

### F. Settlement of Eligible Matters

Section 46(e) also provides for the parties to give arbitrators information about their settlement efforts. The provision states that if an eligible matter is not settled prior to the first hearing date, the parties must submit either a joint statement or individual statements to the arbitrators, setting out a record of the dates and duration of any discussions and the fact that the discussions did not result in settlement, but must not include any statement disclosing the dollar value of any settlement offer or proposal discussed by the parties. The NASD indicated that this subsection is included because it might provide arbitrators with additional information concerning the issues in dispute. The prohibition against disclosing dollar amounts discussed is intended to avoid suggesting dollar values for any award ultimately made by the arbitrators.

### G. Management of Proceedings

Section 46(f) sets out general and specific powers granted to the arbitrators to enable them to manage the proceedings. The arbitrators may, without limitation, delegate their powers under subsection (f) to a single arbitrator to be exercised either in the preliminary hearing or at any other time prior to the hearing. The large and complex case rules specifically permit arbitrators to rule on dispositive motions, such as motions to dismiss on any grounds, including the applicability of a statute of limitations, or motions for summary judgment on specific issues such as liability or damages, or on the whole matter. As noted above, the pamphlet will highlight this provision so that parties may determine whether they wish to utilize the large and complex case rules or whether they wish to agree specifically to amend the panel's ability to rule on dispositive motions.

A significant difference between the large and complex case rules and the rules for other cases administered under current Code provisions concerns the prehearing procedures, or "discovery" process. The large and complex case rules rely to a significant extent on the parties to bargain for setting the scope of discovery. Absent a specific agreement by the parties in the agreement under Section 46 (a)(2) and (a)(3) to proceed under these rules, parties are to use the procedures in Section 46(f). These procedures differ from the present Code in that depositions and interrogatories are intended to be limited to determining and preserving testimony and facts

relevant to the determination of the matter, not for conducting discovery.<sup>14</sup> Further, interrogatories are limited to twenty questions, including parts and subparts. The pamphlet will highlight these and other differences between discovery under the large and complex case rules and discovery under current provisions of the Code and will advise parties that they may agree to modify the discovery rules contained in Section 46(f).

Finally, Section 46(f) authorizes arbitrators to conduct special proceedings as necessary to resolve any such matters before them. Special proceedings may take any form specified by the arbitrators, and may be conducted in person, via teleconference, on written submissions alone, or by any other method.

### H. Form Award

Section 46(g) specifies that the award in an eligible proceeding shall be in the form prescribed in Section 41 of the Code. Arbitrators may at their own initiative issue an award that is accompanied by a statement of reasons or basis of the award. Although not specifically addressed by Section 41, it has been the position of the NASD that arbitrators are permitted under that Section to issue a statement of reasons or basis for the award and arbitrators have issued such statements in many cases.

In addition, the Section provides for arbitrators to issue a statement of reasons or basis of the award if the parties specifically so agree. Accordingly, even in situations where the arbitrators would not otherwise issue a statement accompanying the award, the arbitrators would nonetheless do so where all of the parties have specifically agreed that a statement of the reasons or basis of the award should accompany the award.

### I. Sunset Provision

Section 46(h) of the proposed rule change specifies that the large and complex cases rules will remain in effect for one year following the effective date, unless the Board of Governors authorizes their modification or extension.<sup>15</sup>

<sup>14</sup> By contrast, Section 32 of the Code provides that an arbitrator may "issue subpoenas, direct appearances of witnesses and production of documents, set deadlines for compliance, and issue any other ruling which will expedite the arbitration proceedings." NASD Manual, Code of Arbitration Procedure, Part III, Sec. 32 (CCH) ¶ 3732.

<sup>15</sup> Any such modification or extension must be filed as a proposed rule change with the Commission pursuant to section 19(b)(1) of the Act and Rule 19b-4 thereunder.

### III. Comment Letters

The Lipner Letter states that there were both positive and negative aspects to the large and complex case rules, and recommended certain changes to the rule change to enhance the equitable nature of the arbitration process. NELA's comments were limited to the arbitration of employment disputes. NELA opposes the rule change in the context of employment disputes. As a general matter, NELA objects not only to the proposed rule change but to mandatory arbitration of complex employment.<sup>16</sup> The NELA Letter states that employment disputes typically turn on legal issues rather than factual issues. NELA believes that it is inappropriate for a panel composed of a majority of non-lawyers to decide these issues. Furthermore, the NELA Letter states that arbitration does not provide the opportunity for the development of employment law. The Commission believes that, whatever the merit of these arguments, they are not germane to the instant rule change.

The NELA Letter also states that the large and complex case rules "are clearly designed to give the defendants all of the advantages of litigation in defending the cases while fatally disadvantaging the party with the burden of proof." As noted above, parties will be able to modify all provisions of Section 46 with an agreement under Section 46 (a)(2) and (a)(3) (other than the mandatory administrative hearing), and if parties do not agree upon procedures to govern the matter, than Section 46 will not govern the arbitration of the matter.

The NELA Letter also objects to the level of fees imposed upon large and complex cases. The NELA Letter states that the level of fees is exorbitant given that the employee does not have the option of going to court. The Commission notes that Section 46(a)(4) grants the Director of Arbitration the

<sup>16</sup> The Commission approved a proposed rule change to Sections 1, 8 and 9 of the Code in 1993 that provides that disputes, claims, or controversies arising out of the employment or termination of employment of an associated person are eligible for submission to arbitration. See Securities Exchange Act Release No. 32802 (Aug. 25, 1993), 58 FR 45932 (Aug. 31, 1993). That proposed rule change was prompted by two court decisions interpreting the Code so as not to cover employment disputes. The California Court of Appeals held that Section 8 of the Code did not cover employment disputes, but only covered disputes arising out of or in connection with business transactions. *Higgins v. Superior Court of Los Angeles County*, 1 Cal. Rptr. 2d 57 (1992). The Seventh Circuit concluded that the NASD Code of Arbitration as then drafted, did not require the arbitration of employment disputes between an NASD member and its associated person. *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993). NELA did not comment on that proposed rule change.