single section serves to emphasize the utility of these procedures for large and complex cases.

The NASD stated that the procedures are intended to encourage the parties to come to an agreement on the rules that will govern the disposition of the matter. Under new Section 46, all cases that are eligible for the procedures contained in that Section will be scheduled for an administrative conference in order to determine whether the parties can agree on ways in which the case should be administered. Beyond the mandatory administrative conference, however, all parties to an eligible matter must agree to continue with a proceeding under the provisions of Section 46; otherwise, the Code provisions generally applicable to arbitration matters will govern the proceeding. The NASD stated that most of the provisions of the proposed rules will allow the parties to adopt an alternative procedure of their own creation if they can agree on such procedures.

Section 46 includes procedures for an administrative conference, the appointment of arbitrators, and a preliminary hearing. The provisions of the rule change are described in more detail below.

Finally, the rule change is a one year pilot program. It will remain in effect for cases filed within one year from the date of effectiveness (ninety days after the date of this order) unless the NASD Board of Governors authorizes and the Commission approves its modification or extension. During the pilot program the NASD will monitor the implementation and utility of the rule change in order to determine whether to add it permanently to the Code.

II. Substantive Provisions

A. Fees

Sections 43 and 44 of the Code, which specify the schedule of fees for customer disputes and industry disputes, respectively, have been amended to add subsections specifying that the fees and deposits for matters submitted for arbitration under the large and complex case rules shall be the fees and deposits otherwise specified for claims over \$5,000,000. As discussed further below in Section D., parties may be assessed additional fees to compensate arbitrators. Parties may condition their acceptance of the large and complex case rules on an agreement with the NASD governing these fees.

B. Applicability

Section 46(a) specifies that the procedures for large and complex cases

will be applicable to disputes, claims or controversies ("eligible matters") in which the claim or counterclaim is at least \$1 million, including punitive or exemplary damages, but exclusive of interest costs or fees, or in other cases in which the parties agree that the matter should be subject to the procedures. This provision permits parties with claims of less than \$1 million to have their matter heard pursuant to these procedures if, in their judgment, it would be advantageous to do so.

Section 46(a) requires an eligible matter to be scheduled for an administrative conference. As noted above, unless all parties agree, the large and complex case rules will not govern arbitration of the matter following the administrative conference. The procedures for an administrative conference, discussed in detail below. bring the parties together to consider the various issues involved in managing the matter and to determine if any agreement can be reached on such issues. If the parties fail to agree on procedures, they are not required to continue under the large and complex case rules; the rules are not intended to apply to cases if a party does not wish for them to apply. In order to assist parties in deciding whether to proceed under the large and complex case rules, the NASD will provide all parties with an educational pamphlet.11 The pamphlet will discuss issues that parties should address in a written document prior to submitting a matter for resolution under the large and complex case rules, including, among other issues, arbitrator selection and compensation, discovery and whether an award will include a statement of reasons. Thus, the rule change does not permit a selection of the large and complex case rules in a predispute arbitration agreement. Rather, it specifically provides that any agreement to proceed under such rules will be made at or after an administrative

If all parties agree to continue the proceedings under the large and complex case rules, Subsection (a) provides that the agreement becomes binding on the parties once the last arbitrator is appointed. This requirement reflects the NASD's view that parties devote substantial resources to formulate procedures to govern a particular matter. In addition, substantial effort and commitment is

required to appoint arbitrators. A party could be severely disadvantaged if it devoted time and resources to arbitrating a matter under the large and complex case rules, only to confront unilateral rejection of the agreed-upon procedures later in the process.

In this regard, the NASD has stated that if, at any point after such an agreement under Section 46 (a)(2) and (a)(3) becomes binding, a member of the NASD or an associated person refuses to proceed with the arbitration of the matter and, instead seeks to dismiss the action and refile it in court, another arbitration forum, or with the NASD as an ordinary arbitration action, the NASD would regard this action as a violation of the member's obligation to arbitrate such matters under the Code subjecting the member of associated person to potential disciplinary action. Further, the NASD has stated that any failure by any party to proceed after the agreement becomes binding may be addressed under various provisions of the Code which permit the arbitrators to issue orders, penalize parties and make awards without the attendance or participation of a party. 12

C. Administrative Conference

Section 46(b) provides for an administrative conference of the parties to an eligible matter to discuss, among other things, the claim and amount in dispute, arbitrator preferences, procedures, discovery, scheduling and settlement. In its filing with the Commission, the NASD indicated that this provision is intended to bring the parties together to air and discuss all issues related to the arbitration, to exchange information on procedural and scheduling matters, and to reach agreement on as many procedural and scheduling issues as possible in order to facilitate the orderly and expeditious resolution of the matter. The filing notes that if it becomes apparent that one or more parties are not amenable to proceeding under the large and complex case rules, the administrative conference will have served its purpose and the matter may proceed under the other provisions of the Code.

The NASD expects that parties will have reviewed the NASD's pamphlet before the administrative conference. Among the topics to be addressed in the pamphlet are the issues that parties should address in a written agreement under Section 46 (a)(2) and (a)(3) prior to submitting a matter for resolution under the large and complex case rules,

¹¹ See letter dated October 12, 1994, to Mark Barracca, Esq., Branch Chief, SEC, from Suzanne E. Rothwell, Associate General Counsel, NASD ("NASD Letter").

 $^{^{12}}$ See *e.g.*, NASD Manual, Code of Arbitration Procedure, Part III, Secs. 29, 32, 33 and 35 (CCH) ¶¶3729, 3732, 3733 and 3735.