

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading venue	Share volume in NMS stocks (percent)
200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE Arca must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for NYSE Arca market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.²¹

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Market Data significantly affect the terms on which NYSE Arca can distribute this market data.²² In setting the fees for NYSE Arca Market Data, NYSE Arca must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.²³ Of course, the most basic source of information generally available at an

²¹ See NYSE Arca Order at 74783.

²² See Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Atlanta Richfield Co. v. United States Petroleum Co.*, 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958).

²³ See NYSE Arca Order at 74783.

exchange is the complete record of an exchange's transactions that is provided in the core data feeds.²⁴ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.²⁵ The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on NYSE Arca in setting the terms for distributing its NYSE Arca Market Data. The Commission believes that the availability of those alternatives, as well as NYSE Amex's compelling need to attract order flow, imposed significant competitive pressure on NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE Arca was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (SR-NYSEArca-2010-23) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62181; File No. SR-NYSE-2010-30]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change To Establish the NYSE BBO Service

May 26, 2010.

I. Introduction

On April 1, 2010, the New York Stock Exchange, LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to establish the NYSE BBO Service, a service that will make available the Exchange's best bids and offers and to establish fees for that service. The proposed rule change was published for comment in the **Federal Register** on April 22, 2010.³ The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

a. Subscribers and Data Feed Recipients

The NYSE BBO Service is a NYSE-only market data service that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that NYSE reports under the CQ Plan for inclusion in the CQ Plan's consolidated quotation information data stream ("NYSE BBO Information"). NYSE BBO Information would include the best bids and offers for all securities that are traded on the Exchange and for which NYSE reports quotes under the CQ Plan. NYSE will make the NYSE BBO Service available over a single datafeed, regardless of the markets on which the securities are listed.

The NYSE BBO Service would allow vendors, broker-dealers, private network providers and other entities ("NYSE-Only Vendors") to make NYSE BBO Information available on a real-time basis. NYSE-Only Vendors may distribute the NYSE BBO Service to both professional and nonprofessional subscribers.

The Exchange would make NYSE BBO Information available through its new NYSE BBO Service no earlier than

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 61914 (April 15, 2010), 75 FR 21077.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).

it makes that information available to the processor under the CQ Plan.

b. Fees

i. Access Fee

For the receipt of access to the NYSE BBO datafeed, the Exchange proposes to charge \$1500 per month. One \$1500 monthly access fee entitles an NYSE-Only Vendor to receive both the NYSE BBO datafeed as well as the Exchange's NYSE Trades datafeed.⁴ The fee applies to receipt of NYSE market data within the NYSE-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fees

For the receipt and use of NYSE BBO Information, the Exchange proposes to charge \$15 per month per professional subscriber device.

In addition, the Exchange proposes to offer an alternative methodology to the traditional device fee. Instead of charging \$15 per month per device, it proposes to offer NYSE-Only Vendors the option of paying \$15 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE BBO Information relating to all securities traded on NYSE, regardless of the market on which a security is listed. For the purpose of calculating Subscriber Entitlements, the Exchange proposes to adopt the unit-of-count methodology approved by the Commission earlier this year with respect to its NYSE OpenBook[®] service (the "Unit-of-Count Filing").⁵

iii. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE-Only Vendor \$5.00 per month for each nonprofessional subscriber to whom it provides NYSE BBO Information. The Exchange proposes to impose the charge on the NYSE-Only Vendor, rather than on the nonprofessional Subscriber. In addition, the Exchange proposes, to establish as an alternative to the fixed \$5.00 monthly fee, a fee of \$.005 for each response that a NYSE-Only Vendor disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under the NYSE BBO service. The

Exchange proposes to limit a NYSE-Only Vendor's exposure under this alternative fee to \$5.00 per month, the same amount as the proposed fixed monthly nonprofessional Subscriber flat fee. In order to take advantage of the per-query fee, a NYSE-Only Vendor must document in its Exhibit A that it can: (1) Accurately measure the number of queries from each nonprofessional Subscriber and (2) report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of best bids and offers to nonprofessional Subscribers. The per-query charge is imposed on NYSE-Only Vendors, not end-users, and is payable on a monthly basis. NYSE-Only Vendors may elect to disseminate the NYSE BBO service pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for the NYSE BBO Service, the Exchange proposes to apply the same criteria for qualification as a "nonprofessional subscriber" as the CTA and CQ Plan Participants use. Similar to the CTA and CQ Plans, classification as a nonprofessional subscriber is subject to Exchange review and requires the subscriber to attest to his or her nonprofessional subscriber status. A "nonprofessional subscriber" is a natural person who uses the data solely for his personal, non-business use and who is neither:

A. Registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association,

B. Engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act), nor

C. Employed by a bank or other organization exemption from registration under Federal and/or state securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such function for an organization not so exempt.

c. Justification of Fees

The Exchange believes that the proposed monthly access fee, professional subscriber fee and nonprofessional subscriber fee for the NYSE BBO Service will enable NYSE-Only Vendors and their subscribers to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of NYSE BBO Information in the form taken by the

proposed services. In setting the level of the proposed fees, the Exchange considered several factors, including:

(i) NYSE's expectation that the NYSE BBO Service is likely to be a premium service, used by investors most concerned with receiving NYSE BBO Information on a low latency basis;

(ii) The fees that the CQ Plan Participants, Nasdaq, NYSE Amex and NYSE Arca are charging for similar services (or that NYSE anticipates they will soon propose to charge);

(iii) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;

(iv) The contribution of market data revenues that the Exchange believes is appropriate for entities that are most likely to take advantage of the proposed service;

(v) The contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;

(vi) The savings in administrative and reporting costs that the NYSE BBO Service will provide to NYSE-Only Vendors (relative to counterpart services under the CQ Plan); and

(vii) The fact that the proposed fees provide alternatives to existing fees under the CQ Plan, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

d. Administrative Requirements

The Exchange will require each NYSE-Only Vendor to enter into a vendor agreement just as the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Consolidated Vendor Form"). The agreement will authorize the NYSE-Only Vendor to provide NYSE BBO Information to its customers or to distribute the data internally.

In addition, the Exchange will require each professional end-user that receives NYSE BBO Information from a vendor or broker-dealer to enter into the form of professional subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require NYSE-Only Vendors to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

⁴ The Commission approved the Exchange's NYSE Trades service, a NYSE-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports to the Consolidated Tape Association ("CTA") for inclusion in CTA's consolidated data stream and certain other related data elements. See Securities Exchange Act Release No. 59606 (March 19, 2009), 74 FR 13293 (March 26, 2009) (SR-NYSE-2009-04).

⁵ See Securities Exchange Act Release No. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR-NYSE-2010-22) (approving on a permanent basis the alternative unit-of-count methodology).

a national securities exchange.⁶ In particular, it is consistent with Section 6(b)(4) of the Act,⁷ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,⁸ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,⁹ which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,¹⁰ adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.¹¹

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.¹² In the NYSE Arca Order, the Commission stated that “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core

data are equitable, fair and reasonable, and not unreasonably discriminatory.”¹³ It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”¹⁴ If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”¹⁵

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.¹⁶ In contrast, individual exchanges and other market participants distribute non-core data voluntarily.¹⁷ The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.¹⁸ Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange’s proposal to distribute non-core data meets the standards of Section 6 and Rule 603.¹⁹ Because NYSE’s instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The Exchange proposes to establish a service that would allow a vendor to redistribute best bids and offers for all

securities that are traded on the Exchange and for which NYSE reports quotes under the CQ Plan. The Exchange proposes to establish a monthly vendor fee and an alternative fee rate that uses the unit-of-count methodology. The Exchange represents that this change would provide investors with a less expensive alternative to access bids and offer calculations than the CQ Plan’s consolidated data.

The proposal before the Commission relates to fees for NYSE BBO Information which is a non-core, market data product. As in the Commission’s NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to NYSE in setting the terms of this proposal: (i) NYSE’s compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE’s BBO Information.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE. Attracting order flow is an essential part of NYSE’s competitive success. If NYSE cannot attract order flow to its market, it will not be able to execute transactions. If NYSE cannot execute transactions on its market, it will not generate transaction revenue. If NYSE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of September 2009:²⁰

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHAREVOLUME IN NMS STOCKS SEPTEMBER 2009

Trading Venue	Share Volume in NMS Stocks
Registered Exchanges:	
NASDAQ	19.4
NYSE	14.7
NYSE Arca	13.2
BATS	9.5
NASDAQ OMX BX	3.3

²⁰ The Commission recently published estimated trading percentages in NMS Stocks in its Concept Release on Equity Market Structure. See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3597 n. 21 (January 21, 2010) (File No. S7-02-10).

⁶ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78f(b)(8).

¹⁰ 17 CFR 242.603(a).

¹¹ NYSE is an exclusive processor of the NYSE BBO service under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

¹² Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (“NYSE Arca Order”). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

¹³ *Id.* at 74771.

¹⁴ *Id.* at 74782.

¹⁵ *Id.* at 74781.

¹⁶ See 17 CFR 242.603(b). (“Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.”)

¹⁷ See NYSE Arca Order at 74779.

¹⁸ *Id.*

¹⁹ *Id.*

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading Venue	Share Volume in NMS Stocks
Other Registered Exchanges	3.7
ECNs:	
5 ECNs	10.8
Dark Pools:	
32 Dark Pools (Estimated)	7.9
Broker-Dealer Internatization:	
200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.²¹

In addition to the need to attract order flow, the availability of alternatives to NYSE's BBO Information data significantly affect the terms on which NYSE can distribute this market data.²² In setting the fees for its NYSE BBO Service, NYSE must consider the extent

²¹ See NYSE Arca Order at 74783.

²² See Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Atlanta Richfield Co. v. United States Petroleum Co.*, 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958).

to which market participants would choose one or more alternatives instead of purchasing the exchange's data.²³ Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.²⁴ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.²⁵ The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on the NYSE in setting the terms for distributing its NYSE BBO Information. The Commission believes that the availability of those alternatives, as well as the NYSE's compelling need to attract order flow, imposed significant competitive pressure on the NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the NYSE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (SR-NYSE-2010-30) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Florence E. Harmon,
Deputy Secretary.

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²³ See NYSE Arca Order at 74783.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62177; File No. SR-BATS-2010-013]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series"

May 26, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 13, 2010, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6)(iii) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 19.5, entitled "Minimum Participation Requirement for Opening Trading of Option Series." The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6)(iii).