbitration agreement is in or was entered into in connection with a consumer agreement (as defined below); (2) the arbitration or submission agreement states that the Consumer Arbitration Rules (or the superseded Supplementary Procedures for Consumer-Related Disputes) shall apply; or (3) the submission agreement is for a dispute arising out of or relating to a consumer agreement.**

This revision will allow parties to be certain that the Consumer Rules will apply when they name those rules in their arbitration or submission agreement. And this revision confirms that consumer disputes, whether arising out of an arbitration clause in a consumer contract or a freestanding arbitration or submission agreement, will be administered under the Consumer Rules and fee schedule.

Our proposed revision also remedies another defect with the proposed Rule R-1(a), which (in an apparent attempt at simplification) deleted the current language authorizing parties to select application of the Consumer Rules in their arbitration agreement. The proposed Employment Rules, however, retained the language allowing parties to select application of those Rules in their arbitration agreement, and the same should be true of the Consumer Rules. Otherwise, the deletion of the language allowing parties to select the Consumer Rules would cast into doubt which rules and fee schedule will apply to those agreements—of which there are hundreds of millions. It instead opens the door to a dispute in every case over whether the underlying contract qualifies as a "consumer agreement" under Rule R-1(b). And those disputes will be particularly difficult to resolve under the language of proposed Rule R-1(b), which drops the examples of contracts that do and do not qualify as "consumer agreements" from the

current Rule R-1(a). **Those examples from current Rule R-1(b)** provided useful guidance to parties, and **they should be retained in the new Rule R-1(b)**.[1]

In addition, by clarifying that parties may contract for the Consumer Rules, the AAA will ensure that disputes involving products or services that might not always be strictly "for personal or household use" are certain to be administered under the Consumer Rules and fee schedule by agreement of the parties. Consider, for example, an individual's cell phone contract, credit card agreement, or subscription to productivity software. Individuals frequently use these products or services for both personal and business purposes, yet under the proposed Rule-1(a) and R-1(b), those individuals arguably would not be able to invoke the Consumer Rules and fee schedule even if the parties agree to those rules and fee schedule. It would be difficult, if not impossible, to apply the Consumer Rules to aspects of the dispute involving consumer purchases or uses while applying the Commercial Rules to aspects pertaining to business purchases or uses.

Moreover, sometimes small businesses—typically sole proprietorships—will purchase these products and services, and it may be appropriate to treat them as consumers when a dispute arises. Indeed, the law in some states analogizes small businesses to consumers, concluding that they have resources and sophistication similar to those of consumer litigants.[2] Yet small businesses are arguably precluded from availing themselves of the Consumer Rules and fee schedule under the proposed Rules R-1(a) and (b) even when the parties agree and have contracted for that result. In fact, contracts with small-business customers—or form contracts that are used interchangeably with both consumers and small-business customers—often call for arbitration under the Consumer Rules to treat those customers the same as other customers who would be qualify as consumers subject to the Consumer Rules.

Nor is there any reason not to allow parties to contract for the Consumer Rules. We are not aware of any instances in which large business-to-business contracts have inappropriately selected the Consumer Rules rather than the Commercial Rules. But even if that were to happen, proposed Rule R-1(d) gives the AAA or the arbitrator the authority to decide that the Consumer Rules should not apply to the arbitration.

***Employment Rules*:** The first sentence of proposed Employment Rule R-1(a) contains an ambiguity. It provides: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter 'AAA') *or* under its *Employment/Workplace Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying

[1] The proposed Rule R-1(b) also includes a typographical error. It ends with an asterisk footnote, but there are two asterisk footnotes, which should be combined.

[2] *See*, *e.g.*, *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Super. Ct.*, 34 Cal. Rptr. 3d 659, 675 (Ct. App. 2005) ("We believe that the franchise factual context is sufficiently similar to mandatory employee/employer arbitration, or consumer arbitration, to allow" the unconscionability and public policy "principles" for employment and consumer cases "to be applied to this case.").

particular rules" (first italics added). **The first "or" in the sentence should be deleted** to avoid confusion about whether the Employment Rules apply to disputes unrelated to employment or workplace issues. In addition, **the last two sentences of proposed Rule R-1(a) should be deleted as duplicative of proposed Rule R-1(d)**, which contains the same verbiage.[3]

Proposed Rule R-1(b) goes on to explain that the Employment Rules and associated fee schedule will be applied to disputes "between an independent contractor (working or performing as an individual and not incorporated) and a business or organization when the dispute involves work or work-related claims under independent contractor agreements, including any statutory claims." One of the asterisk footnotes to proposed Consumer Rule R-1(b) includes the same statement that the Employment Rules apply to these disputes.

In both places, the rule should be revised to specify that the Employment Rules apply to "disputes between an independent contractor (working or performing as an individual *and not as a separate business)* and a business or organization when the dispute involves work or work-related claims under independent contractor agreements, including any statutory claims. An independent contractor is working as a separate business when the contractor is incorporated, is an unincorporated entity, or provides services under a d/b/a or business name distinct from the individual's name."

Without this change, the proposed Rule R-1(b) would unsettle the many contracts selecting arbitration under the Commercial Rules for service contracts with unincorporated businesses—as many contractors are organized as limited liability companies, general or limited partnerships, or other unincorporated structures. These disputes are often best resolved under the Commercial Rules and fee schedule, and parties should be free to contract for that result.

Moreover, **Employment Rule R-1(b) should add that "[a]ny decision by the AAA or an arbitrator to apply these Employment/Workplace Rules and fee schedule to a dispute involving an independent contractor shall not be relevant to any determination whether the independent contractor is an employee for purposes of any law."** Without this clarification, parties may become embroiled in unnecessary (and inappropriate) disputes regarding the non-existent legal implications of application of the Employment Rules to certain independent contractors.

Finally, we note that the proposed Employment Rule R-1(d) regarding how to resolve conflicts between arbitration agreements and the AAA rules—specifying that the agreement generally governs over the rules—is a positive, much needed change. The current Rule R-1 provides that if there is "an adverse material inconsistency" between the rules and the

[3] Specifically, Rule R-1(a) states: "The parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." Rule R-1(d) similarly states: "The parties may agree to modify these Rules but they must agree in writing. If they want to make changes after the arbitrator is appointed, any changes may be made only with the approval of the arbitrator."

arbitration agreement, "the arbitrator shall apply these rules" rather than the agreement. The current approach has led to considerable uncertainty, as parties frequently debated (and arbitrators reached contrary views concerning) whether particular inconsistencies are "adverse" and "material." The current approach also deviates from the principles under the Federal Arbitration Act that "arbitrators wield only the authority they are given" by the "'parties' agreement,'" and that parties "may generally shape such agreements to their liking[.]"[4] The proposed Rule R-1(d) restores the primacy of the parties' arbitration agreement (to the extent that the agreement is not unconscionable or otherwise unenforceable). And the proposed language also harmonizes Employment Rule R-1(d) with the similar provision in the Consumer Rules, which have long taken this approach to inconsistencies between arbitration agreements and the AAA rules.[5]

B. Case-initiation procedures

1. Additional filing requirements are needed to prevent fraudulent claims.

The reorganization and clarification of the rules governing how to commence cases and what must be submitted with the demand for arbitration are extremely important and beneficial. They make the process easier to understand and more predictable to navigate. But we recommend further changes to address commonly recurring issues and prevent unfairness to the parties.

***Claimant's identifying information*:** In addition to the information required to be included with any arbitration filing under both proposed Consumer and Employment Rule R-4(a)(iv), **claimants also should be required to provide their customer or account numbers or employee/contractor identification numbers, if any.** This information is often needed by the business to identify the claimant in its records and confirm the existence of an arbitration agreement; the claimant's contact information alone often is not sufficient (although the new requirement that claimants provide their email addresses with their demands for arbitration is helpful). And claimants initiating arbitrations often will attach arbitration clauses printed from a company's publicly available website, which do not show that the claimant is actually a party to an arbitration agreement with the business. Indeed, as the AAA is well aware, there are often discrepancies between the claimant's contact information provided with the demand and the information for that individual in the business's records. Those discrepancies—especially in the context of a mass arbitration—raise significant concerns that the claims have not truly been

[4] *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)).

[5] Specifically, current Consumer Rule R-1(c) contains materially identical language to the language in proposed Employment Rule R-1(d). That language is also continued in proposed Consumer Rule R-1(d).

authorized by the claimants (or even that the claimants are not really customers of or workers associated with the business).

***Claimant's signature and certification*:** The filing process should also **require the claimant to sign the demand for arbitration personally, either by hand or electronically, making the following certifications:**

- **The claimant has entered into the arbitration agreement that he or she has invoked with the respondent; and**
- **if the claimant is represented by counsel, that he or she has authorized counsel to file the arbitration and consents to respondent's disclosure to the AAA, the arbitrator, and claimant's counsel of information about the claimant, the dispute, and the claimant's confidential customer or employment records, as needed to adjudicate the arbitration.**

These signed certifications by claimants (who currently are not required to sign demands for arbitration at all) will help avoid improper filings in the names of individuals who have not (or do not understand that they have) authorized a lawyer to commence a legal proceeding before the AAA. This confusion is widespread in the mass arbitration context. Many mass arbitration claimants are recruited online by lawyers or other lead generators using online or social-media ads that focus on the potential payments that might be available to individuals who click to sign up rather than the reality that the individual would be signing up to be a party to an individual arbitration proceeding.[6] An average reader of these solicitations might consider them to be invitations to participate in mere investigations of a business practice or for the submission of a claim as an absent class member in a class action.

Moreover, requiring confirmation that claimants consent to the disclosure of their account or employment records when necessary will help greatly reduce the incidence of disputes over access to claimant information. Especially in the mass arbitration context, businesses and claimants' counsel frequently clash over the counsel's demand for private information—a serious concern because businesses are often obligated to keep most personal information confidential from third parties unless the claimant has consented to the disclosure.[7]

***Signed certification by claimant's counsel*:** As part of the filing process, **claimant's counsel also should be required to sign a certification that, to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the**

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[6] *See*, *e.g.*, U.S. Chamber of Commerce ILR, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 21 (Feb. 2023), at https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf (displaying sample social-media solicitations for mass arbitration filings) ("*Mass Arbitration Shakedown*").

[7] *See*, *e.g.*, 15 U.S.C. §§ 6801-09 (barring financial institutions from disclosing customer information to third parties without the customer's consent).

claims are not being presented for an improper purpose (such as to harass or needlessly impose costs of arbitration), their claims are not legally frivolous, and their factual contentions have evidentiary support or, if so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. A parallel signature requirement also should be added to counsel filing an answer or asserting a counterclaim.

This certification is modeled after Federal Rule of Civil Procedure 11(b), which (like its state-court equivalents) is intended to prohibit lawyers from filing frivolous claims. It is therefore familiar to all lawyers who might assert claims or counterclaims in AAA arbitrations. Counsel also should be required to certify that the arbitrator may impose sanctions against them if those standards are violated.[8] The proposed certification by counsel is similar to the existing requirement under Mass Arbitration Supplementary Rule MA-2 that "filings [to initiate a mass arbitration] must include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge."

This change (along with a companion change to Consumer and Employment Rule R-57 proposed below) will reduce confusion about arbitrators' authority to sanction counsel when appropriate. The ability to impose such sanctions is needed to deter lawyers from filing demands on behalf of non-existent claimants or on behalf of claimants who have not authorized an arbitration to be filed on their behalf. For example, the Chamber's ILR has identified numerous reports of demands for arbitration being filed by counsel in the names of individuals who, according to the respondent, are fictitious, deceased, not customers who purchased the product or service at issue, or who were unaware that arbitrations had been filed in their names.[9] Lawyers trying to use a mass arbitration to extract a settlement from the targeted business sometimes resort to the filing of ever-larger numbers of unvetted demands for arbitrations simply to drive up AAA fees that the business must pay. In these situations, it may be inappropriate to sanction the claimant for the frivolous filing. Yet under the proposed rules, the lawyers who engage in these tactics will seek to circumvent sanctions by arguing that they are not parties to the arbitration agreement and neither the agreement nor the AAA rules authorize

[8] Indeed, these steps are mandated by the rules of professional conduct and should also apply in the arbitration context. Model R. of Prof. Conduct 3.1 cmt. 2 ("The filing of an action . . . or similar action taken for a client" requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.").

[9] *Mass Arbitration Shakedown*, *supra* n.6, at 37 (noting reports from defense counsel that "the number of obviously groundless claims in mass arbitrations often exceeds 30 percent of claims—and on a number of occasions has exceeded 90 percent"); *see also* Diana Pogosyan, Note, *Issues Arising Out of Mass Arbitrations & Solutions to Combat Them*, 2024 UTAH L. REV. 1173, 1186 (2024) (detailing rising abuse of mass arbitration filings).

sanctions on counsel.[10] In court, there is no question that these lawyers could—and almost certainly would—be sanctioned.[11] AAA arbitrators should have the same authority.

Requiring additional identifying information and signed certifications at the demand-for-arbitration stage should not present a problem for real claimants and their counsel. But in the mass arbitration context, filers of abusive mass arbitrations often cannot provide this basic information because they are not vetting their clients (some of whom are not even real). And filers strive to avoid providing any certification at all as to the legitimacy of filings because they are often parroting (without investigation) information typed by unknown strangers into online claimant-recruitment forms. As a result, process arbitrators have had to order claimants' counsel to submit amended demands that include this information and require claimants' counsel to sign under a similar certification to address the problem of unverified claimants.[12] The rules should simply require this information and certifications upfront to avoid disputes and reduce the level of fraud that has long been documented.

2. Service requirements should conform to parties' agreements and not permit service through methods of questionable effectiveness.

The proposed Consumer and Employment Rules both include additional clarification about how demands for arbitrations are to be served. Two aspects of the proposed revision, however, should be amended to ensure that the proper parties are notified about a new claim.

The first change relates to the fact that, in many consumer and employment or independent-contractor agreements, the parties agree on a specific method for notice of claims. Those contractual agreements regarding notice should be honored. Accordingly, rather than authorizing service of the demand for arbitration "at the last-known address" of the "party or its authorized representative," **Rule R-4(b)(iii) and Rule R-40 of both the proposed Consumer and Employment Rules should state that service should be directed to the address provided in the parties' agreement. Only if the agreement does not so provide (or cannot be done) should case-initiating documents be served in the other ways specified in the proposed rules.**

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[10] *See*, *e.g.*, *Herrera v. Santangelo Law Offs., P.C.*, 520 P.3d 698, 705-707 (Colo. Ct. App. 2022) (concluding that arbitrators lack inherent authority to impose sanctions on counsel under Colorado law).

[11] *See*, *e.g.*, Fed. R. Civ. P. 11(c)(1) (authorizing "an appropriate sanction on any attorney, law firm, or party").

[12] *See*, *e.g.*, *Mosley v. Wells Fargo & Co.*, 2023 WL 3185790, at *1 (S.D. Cal. May 1, 2023) (refusing to vacate process arbitrator award requiring mass arbitration demands to be amended to include claimant's bank account number), *aff'd*, 2024 WL 977674 (9th Cir. Mar. 7, 2024).

Second, **Consumer and Employment Rule R-4(b)(iii)(a) should be amended to allow service of case-initiating documents at the last-known address for *individuals*, but for *entities*, service instead should be made this way only if there is no agent for service of process in the state where the entity is registered, incorporated, or doing business.** Service at any "last known address" for a business may lead to service by mail to ancillary business locations (such as mall kiosks or other retail locations) in an effort to conceal the filings from the business's legal department. Moreover, service of case-initiating documents by mail to the last known address of the business's "authorized representative" may lead to inappropriate attempts to serve businesses by mailing documents to attorneys who may no longer represent the business. Service of case-initiating documents upon counsel should be allowed only with the prior agreement of the party being served.

Accordingly, **Consumer and Employment Rule R-4(b)(iii) should be amended to state as follows:**

> **Any papers, notices, or process necessary for the filing of an arbitration under this Rule may be served on a party in the manner provided for in the parties' agreement. If the agreement does not so provide, a party may be served:**
>
> **a) for an entity, by mail addressed to its registered agent of process in the state where the entity is registered, incorporated, or doing business; or if the entity does not have a registered agent, by mail addressed to the party at its last known address;**
>
> **b) for an individual, by mail addressed to the party at his or her last known address;**
>
> **c) by electronic service/email to the party, or by mail or electronic service/email to the party's authorized representative, with the prior agreement of the party being served;**
>
> **d) by personal service; or**
>
> **e) by any other service methods provided for under the applicable procedures of the courts of the state where the party to be served is located.**

3. The AAA should adopt a fair method to determine which arbitration provision controls when there is a dispute.

It is not uncommon for consumers or workers to file a demand for arbitration based on a superseded or otherwise incorrect version of an arbitration agreement. We therefore recommend revising proposed Consumer and Employment Rule R-5(d), which indicates that in the event of a dispute over which arbitration agreement governs a dispute, the *claimant's* choice of arbitration agreement will control, subject to final decision by the arbitrator.

As written, the proposed rule will predictably cause unnecessary problems if claimants attach the wrong or superseded version of an arbitration provision. This is increasingly prevalent in the mass arbitration context. In recent years, many businesses have revised their arbitration agreements to address the rise of abusive mass arbitrations, such as by adding pre-arbitration notice-of-dispute requirements or adopting other procedures to facilitate the orderly and fair resolution of mass claims. If the *claimant's* choice of arbitration agreement always is controlling as an initial matter—even if incorrect—claimants may be able to impose improper costs and burdens on businesses that seek to enforce the correct versions of their agreements. And that is especially true in the context of a mass arbitration if the process arbitrator decides (incorrectly) that the question of which agreement governs is a merits question that must be decided by merits arbitrators.

Instead, as the default position, Rule R-5(d) should be revised to state that in the event of a dispute over which arbitration agreement governs, the *later-in-time* arbitration agreement is controlling as an initial matter. This choice of default is more logical because the most recent version of the arbitration agreement invoked by a party is more likely to be the governing one.

In addition, Rule R-5(d) should be modified to reflect that, in many instances, a AAA arbitrator cannot decide the issue. To be sure, the AAA rules generally authorize arbitrators to decide their own jurisdiction. But in many arbitration agreements, the parties choose not to delegate these questions of arbitrability to arbitrators, but instead reserve them for courts. And even if the different iterations of the arbitration agreement *both* delegate questions of arbitrability to the arbitrator, if one of the agreements selects a different arbitration administrator (say, JAMS instead of the AAA), the proponents of each agreement would seek to present the arbitrability question to differently empaneled arbitrators. Under the FAA, however, only a court may decide a dispute over who decides arbitrability.[13]

Accordingly, **Rule R-5(d) should specify that "if the respondent alleges that a different arbitration agreement is controlling, the matter will be administered in accordance with the later-in-time agreement, subject to a final determination by a process**

[13] *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 149, 152 (2024) (holding that "if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability," then "a court must decide which contract governs" that issue).

arbitrator or, if there is no process arbitrator, by the merits arbitrator. If the parties have not agreed to delegate questions of arbitrability to the arbitrator (or if the proffered agreements select different administrators), the stay provisions of Rule R-2 shall apply to permit the parties to obtain an order regarding the arbitration from the court."

4. The automatic stay of arbitrations when judicial intervention is sought should be available for 90 days and last until the court rules.

We welcome the proposed change in new Consumer Rule and Employment Rule R-2 to lengthen the automatic stay to 90 days when any party seeks judicial intervention regarding the commencement of an arbitration, with extensions of the stay permitted sua sponte or upon a showing of good cause. This change is an excellent step toward reducing the burden on parties; under the current approach, parties often must litigate both the court challenge and the arbitrations once the 30-day stay expired. And the change also reduces the burden on courts, which were required to decide emergency motions for temporary restraining orders or preliminary injunctions staying the arbitrations while the issue of arbitrability is litigated because of the short duration of the automatic stay under current rules.

The justification for the change is obvious: court actions take much longer than 30 days. And there is no reason for emergency motion practice in court in every case in which the parties dispute arbitrability.

That said, the proposed change is insufficient to address the problem for two reasons. First, although the rule conditions the stay on a party seeking judicial intervention within 30 days of commencement of administration, the respondent may not be in a position at that point to know whether to seek judicial intervention. Especially in a mass arbitration involving many thousands of claimants, the respondent may need more than 30 days to determine, among other things, whether it has arbitration agreements with all claimants and thus whether judicial intervention is needed. **The proposed Rule R-2 therefore be amended to grant the automatic stay if the parties seek judicial intervention within 90 days of commencement of administration.**

Second, the reality of litigation in state and federal courts is that questions of arbitrability almost always take longer than 90 days to be resolved. Yet these disputes rarely entail such exigent circumstances as to—in effect—insist that courts rule in expedited fashion. **We therefore recommend that the AAA amend Rule R-2 to specify that the automatic stay should continue as long as proceedings regarding arbitrability remain pending before the court, unless the court orders otherwise.** That way, in the rare case in which there truly is an emergency that justifies proceeding with the arbitrations faster, the parties can ask the court for an order directing the parties to take steps needed to commence arbitration proceedings—greatly reducing the need for emergency motions (and thus the burdens on parties and courts).

Accordingly, **Consumer Rule and Employment Rule R-2 should be revised to state:**

If within 90 calendar days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration during that court proceeding, unless the court orders otherwise.

5. The proposal to add authority to consolidate multiple arbitrations filed by the same claimant is a valuable tool to address mis-filed or abusive duplicate arbitrations.

Proposed Consumer Rule and Employment Rule R-4(e) authorize the AAA to consolidate multiple arbitrations filed by the *same party* arising out of the same contract, subject to final determination by the arbitrator. This change will promote the efficiency of arbitration proceedings. With the switch to online case initiation, technical issues may lead some claimants inadvertently to file their case multiple times. Or some claimants may deliberately engage in claim splitting or duplicative filings to inflict needless arbitration costs on the respondent business. In either scenario, the proposed rule makes sense, confirming that the AAA has the discretion to consolidate multiple arbitrations filed by the same claimant into a single proceeding.

6. The proposed changes to Consumer Rule R-14 and Employment Rule R-12 could be misinterpreted to impose an inappropriately short deadline to raise objections to the locale of the arbitration or arbitration hearings.

Proposed Consumer Rule R-14 and Employment Rule R-12 have rewritten the current rules regarding the fixing of the locale of the arbitration to be more uniform. This harmonization and better explanation of determining the locale is greatly appreciated.

There appears to be a typographical error, however, in Consumer Rule R-14. It is missing the language in Employment Rule R-12(b) regarding how to determine the locale when one is specified in the arbitration agreement—namely, that the parties' agreement will govern, unless the parties agree otherwise or the arbitrator decides that a different locale is required. There is no reason to omit that language from Consumer Rule R-14, because that procedure has historically been applied in consumer arbitrations without difficulty. **Consumer Rule R-14 therefore should be amended to add a provision mirroring Employment Rule R-12(b).**

In addition, one substantive change should be made to these proposed rules. Specifically, Consumer Rule 14(c) and Employment Rule R-12(d) each state that "[a]ny disputes

regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA." The introduction of a 14-day deadline to raise objections regarding the locale is new, and could threaten to upend the orderly administration of arbitrations.

The inclusion of a presumptive deadline for locale challenges creates a risk that arbitrators might find that a party has waived an objection to the locale by not raising it during the 14-day period. It is likely that no such hard-and-fast deadline for raising issues regarding the locale of an arbitration or any hearings was intended. But the proposed rule may be read that way. And a 14-day deadline is too short for issues regarding locale to be raised, especially in the context of a mass arbitration. Parties may have initial threshold disputes that make it impractical to figure out what the locale should be before the answer is filed—including, for example, disputes over where a claimant lives (an issue that occurs with some frequency in mass arbitrations). Moreover, at this early stage, parties may be in the process of engaging counsel and may be unaware of the short time in which to object to the locale. And in the mass arbitration context, the initial answers to the demands for arbitration are not even due until 45 days after the filing requirements for each demand have been met (Rule MA-4(a))—yet under the proposed rule, any objections to locale must be raised far earlier.

To be sure, we appreciate that the AAA must be able to choose an initial locale as an administrative matter to appoint an appropriate arbitrator. Requiring that objections to locale be included in the answer or by some other deadline the AAA may set is appropriate. But the rule should be revised to clarify that subsequent objections to the locale may be raised but will be decided by the arbitrator. Thus, **Consumer Rule R-14 and Employment Rule R-12 should state that "[a]ny disputes regarding the locale that are to be decided by the AAA should be included in the answer or submitted to the AAA and all other parties before the AAA begins arbitrator selection or by the date established by the AAA. Any later objections to locale must be presented to the process or merits arbitrator."**

C. The Consumer Clause Registry

1. Determining whether an arbitration clause may be included on the Consumer Clause Registry should be a one-time determination of compliance with the Consumer Due Process Protocol.

Proposed Consumer Rule R-12 reorganizes and revises the current rule requiring arbitration clauses in consumer agreements to be submitted for review for compliance with the AAA's Consumer Due Process Protocol and published on the AAA's Consumer Clause Registry before the AAA will administer any arbitrations under the clause. The AAA should make two changes to the proposed rule to promote fairness to the parties and predictability of outcomes.

***Compliance with unwritten "due process standards" in Consumer Rules*:** Proposed Rule R-12(b) specifies that the required review will encompass not only "material compliance with due process standards" in the Protocol, but also with those in "the *Consumer Arbitration Rules*[.]" The implication is that some aspects of the Consumer Rules contain unenumerated due process standards—separate and apart from the comprehensive due process standards articulated in the Consumer Due Process Protocol—that arbitration clauses cannot vary. This nebulous standard provides no guidance to parties drafting arbitration agreements, who might wish to depart from the default Consumer Rules in certain respects. This approach also conflicts with proposed Rule R-1(e), which confirms that parties can tailor arbitration procedures and rules in their arbitration agreements for the types of disputes that can arise or for the needs of particular cases, subject to the limits of the Consumer Due Process Protocol.

This approach also is entirely unnecessary. Arbitration clauses already must comply with the Consumer Due Process Protocol, which protects fairness to consumers. And parties already have the power to challenge the enforceability of an unfair arbitration clause under state unconscionability law, either by raising the challenge to the arbitrator under Rule R-7 or, if the clause does not delegate questions of arbitrability to the arbitrator, raising that challenge in court.[14] Those arbitrability challenges are resolved in a predictable fashion, as a large body of precedent determines or at least guides the outcome. There is no need to inject additional uncertainty by suggesting that a new extra-legal source of challenges to arbitration clauses must be considered—namely, compliance with unwritten "due process standards contained in . . . the *Consumer Arbitration Rules*," as proposed Rule R-12(b) would require. Indeed, it would be unfair to the parties to arbitration agreements if, after a dispute has arisen, a party could evade arbitration by arguing that the arbitration agreement impermissibly departs from some unidentified inalterable requirement of the Consumer Rules, even though the agreement otherwise is fully enforceable under applicable law. **Accordingly, references to "due process standards of these Rules" in Consumer Rule R-12(b) should be deleted.**

***Collateral attacks on Consumer Due Process Protocol compliance*:** Proposed Rule R-12(b) also refers to proposed Rule R-1(c), which states that even if the AAA accepts a case for administration, any party who "disagrees" about "whether the agreement meets these Rules and the *Consumer Due Process Protocol* . . . can bring the issue to an arbitrator for a final decision." In other words, issues regarding compliance with the Consumer Due Process Protocol and unwritten due process principles asserted to be implicit in the Consumer Rules now may be litigated in every case.

This potential for collateral challenges to the AAA's decision to approve an arbitration clause and include it on the Consumer Clause Registry will greatly unsettle the enforceability of

[14] *See*, *e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019) ("The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions[.]"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question[.]").

arbitration agreements. The AAA has many arbitrators on its roster that it appoints to consumer arbitrations, and those arbitrators may have differing views about the fairness of consumer arbitration agreements. Thus, parties will lack the needed confidence that a AAA-approved arbitration agreement will actually be enforced by AAA arbitrators.

In fact, claimants already have begun to mount these types of collateral attacks under current Consumer Rule R-1(d), which does not expressly authorize collateral challenges to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol. The experience of Chamber, AFSA, and AAI members with these challenges makes clear that the rules should prevent those attacks—not allow such challenges in every case.

To begin with, these challenges are being raised today even if judicial decisions confirm that the arbitration agreement is enforceable as a matter of law. Nonetheless, claimants' counsel often urge arbitrators to depart from legal precedents and instead to indulge extra-legal arguments about perceived "fairness." But that mode of analysis is effectively rudderless—and its outcome is entirely unpredictable. The inevitable result is that almost any arbitration clause, no matter how pro-consumer, may eventually be deemed out of compliance with the Protocol or unwritten fairness principles argued to be implicit in the rules by fiat of some future arbitrator applying his or her own brand of justice, regardless of the governing law.

This result would be palpably unfair to contracting parties, who count on the enforceability of arbitration agreements. The AAA should not codify a procedure that creates an enormous—and unpredictable—risk that arbitration agreements that are enforceable under applicable law will be invalidated. Indeed, many companies that use form contracts incur enormous expenses to print and distribute millions of consumer contracts containing arbitration clauses. These companies must be able to rely on the AAA's upfront determination that it will administer disputes brought under a particular arbitration clause. If the AAA decides in that initial review that the arbitration clause does not comply with the Consumer Due Process Protocol, the company has advance notice, and so can change its clause before including it in contracts with customers either to comply with the Protocol or to pick another administrator. But if the AAA's initial approval of the arbitration clause can be overturned in any future case, it is too late for the company to rewrite the clause to make it enforceable, and the predictability and other benefits of arbitration will be lost.

Nor are these collateral challenges to initial AAA approval of arbitration clauses necessary. As noted above, in any future case, consumers are free to argue that the arbitration clause is unconscionable or otherwise unenforceable under applicable law. Because those arbitrability challenges can be made in any case, there is no need for an additional collateral challenge to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol.

Accordingly, the AAA **should revise proposed Consumer Rules R-1(c) and R-12** to avoid these issues:

- First, **the provisions authorizing the AAA to refuse to administer arbitrations under arbitration clauses that do not comport with the Consumer Rules or satisfy "due process standards" implicit in those rules should be deleted**, as all that should be required is compliance with the Consumer Due Process Protocol.

- Second, **the final two sentences of proposed Rule R-1(c), which authorize collateral challenges to the AAA's administrative determinations in every case, should be deleted**.

- Third, **the following sentence should be added to the end of proposed Rule R-12(d): "Once the AAA has accepted a case for administration and approved an arbitration agreement for inclusion on the Consumer Clause Registry, those determinations may not be reversed by an arbitrator. But if a party believes that an arbitration agreement is unenforceable under applicable law, they may raise that issue with the arbitrator under Rule R-7 or (if the parties have not agreed to arbitrate such issues) with a court."**

2. The changes to the annual registry fee create an unjustifiable trap for the unwary.

Proposed Consumer Rule R-12(e) states that if a party does not pay the annual Registry fee, "the AAA will decline to administer consumer arbitrations arising from that arbitration agreement," and that "[c]harging an expedited review fee as an alternative is not permissible." **This language should be revised to permit administration upon payment of the annual Registry fees that were not previously paid, plus a reasonable penalty (such as an additional year's Registry fee). Alternatively, the AAA could eliminate the annual Registry fee and simply increase the initial fee when a business's arbitration agreement is first submitted for review**.

Refusal to administer arbitrations under a previously approved arbitration agreement merely because the business fell behind on the annual Registry fee creates a trap for the unwary. Administrative errors such as this are inevitable, especially because turnover in personnel in legal departments may mean that the invoice for the annual Registry fee is sent to an unmonitored email inbox. In addition, the consequences for nonpayment under the proposed rule—the end of a company's consumer arbitration program—are unduly harsh. Indeed, that penalty is far out of proportion to the failure to pay the annual fee, because that fee is not for any particular case and thus nonpayment would not disrupt any consumer arbitration. And consumers, in particular, suffer from this approach; a consumer rebuffed from trying to initiate arbitration that the AAA refuses to administer for this reason would have little recourse but to submit their claim to the overburdened, expensive, and harder to navigate court system. Many consumer claims that would be feasible to arbitrate would be priced out of court entirely, leaving these consumers with no redress.

Likely for this and similar reasons, other arbitration providers, such as JAMS and NAM, do not impose such a harsh penalty.

D. The pre-administration notice and review requirement for employment arbitrations.

Unlike the proposed Consumer Rules, which expand the pre-arbitration registration requirement and allow it to be revisited in every case, the proposed Employment Rules eliminate current Rule R-2, which mandated that employers intending to use AAA to administer disputes under an "employment ADR plan" "notify" AAA at least "30 days prior to the planned effective date of the program" and "provide the [AAA] with a copy of the employment dispute resolution plan."

This is a good change that should be retained. Few employers understood whether their employment or independent-contractor arbitration agreements were subject to the requirements in current Rule R-2. The rule did not explain what the AAA would do once notified, leaving the standard for whether and why the AAA would accept or reject particular arbitration agreements unclear. And existing law already affords parties with the ability to challenge the enforceability of unconscionable arbitration agreements. Because the pre-administration notice and review process was superfluous and unsettled the enforceability of arbitration agreements, it is appropriate to eliminate it.

E. Mediation

Proposed Consumer Rule and Employment Rule R-11 provides that in every arbitration, and at any stage in the case, "the AAA may refer the parties to mediation," separate and apart from any "request" by the "parties" for "mediation." But the AAA should not empower itself to force the parties to participate in mediation. Given the relatively modest stakes of most one-off consumer or workplace arbitrations, the cost of formal mediation simply is not justified. And many agreements already include pre-arbitration dispute-resolution procedures designed to facilitate the voluntary settlement of cases. If parties have agreed to and participated in these contractual dispute-resolution processes, a requirement by the AAA that they engage in mediation—perhaps for a second time—would be wasteful.

Even worse, the potential for AAA-required mediation allows claimants to extract unfair settlement leverage over businesses. The AAA's proposed Rule R-11 calls for any such compelled mediation to be administered by AAA under the AAA Consumer (or Employment) Mediation Procedures—and under those procedures, the company generally must pay the cost of mediation. That means that claimants can request mediation in every case, which can be ordered over the business's objection, simply to force the business to pay the additional expense. This potential for abuse would be even greater in mass arbitrations if mass arbitration filers could request individual mediations in every case.

For these reasons, **this aspect of proposed Consumer and Employment Rule R-11 authorizing the AAA to refer the parties to mediation even if they do not all agree should be abandoned entirely**. But if the AAA insists on including such a rule, the rule should be limited to global mediations in the context of mass arbitrations.

That is because, in mass arbitrations—as in mass torts cases administered by courts under multi-district litigation procedures—the ability to require global mediations regardless of a party's wishes makes more sense. These types of disputes are almost always resolved through settlements achieved pursuant to one or more global mediations. Nonetheless, lawyers who file mass arbitrations sometimes refuse to mediate in an effort to accelerate the targeted business's obligation to pay arbitration fees—and thereby to impose additional unfair settlement leverage on the business. Accordingly, **proposed Rule R-11 should be revised to specify that global mediation may be ordered over a party's objections by either the AAA or an arbitrator only if (1) the proceeding is governed by the Mass Arbitration Supplementary Rules and (2) any party paying in whole or in part for the mediation agrees.**

The proposed Rule R-11 also should be revised in two other respects. First, **the rule should clarify that the parties may agree to mediation that is not administered by the AAA**. Parties may prefer to use a different mediator who is affiliated with another administrator or an unaffiliated mediator expert in resolving the particular type of claim. The AAA should not prohibit parties from using non-AAA mediators; it is inappropriate to tie the AAA's arbitration services to its mediation services in this manner, and arguably gives improper incentives to the AAA to order AAA mediation over a party's objections.

Second, **proposed Rule R-11 should specify that unless the parties agree otherwise, arbitration proceedings must be stayed during the mediation.** The proposed rule adopts the opposite presumption. But requiring concurrent mediation and arbitration produces unnecessary expense, by both the parties and the arbitrator. And this waste is especially pronounced in mass arbitrations, where claimants may seek to expedite the arbitration proceedings solely to increase the business's AAA fees as a tactic to extract a blackmail settlement during the mediation.

F. Dispositive motions

The treatment of dispositive motions is a critical one for Chamber, AFSA, and AAI members given that many issues can be bifurcated and decided on an expedited basis—often as a matter of law—before the parties engage in costly discovery or prepare for and participate in a hearing. The current Consumer Rule R-33 and Employment Rule R-27 address this issue appropriately by giving the arbitrator the *discretion* to allow dispositive motions if there is "substantial cause" for believing that the motion is likely to succeed and dispose of or narrow the issues in the case. Indeed, in the experience of Chamber, AFSA, and AAI members, a significant percentage of consumer arbitrations in particular are swiftly resolved as a matter of law on the basis of a dispositive motion.

Although proposed Consumer Rule R-31 and Employment Rule R-32 keep the current language in subpart (b), both add two provisions that each place a heavy thumb on the scale against allowing a party to file a dispositive motion. First, subpart (a) states that the arbitrator "has the sole discretion to allow or deny the filing of a written motion and the arbitrator's decision is final." That statement is hard to square with the possibility of arbitral appeals under proposed Consumer Rule R-58. It also is a barely disguised admonition to arbitrators that they are free to dispense with the "substantial cause" standard of subpart (b) and refuse to allow the filing of a dispositive motion. And that is especially true when subpart (a) is taken in combination with subpart (c), which states that "[c]onsistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." That statement effectively discourages arbitrators from allowing dispositive motions in consumer and workplace arbitrations.

In fact, by directing arbitrators to consider the expense of briefing dispositive motions, proposed subpart (c) requires them to look into the wrong end of the telescope. When there is substantial cause to believe the dispositive motion is likely to succeed and dispose of or narrow the issues, the motion will, by definition, *reduce* the time and cost of an arbitration. By contrast, disallowing such a dispositive motion would never reduce the parties' costs, because the parties will in every case be required to include in their pre-hearing briefs the arguments that would have been contained in the dispositive motion and then argue those issues at the hearing. Eliminating dispositive motions does not save any expense. Instead, it makes the dispute more costly to resolve because the parties must develop facts and prepare for and participate in a hearing on all issues, even those that would have been rendered irrelevant by an early ruling on a dispositive motion. Yet the proposed subpart (c) encourages arbitrators to ignore this reality and view the costs of briefing a proposed dispositive motion in isolation.

Indeed, the proposed change to discourage dispositive motions is internally inconsistent with the proposed change to expand the use of desk arbitrations in consumer cases under proposed Consumer Rule R-36.[15] Dispositive motions allow cases to be resolved efficiently on the papers—but without depriving any party of the ability to show that factual disputes warrant a hearing. As the AAA well knows, and as the experience of Chamber, AFSA, and AAI members confirms, a substantial portion of both consumer and employment arbitrations are resolved outright, or at least greatly streamlined, by orders granting dispositive motions. The proposed changes, however, would needlessly increase the time and cost of arbitrations.

Accordingly, both subparts (a) and (c) should be deleted. There is no reason to depart from the current rules governing the availability of dispositive motions.

At a minimum, however, **if subpart (c) is retained, it should be revised to direct the arbitrator also to consider the "time and cost for the parties, witnesses, and the arbitrator associated with proceeding with information exchange, hearing preparation, and**

[15] As discussed below, we recommend against the expanded use of desk arbitrations.

conducting the hearing that encompasses the issues that otherwise would have been potentially resolved, or rendered irrelevant, by the dispositive motion."

In addition, to promote the goal of achieving an efficient and economical resolution of the dispute, **the proposed rule also should clarify that information exchange should be stayed during the pendency of a dispositive motion, unless the parties agree otherwise or good cause is shown for denying a stay.**

G. Offers of entry of an award on specified terms

In amending the Consumer and Employment rules, the AAA should adopt a procedure commonly used in court litigation to facilitate early settlement of disputes—the offer of judgment procedure available in federal and many state courts.[16] **A new rule should be added to permit any party to serve an offer of judgment, similar to Federal Rule of Civil Procedure 68.**

Under this approach, no later than two weeks before the hearing, either party may serve the other with an offer of entry of an award on specified terms. If an offer is accepted, the arbitrator shall enter a consent award in accordance with those terms pursuant to proposed Rule R-47. If an offer is not accepted within 14 days, it is considered withdrawn, and evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. If the award that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made, including any AAA or arbitrator fees paid after the date of the offer. This change would greatly promote settlement of consumer and workplace cases.

H. Exchange of information

The proposed changes to the rules governing information exchange in consumer and workplace arbitrations create confusion about what information must be exchanged and the extent to which additional discovery may be required without arbitrator approval.

***Anticipated exhibits and witness lists*:** We advise clarifying that in every case, the arbitrators shall direct the parties to exchange documents in their possession or custody on which they intend to rely at the hearing. That is the approach taken in current Consumer Rule R-22(b). In addition, we also recommend requiring parties in every case to disclose in advance the witnesses, if any, they plan to have testify and the topics of their anticipated testimony. Consumers and employees should not be left guessing what documents or witnesses a company may use to make out its claims and defenses, and vice versa. Thus, **proposed Consumer Rule R-20(b) and Employment Rule R-21(b) should be revised to state that "[u]nless the parties agree otherwise or for good cause shown, by such date that the arbitrator sets that is sufficiently in advance of the hearing to permit a fundamentally fair**

[16] *See*, *e.g.*, Fed. R. Civ. P. 68.

process, the arbitrator shall require the parties to do the following: (i) exchange documents in their possession or custody on which they intend to rely at the hearing; (ii) exchange lists of witnesses, if any, they intend to have testify at the hearing, along with each witness's contact information and the proposed topics of his or her testimony; and (iii) update their exchanges of documents on which they intend to rely and list of witnesses they intend to have testify, as those documents or witnesses become known to them."

***Requests for production of documents*:** The proposed subparts (b)(iii)-(iv) appear to contemplate in every case that requests for production of documents—including the requests for electronically stored information that make litigation in court so expensive—may routinely be granted in every arbitration. That creates the misimpression that such wide-ranging discovery tools are appropriate in every consumer and employment case. Yet as the Supreme Court has observed, "discovery allowed in arbitration . . . might not be as extensive as in the federal courts, [because] by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[17] Indeed, "[p]arties generally favor arbitration precisely because of the" lower cost of resolving a dispute without court rules and full-blown judicially supervised discovery, which "may be of particular importance in employment litigation, which often involves smaller sums of money[.]"[18] The Court also has stated that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation" in court.[19]

For these reasons, **subpart (b)(iii) should be revised to clarify that "the arbitrator may, on application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration process remains fast and economical, require another party, in response to a reasonable and narrowly tailored document request, to make available documents in the responding party's possession or custody, not otherwise available to the party seeking the documents, that are relevant and material to the outcome of disputed issues."**

***Interrogatories and depositions*:** Proposed Consumer Rule R-20 and Employment Rule R-21 do not address the availability of interrogatories or depositions. By contrast, current Employment Rule R-9 gives the arbitrator the authority to order those forms of discovery when truly necessary. Because targeted depositions and interrogatories may sometimes be appropriate in workplace arbitrations, **proposed Employment Rule R-21(b) should be revised to add a new subpart that authorizes the arbitrator to permit, "upon application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration**

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[17] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (internal quotation marks omitted).

[18] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009).

[19] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

process remains fast and economical, other forms of discovery, including narrowly targeted depositions or interrogatories."

***Sua sponte discovery*:** Proposed Consumer Rule R-20 and Employment Rule R-21 indicate that the arbitrator may order discovery "on the arbitrator's own initiative." Similarly, proposed Consumer Rule R-32(d) and proposed Employment Rule R-33(d) would authorize the arbitrator to "subpoena witnesses or documents . . . on the arbitrator's own initiative." **The adoption of arbitrator-led, sua sponte discovery should be reconsidered.**

The norm for American arbitrations, particularly for consumer and workplace disputes, is for party-led discovery—with limits to avoid the type of full-blown discovery that takes place in courts. This approach ensures that the parties enjoy the flexibility to keep the cost of dispute resolution lower by choosing to forgo additional discovery. This flexibility should be preserved. There is no reason to shift to a more European inquisitorial system, under which the arbitrator independently conducts discovery by propounding his or her own discovery requests and subpoenaing witnesses the parties otherwise would not have called.

I. Procedure for hearings

Four aspects of the proposed changes to procedures for hearings warrant reconsideration. First, non-parties should not be permitted to attend arbitration hearings, and certainly not without advance notice and a showing of a right to attend. Second, documents-only desk arbitrations over a party's objections should not be required. Third, unsworn written testimony should not be allowed to be submitted as evidence. Fourth, the AAA should restore deleted language confirming that arbitrators should apply in employment arbitrations the same burdens of proof and production that would apply in court.

1. Arbitrators should not be permitted to allow third parties to attend arbitration hearings without advance notice.

The confidential nature of arbitration has a long history.[20] Confidentiality is particularly beneficial in workplace arbitrations, which can involve sensitive issues, such as allegations of

[20] *See*, *e.g.*, *Del. Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013) ("Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings."); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (arbitration is "a private proceeding which is generally closed to the public"); *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 312 (5th Cir. 1970) ("T]he arbitration process is a private one[.]"); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 Tex. Int'l L.J. 121, 122 (1995) (describing "institutional arbitration rules" requiring that arbitrations "shall be held in private" and "centuries" of legal recognition in the laws of common law jurisdictions that "arbitrations take place in private").

misconduct that the parties generally would prefer to keep private. Parties to consumer arbitrations also benefit from confidentiality, as the privacy of the proceedings frees the parties in consumer cases as well as in workplace cases to take a less hostile, more conciliatory approach toward one another than parties might otherwise feel constrained to take in public view. Worker and consumer claimants might feel pressure to take a more adversarial approach; and businesses would be concerned that any attempt at conciliation or decision not to raise legal or factual defenses would be invoked against the business in future proceedings in arbitration or in court.

Nonetheless, proposed Consumer Rule R-23 and Employment Rule R-24 both state that "[a]ny person having a direct interest in the arbitration is entitled to attend hearings." What might constitute a "direct interest" entitling a third party to attend a hearing is left undefined and unexplained. Under this vague standard, members of the press, bloggers and other curious individuals—including an entire constellation of individuals claiming some connection to the parties or the subject matter—might insist upon a right to attend hearings. And the parties would be powerless to prevent these interlopers from attending. That would undermine the parties' expectation of privacy in arbitration.

Even worse, under these proposed rules, the parties are not even guaranteed advance notice and an opportunity to object if a third party seeks to attend a hearing. This approach to arbitration hearings risks very substantial unfairness to the parties.

The provision in these proposed rules allowing anyone with a "direct interest" to attend hearings should be deleted.

Alternatively, if the proposed language is kept, it should be revised to require third parties seeking to attend the hearing either to obtain consent from all parties or demonstrate a "substantial direct financial interest in the arbitration and a sufficient need to attend that overcomes the presumption of privacy of arbitration proceedings." In addition, third parties seeking to attend hearings without consent from all parties should be required to request leave in writing in advance, and all parties should be given an opportunity to object.

2. Telephonic or virtual hearings promote due process and help to curb widespread abuse in mass arbitrations.

Under the current Consumer Rules, cases involving claims for $25,000 or less default to a document-only desk arbitration, but a hearing of some sort is granted if "a party asks for a hearing or the arbitrator decides that a hearing is necessary." Rule D-1(b). By contrast, under proposed Consumer Rule R-1(f), "[w]here no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration as provided in Rule D-1(b) of the Procedures for the Resolution of Disputes through Document Submission." That referenced Rule D-1(b), as well as proposed Rule R-36, clarify that the arbitrator may order

a "virtual or telephonic hearing" if one is "necessary," or an "in-person hearing" is needed "for a fundamentally fair process."

We agree with increasing the amount-in-controversy threshold below which cases default to desk arbitrations from $25,000 to $50,000. Desk arbitrations often can efficiently resolve these types of disputes. But parties should remain entitled to at least a telephonic or virtual hearing, without the risk that arbitrators will decide that the party has not sufficiently proven that a hearing is "necessary."

Indeed, the AAA Consumer Due Process Protocol Principle 12(1) explains that as part of the right to "a fundamentally-fair arbitration hearing," parties must be afforded "an opportunity to be heard[.]" To be sure, the Protocol goes on to explain that this right "may be met by hearings conducted by electronic or telephonic means or by a submission of documents." But in this age of pervasively available telephonic or virtual hearing options, cases should be resolved without a hearing over a party's objection only if a dispositive motion can resolve the case. Otherwise, where factual disputes must be resolved, any party who requests a hearing should be granted at least a telephonic or virtual hearing so that the party can ask questions of witnesses and to allow the arbitrator to assess credibility.

Making telephonic or virtual hearings available when requested by a party also ensures that all parties will have an opportunity to speak with and have their arguments acknowledged by the arbitrator. Because arbitrators do not speak with the parties in a desk arbitration, arbitrators have no opportunity to demonstrate their attentiveness and careful consideration of each party's positions.

Finally, allowing parties to request telephonic or virtual hearings will also deter abusive mass arbitrations in which the lawyer filing the arbitrations has no real relationship with the purported claimants—who may not even exist or have any idea that arbitrations have been filed in their names. These lawyers typically request desk arbitrations, which allows them to obscure the claimants' fictitiousness or lack of awareness of the proceedings. Accordingly, **Rules R-1(f), R-36, and D-1(b) should all be revised to clarify that a desk arbitration will be converted to a telephonic or virtual hearing upon the request of any party.**

3. Unsworn written testimony should not be permitted.

Proposed Consumer Rule R-33(a) and Employment Rule R-34(a) authorize the arbitrator to "receive and consider the evidence of witnesses by written statements rather than in-person testimony." That is a change from current Consumer Rule R-35(a), which permits written testimony only "by declaration or affidavit." (The current Employment Rules do not have a counterpart to current Consumer Rule R-35(a), but current Employment Rule R-8(xv) provides that during the initial arbitration management conference, the arbitrator shall consider "the extent to which testimony may be admitted at the hearing . . . by affidavit[.]").

The AAA should not allow unsworn written testimony to be presented as evidence. This change would invite fraud, as a lying witness could later avoid punishment by pointing out that

he or she was not under oath. And the change is unnecessary, as it is easy for parties to provide sworn affidavits or declarations signed under penalty of perjury.

4. Arbitrators should apply the same burdens of proof and production as courts in employment cases.

In the current Employment Rules, the third sentence of Rule R-28 provides that "[t]he parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." The counterpart to that rule in the proposed Employment Rules, Rule R-31, deletes that sentence. This omission may lead to confusion about whether the discretion conferred on arbitrators to "vary" hearing procedure includes the power to reallocate the burdens of proof and production imposed by substantive law. That outcome could unfairly bias the proceedings against either the claimant or the respondent and systematically distort the results in employment arbitrations. This change should be reconsidered, and **the third sentence of Rule R-28 should be restored**.

J. Sanctions

As discussed above, **the proposed rule regarding sanctions (Rule R-57 in both the Consumer and Employment rules) should be revised to authorize arbitrators to impose sanctions on counsel who fail to comply with the required certifications**. Particularly in mass arbitrations, where claimants may be fictitious or unaware of the frivolous claims filed in their names, both merits and process arbitrators should be empowered to impose sanctions on counsel, because counsel (rather than the claimants) are the ones responsible for the breach of ethical obligations.

K. Publication of arbitration awards

Proposed Consumer Rule and Employment Rule R-42(c) provides that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." The potential that the AAA may indiscriminately publish awards is inconsistent with the confidential nature of arbitration. And even if an applicable law required the disclosure of the *result* of an arbitration, publication of the full award—including the arbitrator's detailed discussion of the allegations, evidence, and findings—would be unnecessary. But if the proposed rule were to be kept, three aspects should be changed.

First, the proposed rule improperly permits the AAA to publish an award even if the parties have agreed to keep the arbitration proceedings and the arbitrator's award confidential. Parties sometimes choose to agree to arbitration because arbitration proceedings are private. The proposed rule would frustrate those parties' intentions.

Second, even if the parties have not expressly agreed to keep the award confidential, the proposed rule fails to provide the parties with advance notice and the ability to object to

publication of the award. Because of the expectation of privacy in arbitration, and the potential that particular arbitrations may involve sensitive subjects or materials, all parties should have the right to show that there is good cause not to publish an award, either in whole or in part.

Third, even if an award were to be published, the proposed rule improperly assumes that the only redactions from the published version should be the names of the parties and witnesses. Arbitration awards may discuss trade secrets or other confidential matters, or information that a party finds embarrassing.

Accordingly, **if kept, Consumer Rule and Employment Rule R-42(c) should be revised to provide:**

> **The AAA may choose to publish an award rendered under these Rules if the parties have not agreed to keep the arbitration proceedings confidential. If the AAA intends to publish an award, the parties will be given 30 days advance notice and an opportunity to object. An award will not be published if any party shows good cause. If an award is published, the names of the parties and witnesses and any sensitive information identified by the parties will be redacted.**

L. Arbitral appeals

Proposed Consumer Rule R-58 expressly authorizes an optional appellate arbitration process, so long as the appeal complies with the Consumer Due Process Protocol and the associated AAA and arbitrator fees are allocated in the same manner as regular arbitrations under the Consumer fee schedule.

The adoption of an express rule governing optional appeals in consumer arbitrations is helpful. But the AAA should make three changes to this proposed rule.

***Appeal of non-final awards*:** First, **the rule should specify that only final arbitration awards, not interim awards or process arbitrator orders, are subject to appeal**. Otherwise, claimants seeking settlement leverage might appeal every conceivable interlocutory ruling to delay the proceedings and inflict costs on the respondent.

***Consumer fee schedule*:** Second, **the Consumer fee schedule should not apply to arbitral appeals**. That fee schedule would require the business to subsidize the lion's share of the costs of arbitral appeals, which are far more expensive than the typical consumer arbitration because they often involve a panel of three arbitrators rather than one. **Instead, the cost allocation of Rule A-12 of the AAA's Optional Appellate Rules should apply, unless a different allocation is required by applicable law.** Under Rule A-12, the appellant generally advances the fees, subject to reallocation by the arbitral panel in the final award. This allocation

ensures fairness to both parties because, by requiring appellants to pay the costs unless they prevail (or justice otherwise requires), it discourages the pursuit of groundless appeals.

If the Consumer fee schedule instead were applied to arbitral appeals, claimants will have an incentive to threaten to appeal in every case, no matter how baseless, simply to drive up a business's costs and enable the claimant to extract a higher cost-of-defense settlements for claims that the arbitrator already has determined to be valueless. This risk is particularly acute in the mass arbitration context, where filers already take every opportunity to maximize the threatened AAA fees on a business.

Moreover, many existing agreements with appellate options were written in reliance upon the Optional Appellate Rules and their approach to fee allocation, which does not assume that the business pays the vast majority of expenses for appeals, regardless of who wins. By switching to a much more one-sided allocation, the AAA would frustrate the parties' intentions in drafting those agreements.

Alternatively, **even if the AAA were to require the Consumer fee schedule apply to arbitral appeals, that fee schedule should apply only if the value of the relief sought (whether monetary or non-monetary) is $75,000 or less**. In other cases, the amount at stake is sufficient to justify application of the fee allocation of Rule A-12 of the Optional Appellate Rules.

***Safe harbor for appellate procedures*:** Third, **the rule should add a safe harbor clarifying that an agreement authorizing an appeal under the AAA's Optional Appellate Arbitration Rules does not also have to comply with the AAA's Consumer Due Process Protocol.** Otherwise, because the Protocol was not written with appeals in mind, application of the Protocol to appellate procedures will lead to considerable uncertainty. For example, does the Protocol's right to bring claims in small claims court mean that appeals must also be removable to small claims court? At what point does the schedule for briefing, argument, and decision—or even the availability of an appeal—cause "undue delay" within the meaning of the Protocol? To avoid these issues, the AAA should prescribe a safe harbor and identify its appellate arbitration rules as acceptable.

II. Additional Reforms Are Urgently Needed to Curb the Rapidly Growing Number of Abusive Mass Arbitrations.

Although amendments to the Consumer and Employment Rules can improve the efficacy and fairness of arbitration proceedings, these changes at the margins fail to confront the elephant in the room—abusive mass arbitrations. These campaigns are being pursued at an accelerating rate. Law firms filing these mass arbitrations do not seek to obtain merits rulings on the asserted claims, but instead exploit loopholes in the AAA's rules and fee schedules to inflict enormous upfront arbitration fees on companies. These fees leave companies no choice but to

pay excessive settlements, regardless of the merits (or lack of merits) of the underlying claims. The AAA should make immediate changes to the Mass Arbitration Supplementary Rules and fee schedules to halt this subversion of AAA proceedings.

A. Abusive mass arbitrations are proliferating, and threaten to undermine continued viability of consumer and employee/worker arbitration.

There is nothing inherently wrong with consumers or workers taking advantage of economies of scale by using shared counsel to pursue individual arbitrations of similar claims. Many such claims are individualized and could never have been certified as class actions in court. Without arbitration, these claims would have been priced out of the justice system. And even if a class action could have been possible, individual arbitrations are often superior; they can be resolved in a fraction of the time and for a fraction of the cost, and the outcomes are generally fairer to the parties. Indeed, studies show that consumers and workers who bring claims in arbitration prevail more often and recover as much or more than consumers or workers who litigate in court.[21] By contrast, class members rarely benefit from class actions.[22]

But the mass arbitration device, in its current form, is susceptible to abuse because of vulnerabilities in the AAA's rules and fee schedules. Lawyers pursuing this strategy recruit as many claimants as possible—regularly tens of thousands or even over a hundred thousand. The recruited pool contains many more claimants than the lawyers could possibly vet, much less for whom the lawyers could actually arbitrate claims. But the point is not to arbitrate the claims. Instead, the point is to threaten to file arbitrations because it would inflict massive AAA fees on the target. The aggregated fees leave the business little choice but to yield to a settlement, because it is simply impossible under the AAA's current approach to mass arbitrations for businesses to mount a defense. Indeed, in a decision issued earlier today, the Ninth Circuit criticized a law firm that frequently pursues mass arbitrations before the AAA for trying to inflate a business's arbitration fees in a JAMS mass arbitration from $1,750 to $12,775,000.[23] The Ninth Circuit stated that the law firm had used a "mass-arbitration tactic" that "appear[ed] to be geared more toward racking up procedural costs to the point of forcing [the business] to capitulate to a settlement than proving the allegations [underlying the claims] to seek appropriate redress on the merits."[24]

In 2023, the Chamber's ILR published a report documenting the sharp rise in the filing of abusive mass arbitrations, noting (for example) that public reporting showed that, during a short

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[21] *See Mass Arbitration Shakedown*, *supra*, n.6, at 10-11 (identifying and discussing studies comparing consumer and employment litigation and arbitration outcomes).

[22] *See id.* at 12-14 (discussing studies of the limited benefits of class actions to class members).

[23] *Jones v. Starz Entmt., LLC*, No. 24-1645, slip op. at 6 (9th Cir. Feb. 28, 2025).

[24] *Id.* at 14.

time period, a single law firm had filed enormous mass arbitrations against Doordash, Postmates, CenturyLink, FanDuel, Draftkings, Intuit, Amazon, Chegg, Samsung, Buffalo Wild Wings, Chipotle, Dollar Tree, and Peloton.[25] Those publicly reported mass arbitrations were, of course, merely the tip of the iceberg. Most mass arbitration filings go unreported. And far more mass arbitrations are threatened and produce settlements before arbitrations are filed.

The AAA's January 2024 introduction of the Mass Arbitration Supplementary Rules and new consumer and employment mass arbitration fee schedules reflected a welcome recognition of the need to address this new dangerous abuse of the arbitration system.[26] The reforms adopted in those rules and fee schedules were much needed. But they are not enough.

Since those January 2024 changes went into effect, the pace of threatened and actual filings of abusive mass arbitrations has dramatically quickened. Many more Chamber, AFSA, and AAI members have been targeted by improper mass arbitration campaigns. And the velocity of new threats and size of law firms' claimant portfolios continue to increase. The end result is that mass arbitrations are evolving into a heavy tax on companies that continue to select the AAA in arbitration agreements with customers and workers.

The AAA should take action now to stop abusive mass arbitrations and to ensure that its forum remains a fair and cost-effective way to resolve all types of consumer and workplace disputes—including mass disputes.

B. Additional case-initiation requirements are needed to address ongoing mass arbitration abuses.

The first area in which reform of mass arbitration procedures is sorely needed is at the filing stage.

***Need for claimant identifying information and signed certifications by claimants and their counsel*:** In the experience of Chamber, AFSA, and AAI members, the number of mass arbitration claims filed in the names of individuals who turn out not to be purchasers of the disputed product or service (or workers subject to the challenged employment practice) is often shockingly high—typically 30 percent of filings, and sometimes exceeding 90 percent.[27] Frequently, mass arbitration claimants are fictious or have no arbitration agreement at all with the respondent. Yet without adequate identifying information, determining which claimants do not exist, or are asserting non-arbitrable or frivolous claims (because they are not the customers or workers at issue) is often a laborious manual process. And it is a task that—

[25] *See id.* at 19-21.

[26] *See* Adam Shoneck, *Mass Arbitration—How Did We Get Here & Where Are We Now?* (June 6, 2024), at https://www.adr.org/blog/mass-arbitration-how-did-we-get-here-and-where-are-we-now (describing 2024 changes to rules and fee schedules for mass arbitrations).

[27] *See*, *e.g.*, *Mass Arbitration Shakedown*, *supra* n.6, at 37.

unless an enormous amount of manpower is expended—would take the business longer than the 30 days a respondent has under the Mass Arbitration Supplementary Rules to file a court action to halt non-arbitrable arbitrations or the 45 days a respondent has to file an answer.[28]

This problem is getting worse, not better. Claimants' counsel often recruit claimants online by posting websites or social-media ads using webforms for prospective claimants to complete.[29] These forms have always attracted fraudsters who fill out fake information in the hope that that the claim would avoid scrutiny but pay out in the almost inevitable settlement. But the rise of generative AI and related technologies is making it possible to submit ever-larger numbers of fake claims and to customize the information to make the fraud harder to spot.

The recent spike in fraudulent claims submitted in class settlements via online web portals—which operate similarly to the forms used to recruit mass arbitration claimants—illustrates the problem. Experience shows that even small class settlements often receive hundreds of thousands or millions of increasingly clever fake claims, such as ones with individualized claimant identifying and contact information or even computer-generated proofs of purchase.[30] In class settlements, neutral claims administrators scrutinize the filings to weed out improper claims. But in mass arbitrations, business respondents often report that claimants' counsel are doing little or nothing to investigate their recruited "claimants" before filing arbitrations.[31]

Claimants' counsel have an ethical duty to vet their mass arbitration claimants *before* filing demands for arbitrations in the claimants' names.[32] Claimants' counsel should not be permitted to outsource that duty to business respondents as a tactic for imposing substantial investigation costs and AAA fees on the business. But the current rules allow that result because insufficient identifying information is required at the case-initiation stage, and neither claimants

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[28] *See* MA Rules R-1(e) & R-4(a).

[29] *See Mass Arbitration Shakedown*, *supra* n.6, at 34.

[30] *See*, *e.g.*, Dkt. 54 ¶¶ 20-23, *Hezi v. Celsius Holdings, Inc.*, No. 1:21-cv-9892 (S.D.N.Y. Nov. 22, 2022) (declaration of claims administrator describing 658,719 fake claims submitted via class settlement website); Dkt. 155 at 1-2, *Hesse v. Godiva Chocolatier, Inc.*, No. 1:19-cv-972 (S.D.N.Y. Dec. 16, 2022) (noting determination by claims administrator that claims had been faked by a "bot" hosted in a "foreign country").

[31] *See*, *e.g.*, *Mass Arbitration Shakedown*, *supra* n.6 at 37.

[32] *See*, *e.g.*, Model R. of Prof. Conduct 3.1, cmt. 2 (stating that before "[t]he filing of an action . . . or similar action taken for a client," the lawyer must "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions"); Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration*, 63 Disp. Resol. J. 38, 40 (2008) ("The prevailing view" is that "state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct, . . . apply to lawyers who serve as advocates in arbitration.").

nor claimants' counsel are required to sign certifications that subject them to the same standards barring the filing of frivolous claims that would apply in court. **As discussed above, we urge the AAA to adopt stricter filing requirements above for all consumer and workplace arbitrations. Those requirements are especially needed to curb abusive mass arbitrations.**

***Process arbitrator authority to impose sanctions on counsel*:** Relatedly, **Mass Arbitration Supplementary Rule MA-6 should be amended to clarify that when process arbitrators decide disputes over compliance with AAA or contractual filing requirements or related issues regarding proper case initiation, if the arbitrator finds that claimants' counsel has filed patently improper claims, the arbitrator has authority to require claimants' counsel to show cause why they should not be sanctioned**. The process arbitrator also **should have the authority to impose sanctions if appropriate:** these improper cases will never reach a merits arbitrator, and this abusive conduct will escape sanctions entirely unless the process arbitrator is authorized to take action.

***Satisfaction of pre-arbitration dispute-resolution processes*:** Another commonly disputed issue before process arbitrators is the failure of claimants to comply with contractual obligations to engage in informal dispute resolution before commencing arbitration.[33] For example, arbitration agreements often require the parties to provide written notice 30 days or more before filing arbitration so that the parties have a meaningful opportunity to discuss settlement before AAA fees are incurred. The AAA therefore should **require mass arbitration claimants to attach either their pre-arbitration notices to their demands for arbitration if compliance with such a procedure is required by the arbitration agreement or an explanation why they believe that no such requirement applies (or is legally enforceable)**. In many cases, that attachment would prove whether a claimant has complied with the contractual precondition to arbitration, streamlining the issues for process arbitrators or courts that are later asked to enforce the pre-arbitration requirement—or perhaps avoiding the dispute entirely.

***Disclosure of third-party litigation funding agreements*:** Many larger mass arbitration campaigns are now financed by third-party litigation funders, which loan money to claimants' counsel to pay the expenses incurred to recruit as many claimants as possible in exchange for a share of the proceeds. The presence of these third-party funders, however, may distort both litigation and settlement behavior by claimants' counsel. Counsel may feel beholden to the funder to take ethically dubious steps to maximize the funders' payout, such as advancing non-meritorious or even frivolous claims to extract a settlement based on the business's AAA

[33] *See* Mass Arbitration Supplementary Rule MA-6(c)(ii) (authorizing process arbitrators to hear "[d]isputes over any applicable conditions precedent" to arbitration).

fees and cost of defense.[34] For this reason, some courts (either by operation of statute, court rule, or standing order) require disclosure of such arrangements.[35] The AAA should do likewise and **require mass arbitration filers to disclose, when the arbitration is initiated, copies of any contractual agreements giving anyone other than the claimant or claimants' counsel the right to receive compensation that is contingent on the proceeds of the arbitration.**

C. AAA and arbitrator fees should not be assessed on a per-case basis in mass arbitrations.

The fee schedule for mass arbitrations should be also be reexamined and revised. The January 2024 switch from per-case filing fees to a single initiation fee, no matter how many cases are filed, was a salutary change. But this realignment should extend to the rest of the fee schedule. **All per-case fees and deposits should be eliminated and replaced with fees that fairly compensate the AAA and arbitrators for the cost of services provided without giving claimants' counsel the ability to weaponize the AAA's fee schedule to extract blackmail settlements from respondents.**

For example, consider a mass arbitration that continues past the process-arbitrator stage in which claimants insist on proceeding with all cases at once. At that point, under the fee schedules for both consumer and employment mass arbitrations, the AAA would charge the business nonrefundable Per Case Fees and Arbitrator Appointment Fees for every case—even if only a small fraction of those cases would ever be arbitrated.[36] Similarly, separate initial

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[34] *See*, *e.g.*, U.S. Chamber of Commerce ILR, *What You Need to Know About Third Party Litigation Funding* (June 7, 2024), at https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/.

[35] *See*, *e.g.*, Ind. Code § 24-12-11-5; La. Rev. Stat. § 9:3580.13(B); Mont. Code § 31-4-108; W.V. Code § 46A-6N-6; Wis. Code § 804.01(2)(bg); *see also* D. Ariz. L.R. 7.1.1; C.D. Cal. L.R. 7.1-1; Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement ¶ 17 (N.D. Cal. Nov. 30, 2023); Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); M.D. Fla. L.R. 3.03(a); N.D. Ga. L.R. 3.3(A)(2); S.D. Ga. L.R. 7.1.1; N.D. Iowa L.R. 7.1; S.D. Iowa L. R. 7.1; D. Md. L.R. 103.3(b); E.D. Mich. L.R. 83.4(b)(2); Nev. L. R. 7.1-1(a); D.N.J. Civ. L.R. 7.1.1; E.D.N.C. L. Civ. R. 7.3(b)(2); M.D. Tenn. L.R. 7.02; N.D. Tex. L.R. 3.1(c); W.D. Tex. L.R. CV-33(b)(3).

[36] *See* AAA, *Consumer Mass Arbitration and Mediation Fee Schedule* (2024), https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf; AAA, *Employment/Workplace Mass Arbitration and Mediation Fee Schedule* (2024), https://adr.org/sites/default/files/Employment-Workplace_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.

arbitrator deposits can be charged for every case, even if all of the cases are assigned to a small roster of arbitrators who each will decide numerous cases individually.[37]

These charges, which must be paid upfront and in full before the company can defend itself on the merits in any case, can reach staggering amounts. As the number of claimants increase, the amount can be so high that the company cannot reasonably afford to mount a defense. To illustrate these concerns, consider the amount of Per Case Fees, Arbitrator Appointment Fees, and initial arbitrator compensation deposits a business must pay for a mass arbitration of 10,000 claimants, 50,000 claimants, or 100,000 claimants—representing commonly compiled numbers of individual arbitrations that lawyers frequently threaten to file:

Number of Claimants	Per Case Fees	Arbitrator Appointment Fees[38]	Initial Arbitrator Deposits[39]	Total
10,000 consumers	$1,375,000	$4,500,000	$30,000,000	$35,875,000
10,000 workers	$1,375,000	$11,000,000	$30,000,000	$42,375,000
50,000 consumers	$5,375,000	$22,500,000	$150,000,000	$177,875,000
50,000 workers	$5,375,000	$55,000,000	$150,000,000	$210,375,000
100,000 consumers	$10,375,000	$45,000,000	$300,000,000	$355,375,000
1000,000 workers	$10,375,000	$110,000,000	$300,000,00	$420,375,000

These amounts—tens or hundreds of millions of dollars—cannot feasibly be paid upfront. And they are not the only fees that must be paid: businesses also must pay Final Fees on a per-case basis as hearings are scheduled, and arbitrators may request additional deposits for each case to which they are assigned as they do work.[40] But it is the potential of being charged the Per Case Fees, the Arbitrator Appointment Fees, and initial deposits for the arbitrator's compensation on a per-case basis, before merits arbitrators can hear defenses in any case, that gives mass arbitration filers tremendous leverage to extract a settlement.

The AAA therefore should revise its fee schedules to eliminate per-case fees and deposits in mass arbitrations. Those per-case amounts are the driver of abusive mass

[37] *See supra* n.36.

[38] For consumer cases, this calculation assumes the AAA will directly appoint arbitrators. If the agreement calls for rank-and-strike appointments, the fees would be even higher.

[39] This calculation assumes an initial arbitrator deposit of $3,000 per case.

[40] *See supra* n.36.

arbitrations. And per-case fees quickly reach astronomical sums that bear no relation to the amount of fair compensation for the work the AAA does in administering the cases, almost none of which will actually be arbitrated. Instead, **in mass arbitrations, the AAA should charge for administrative services on an hourly basis and collect deposits on a per-arbitrator basis, no matter how many cases are assigned to an arbitrator, rather than on a per-case basis.**

D. Process arbitrators should enforce agreements to stage or batch cases to facilitate the efficient resolution of mass arbitrations.

Many companies have tailored their arbitration agreements to the needs of mass arbitration by preserving the right to individual arbitration but ensuring that those individual arbitrations proceed in an orderly fashion. Typically, these agreements require the parties to select bellwether or test cases to be arbitrated first, so that the outcome can inform a global mediation. Although the results on the bellwether cases would not be binding on any of the claimants in the other cases, the outcomes of those cases would provide useful information for all parties regarding the relative strength of the parties' claims and defenses. If any cases remain after the mediation, these agreements often specify that the individual arbitrations will proceed in an orderly staged fashion.

This is the process that courts use to handle mass numbers of individual cases, such as mass torts, whether in the multidistrict litigation process in federal court or similar procedures at the state level.[41] Courts do not simply proceed to simultaneous individual trials in each and every case. There is no reason for the AAA to lack the ability to impose coordination on mass individual proceedings by requiring orderly staging of cases when courts do exactly that in virtually identical circumstances.

With these tools, the AAA is well situated to administer mass arbitrations, even if all claimants want individual hearings. The AAA has a deep roster of neutrals who can preside over individual hearings. But those cases will necessarily need to be sequenced, and an intelligent staging process can facilitate the voluntary settlement of the vast majority of other cases. Mass arbitrations of claims in this way can be resolved fairly and efficiently.

Many claimants' counsel agree and cooperate with using these approaches to resolve mass arbitrations. But some claimants' counsel refuse to participate in the selection of bellwether cases or the orderly staging of arbitrations. Instead, they insist that every case must be individually tried *at the same time*. In practice, arbitrating every case in a significant mass arbitration simultaneously is never done. There simply are not enough arbitrators to try thousands or tens of thousands of cases at the same time. And it is an unfair abuse of AAA, arbitrator, and party resources to allow unscrupulous claimants' counsel to insist on this approach in an attempt to inflict additional AAA fees on companies in order to extract blackmail

[41] *Mass Arbitration Shakedown*, *supra* n.6, at 48-50.

settlements. Indeed, this practice harms the parties in other unrelated disputes by improperly diverting AAA resources.

Accordingly, the Mass Arbitration Supplementary Rules should be amended to provide that arbitrators will enforce bellwether or batching clauses in arbitration clauses unless invalidated by a court order or, if there is a delegation clause, the arbitrator has ruled that the clause is unlawful under the law of a particular state (in which case the bellwether or batching shall be applied to claimants from other states).

E. The Mass Arbitration Supplementary Rules should also apply when mass arbitrations are threatened.

As currently written, Rule MA-1(b), the Mass Arbitration Supplementary Rules apply when 25 or more similar demands for arbitration are *filed* by the same or coordinated counsel. This requirement should be revised so that the rules also apply when 25 or more such demands are *threatened in writing* to be filed.

Under some arbitration agreements, if numerous claimants represented by the same or coordinated counsel notify the business of an intent to arbitrate similar claims, all of the claims must be either batched together in a single or a small number of arbitrations or only a small number of individual test cases may be filed in arbitration at a time. When parties follow these procedures and fewer than 25 cases are filed at once, the AAA is currently declining to apply the Mass Arbitration Supplementary Rules. But that outcome prevents the parties from taking advantage of the process-arbitrator procedure available under those rules—a role that can help facilitate the efficient resolution of disputes over threshold administrative issues.

The AAA therefore should amend Rule MA-1(b)(i) to provide that Mass Arbitrations are defined as "twenty-five or more similar Demands for Arbitration (Demand(s)) filed or threatened in writing to be filed against or on behalf of the same party or related parties."

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We again thank the AAA for the opportunity to submit public comment on behalf of our members regarding the proposed rule changes.

Sincerely yours,

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