

Consolidated Audit Trail (CAT) Fee Dispute Resolution Process

SEC Approves the CAT Fee Dispute Resolution Process

Rule Implementation Date: December 1, 2017 (Note: the CAT Fee Dispute Resolution Process will not be in effect until CAT fees are operative.)

Summary

The SEC approved Rule 6898 to establish the procedures for resolving potential disputes related to CAT fees charged to industry members.¹ This rule will be implemented on December 1, 2017; however, the CAT Fee rules currently are pending and not yet operative. FINRA will provide additional information in a *Regulatory Notice* promptly following the adoption of the CAT fees.²

Questions concerning this *Notice* should be directed to Julia Bogolin, Counsel, Office of General Counsel, at (202) 728-8111 or julia.bogolin@finra.org.

Background & Discussion

The National Market System Plan Governing the Consolidated Audit Trail (CAT NMS Plan) is designed to create, implement and maintain a consolidated audit trail that will capture customer and order event information for orders in NMS securities and OTC equity securities, across all markets, from the time of order inception through routing, cancellation, modification or execution in a single consolidated data source. Under the CAT NMS Plan, the Operating Committee of CAT NMS, LLC (Operating Committee) has discretion to establish funding to operate the CAT, including establishing fees that the participants will pay, and establishing fees for industry members that will be implemented by the participants (CAT fees), subject to any necessary filings with the SEC.³ FINRA has filed a rule change in conjunction with the other CAT NMS Plan participants to establish Rule 6897 imposing the CAT fees, but the rule has not yet been adopted.⁴ Rule 6898 adopts into the FINRA rulebook the procedures approved by CAT NMS, LLC for resolving potential disputes relating to CAT fees charged to industry members (Procedures).⁵

November 15, 2017

Notice Type

- ▶ New Rule

Suggested Routing

- ▶ Accounts Payable
- ▶ Compliance
- ▶ Finance
- ▶ Internal Audit
- ▶ Legal
- ▶ Operations
- ▶ Senior Management
- ▶ Trading

Key Topics

- ▶ Consolidated Audit Trail
- ▶ Fees
- ▶ Trade Reporting

Referenced Rules & Notices

- ▶ Rule 6800 Series
- ▶ Rule 6898

On September 14, 2017, the SEC approved Rule 6898 (Consolidated Audit Trail – Fee Dispute Resolution) to establish the procedures for resolving potential disputes related to CAT fees charged to industry members under proposed Rule 6897. Rule 6898 incorporates the procedures adopted by the Operating Committee into the FINRA rulebook; the other CAT NMS Plan participants are also adopting this rule. This rule details the procedure for industry members that dispute CAT fees, including disputes related to the designated tier and the fee calculated pursuant to such tier,⁶ to apply for an opportunity to be heard and for review of the disputed CAT fees. The procedures are modeled after the adverse action procedures various exchanges adopted,⁷ and will be posted on the website for the CAT NMS Plan.⁸

Under the procedures, an industry member that disputes CAT fees it is charged and that desires to have a hearing on the disputed fees must file a written application with the CAT NMS, LLC *within 15 business days* after being notified of the disputed fees. Please note this application would not be filed with FINRA or any of the other self-regulatory organizations of which the firm may be a member. The application must:

- ▶ identify the disputed CAT fees;
- ▶ state the specific reason(s) why the applicant takes exception to such CAT fees; and
- ▶ set forth the relief sought.

In addition, if the applicant intends to submit any additional documents, statements, arguments or other material in support of the application, the same should be so stated and identified.⁹

CAT NMS, LLC will refer applications for hearing and review promptly to a Fee Review Subcommittee.¹⁰ The Fee Review Subcommittee will hold hearings promptly and keep a record of the proceedings. The parties to the hearing will consist of the applicant and a representative of CAT NMS, LLC who shall present the reasons for the action taken by the company that allegedly aggrieved the applicant.¹¹ The parties to the hearing shall furnish the Fee Review Subcommittee with all materials relevant to the proceedings at least 72 hours prior to the date of the hearing. Each party will have the right to inspect and copy the other party's materials prior to the hearing.¹² The applicant is entitled to be represented by counsel at all stages of the proceedings.¹³

The Fee Review Subcommittee will determine all questions concerning the admissibility of evidence and will otherwise conduct of the hearing. Each of the parties will be permitted to make an opening statement, present witnesses and documentary evidence, cross examine opposing witnesses and present closing arguments orally or in writing as determined by the Fee Review Subcommittee. The Fee Review Subcommittee also will have the right to question all parties and witnesses to the proceeding. The formal rules of evidence will not apply.¹⁴

The Fee Review Subcommittee must set forth its decision in writing and send the written decision to the parties to the proceeding. Such decisions will contain the reasons supporting the conclusions of the Fee Review Subcommittee.¹⁵ The decision of the Fee Review Subcommittee will be subject to review by the Operating Committee either on its own motion within 20 business days after issuance of the decision or upon written request submitted by the applicant within 15 business days after issuance of the decision. The applicant's petition must be in writing and must specify the findings and conclusions to which the applicant objects, together with the reasons for such objections. Any objection to a decision not specified in writing will be considered to have been abandoned and may be disregarded. Parties may petition to submit a written argument to the Operating Committee and may request an opportunity to make an oral argument before the Operating Committee. The Operating Committee will have sole discretion to grant or deny either request.¹⁶

If a review is granted, the Operating Committee will conduct the review. The review will be made upon the record and will be made after such further proceedings, if any, as the Operating Committee may order. Based upon such record, the Operating Committee may affirm, reverse or modify, in whole or in part, the decision of the Fee Review Subcommittee. The decision of the Operating Committee will be in writing, will be sent to the parties to the proceeding and will be final.¹⁷

A final decision regarding the disputed CAT fees by the Operating Committee, or the Fee Review Subcommittee (if there is no review by the Operating Committee), must be provided within 90 days of the date on which the industry member filed a written application regarding disputed CAT fees with the CAT NMS, LLC. The Operating Committee may extend the 90-day time limit at its discretion.¹⁸

The decisions on CAT fee disputes made pursuant to this rule will be binding on industry members, without prejudice to the rights of any industry member to seek redress from the SEC, or in any other appropriate forum.¹⁹ Finally, an industry member that files a written application with the CAT NMS, LLC regarding disputed CAT fees in accordance with this rule is not required to pay the disputed fees until the dispute is resolved in accordance with the procedures, including any review by the SEC, or in any other appropriate forum. For these purposes, the disputed CAT fees means the amount of the invoiced CAT fees that the industry member has asserted the industry member does not owe to the CAT NMS, LLC. The industry member must pay any invoiced CAT fees that are not disputed when due as set forth in the original invoice.²⁰

Once the dispute regarding CAT fees is resolved pursuant to these procedures, if it is determined that the industry member owes any of the disputed CAT fees, then the industry member must pay the disputed CAT fees that are owed, as well as interest on the disputed CAT fees from the original due date (that is, 30 days after receipt of the original invoice of such CAT fees) until such disputed CAT fees are paid at a per annum rate equal to the lesser of (i) the prime rate plus 300 basis points, or (ii) the maximum rate permitted by applicable law.²¹

As noted above, Rule 6898 relating to the CAT Fee Dispute Resolution Process will be implemented on December 1, 2017; however, Rule 6897 imposing the CAT Fees currently is pending and is not yet operative. FINRA will provide additional information in a *Regulatory Notice* promptly following the adoption of the CAT Fees and Rule 6897.

Endnotes

1. See Securities Exchange Act Release No. 81616 (September 14, 2017), 82 FR 44010 (September 20, 2017) (Order Approving File No. SR-FINRA-2017-020).
2. On October 30, 2017, the participants filed Amendment No. 3 to the National Market System Plan Governing the Consolidated Audit Trail. The proposed amendment details the CAT fees and would add a fee schedule to a new Exhibit B of the Plan which sets forth the CAT fees to be paid by the participants.

On May 8, 2017, FINRA filed a proposed rule change with the SEC to adopt CAT fees pursuant to new proposed Rule 6897 (Consolidated Audit Trail Funding Fees), which will require industry members that are FINRA members and have order or trading activity that would be reportable to the CAT to pay the CAT fees determined by the Operating Committee. See Securities Exchange Act Release No. 80710 (May 17, 2017), 82 FR 23629 (May 23, 2017) (SR-FINRA-2017-011). The SEC subsequently suspended FINRA's CAT fee filing proposing Rule 6897 on June 30, 2017. See Securities Exchange Act Release No. 81067 (June 30, 2017), 82 FR 31656 (July 7, 2017) (Suspension Order).
3. Section 11.1(b) of the CAT NMS Plan.
4. See *supra* note 2.
5. Unless otherwise specified, capitalized terms used in this *Notice* are defined as set forth herein, or in the Rule 6800 Series (Consolidated Audit Trail Compliance Rule) or in the CAT NMS Plan.
6. Under proposed Rule 6897, CAT fees will be assessed by placing CAT reporters into fixed tiers based on "message traffic" for industry members (other than Execution Venue ATSS) and on market share for Execution Venues (including Execution Venue ATSS). See Securities Exchange Act Release No. 80710 (May 17, 2017), 82 FR 23629 (May 23, 2017) (SR-FINRA-2017-011).
7. See, e.g., Chapter X of BATS BZX Exchange, Inc. (Adverse Action); and Chapter X of NYSE National, Inc. (Adverse Action).
8. The CAT NMS Plan website is available at <http://www.catnmsplan.com/>.
9. See Rule 6898(c)(2).
10. See Rule 6898(c)(3)(A). The members of the Fee Review Subcommittee will be subject to the provisions of Section 4.3(d) of the Plan regarding recusal and Conflicts of Interest.
11. See Rule 6898(c)(4)(A).
12. See Rule 6898(c)(3)(C).
13. See Rule 6898(c)(4)(B).
14. See Rule 6898(c)(4)(C).

15. *See* Rule 6898(c)(4)(D).
16. *See* Rule 6898(c)(5)(A).
17. *See* Rule 6898(c)(5)(B).
18. *See* Rule 6898(c)(6).
19. *See* Rule 6898(c)(8).
20. *See* Rule 6898(c)(9)(A).
21. *See* Rule 6898(c)(9)(B).