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January 23, 2009

**DELIVERY BY HAND**

Secretary of Commerce  
U.S. Department of Commerce  
Attn: Import Administration  
Central Records Unit, Room 1870  
14th Street and Constitution Avenue, N.W.  
Washington, DC 20230

Attn: Anthony Hill, Michael Rill

**Re: Comments on Withdrawal of the Regulatory Provisions Governing Targeted Dumping**

Dear Mr. Secretary:

On behalf of various domestic producers,<sup>1</sup> these comments respond to the Department's December 10, 2008 Federal Register notice inviting public comment on the withdrawal of the regulatory provisions governing targeted dumping in antidumping investigations.<sup>2</sup>

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<sup>1</sup> AK Steel Corporation, Allegheny Ludlum Corporation, Carpenter Technology Corporation, Crucible Specialty Metals Division, Crucible Materials Corporation; Electralloy Corporation, a Division of G.O. Carlson, Inc., New World Pasta Company, American Italian Pasta Company and Dakota Growers Pasta Company, Mid Continent Nail Corporation, Davis Wire Corporation, Gerdau Ameristeel Corporation (Atlas Steel & Wire Division), Maze Nails (Division of W.H. Maze Company), Treasure Coast Fasteners, SGL Carbon LLC, Superior Graphite Co., the Municipal Castings Fair Trade Council all domestic producers involved in antidumping proceedings.

**I. OVERVIEW**

Domestic producers support the Department's withdrawal of its regulations related to targeted dumping. First, domestic producers support the Department's concerns regarding the deadline for submitting targeted dumping allegations. Targeted Dumping Withdrawal Notice, 73 Fed. Reg. at 74,931. Instead, in every original investigation, the Department should automatically conduct a targeted dumping analysis once it has a complete sales dataset to determine whether targeting is occurring.

Second, domestic producers agree that the Department's newly-developed methodology establishes "thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping." Targeted Dumping Withdrawal Notice, 73 Fed. Reg. at 74,931. As explained in detail in domestic producers' June 23, 2008 comments, the Department's proposed methodology for calculating targeted dumping is at odds with the statutory intent. Most importantly, the new methodology cannot detect obvious patterns of targeting. 19 U.S.C. § 1677f-1(d)(B)(i). Furthermore, the methodology is complex, redundant and difficult to satisfy, thereby limiting domestic industries' ability to obtain relief from unfair trading practices, in contravention of legislative intent. Accordingly, the Department has appropriately decided to withdraw its regulations and should decide that its proposed methodology does not unmask dumping as required by the statute.

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(...continued)

<sup>2</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008) ("Targeted Dumping Withdrawal Notice"); see also 74 Fed. Reg. 2059 (Dep't Commerce January 14, 2009) (extending deadline for comments until January 23, 2009).

As the Department considers how best to implement the statutory provisions governing targeted dumping, it should develop simple transparent methodologies that effectively identify targeted dumping among sales to different purchasers, regions, or at different periods of time whenever and wherever they occur.

Third, the Department's concerns with its existing regulations and practice confirm that the Department's application of the alternative calculation methodology to only a small portion of sales that pass its targeted dumping test is improper. Instead, the Department should decide that once targeting is found, the alternative methodology (an average-to-transaction-specific calculation) should be used to calculate margins on all sales.

**II. TARGETED DUMPING INVESTIGATIONS SHOULD BE INITIATED AUTOMATICALLY WITHOUT REQUIRING AN ALLEGATION BY PETITIONERS AND WITHOUT ESTABLISHING A MINIMUM THRESHOLD FOR ACCEPTING AN ALLEGATION OF TARGETED DUMPING**

In its original request for comments on targeted dumping, the Department inquired whether it should establish a type of *de minimis* threshold upon which an allegation should be based, either in terms of quantity of control numbers or share of sales covered. Moreover, in its notice withdrawing its regulations, the Department noted that it questioned whether the deadline for submitting allegations was appropriate. Targeted Dumping Withdrawal Notice, 73 Fed. Reg. at 74,931.

The Department should not establish minimum thresholds for accepting allegations of targeting dumping and should not establish a deadline for submitting an allegation. The statute simply states that there must be a pattern of targeting dumping; it does not require the Department to establish standards for accepting allegations that targeted dumping may be

occurring. The statute does not impose any burden on the petitioners to make such an allegation and in fact, none should be imposed.

Additionally, there is no indication that other countries or dumping authorities (such as the EU) have established minimum thresholds for examining whether targeted dumping is occurring. Moreover, it appears that other countries and dumping authorities conduct targeted dumping examinations as a routine practice and there is no basis for the Department to establish unilaterally a minimum threshold for accepting an allegation of targeting dumping or for conducting an examination of whether targeted dumping is occurring. Thus, instead, in every original investigation, the Department should itself conduct a targeted dumping analysis once it has a complete sale dataset to determine whether targeting is occurring.

**III. THE DEPARTMENT'S PROPOSED METHODOLOGY DOES NOT FULFILL THE STATUTORY REQUIREMENTS FOR DETERMINING WHETHER TARGETING EXISTS**

In its withdrawal notice, the Department expressed concerns that it “may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping.” Targeted Dumping Withdrawal Notice, 73 Fed. Reg. 74,931. Domestic producers agree with this assessment. As we concur with the affirmative of this judgment, we hope that the Department will consider new, simple approaches to targeted dumping that are focused on the identification of masked dumping. To aid the Department as it considers anew how to identify such dumping, we review the problems with the methodology that the Department proposed in its May 2008 notice. See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations, 73 Fed. Reg. 26,371 (Dep’t Commerce May 9, 2008) (request for comment) (hereinafter “Targeted Dumping Notice”)

The targeted dumping provision of the statute directs Commerce to consider whether there is “a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” 19 U.S.C. § 1677f-1(d)(1)(B)(i). The statutory provision is not satisfied by the Department’s proposed methodology. Accordingly, the Department should seek other alternatives.

**A. The Department’s Test Does Not Satisfy the Statutory Requirements**

**1. The Test Is Not Valid Because It Cannot Detect Obvious Patterns of Targeting**

As noted above, when a respondent’s sales exhibit a pattern that differs significantly among purchasers, regions or periods of time, the statute provides that the Department should rely on an alternative method for calculating the dumping margins. In contravention of the statute, Commerce’s proposed targeted dumping methodology cannot detect clear patterns of targeting. If a company engages in targeted dumping by making some sales at very low prices while making other sales at higher prices to “mask” its dumping (the classic example of targeting), the Department’s application of its proposed methodology makes it difficult (as a mathematical matter) to find targeting. Similarly, in a situation in which a company primarily sells to a single important customer at prices that are below its prices to all other customers, the vast majority of those sales to that targeted customer would not, as a mathematical certainty, “survive” the Department’s test. Thus, respondents who engage in the most pernicious type of targeted dumping will be found not to be engaging in targeted dumping under the Department’s

test. This predetermined outcome shows that the Department's methodology cannot accomplish the purpose of the statute.<sup>3</sup>

Consider a hypothetical example in which three customers purchase a particular CONNUM of subject merchandise during a specific time period from a foreign company.<sup>4</sup> Table 1 shows the prices, unit sales, and dollar sales to three U.S. purchasers by a foreign supplier. In our example, we assume that the foreign company sets its prices to \$10, \$5, and, \$1 for customers 1, 2, and 3 respectively. Customer 3 is alleged to be targeted. Under the trade laws, Commerce should, at the very least, investigate the business practices of the hypothetical seller. Yet, applying Commerce's new "standard deviation" test results in a finding of no targeted dumping.

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<sup>3</sup> A test to determine if significant targeting is taking place must be able to remove the effects of masking to see if there are price differences among customers, and to determine if these differences are economically significant. Commerce's test fails to unmask targeted dumping and therefore does not satisfy the statutory objective.

Specifically, Commerce's test eliminates alleged targeted sales from the pool of possible targeted sales if they are within one standard deviation below the mean weighted price for a certain CONNUM, over the period of investigation ("POI"). This implies that the greater the standard deviation, the higher the threshold an alleged targeted sale must pass to be part of a pattern of targeting. Because masking targeted sales increases the standard deviation, a seller who targets and then intentionally masks its targeted sales is more likely to avoid detection under Commerce's test. Thus, if the test becomes the standard for judging when a seller targets sales, sellers will have a blueprint for easily avoiding detection – masking targeted sales.

<sup>4</sup> Chart 1 depicts this point graphically. See Chart 1 (at Enclosure 1).

**Table 1**  
**Hypothetical Example**

Customer	Prices (\$/unit)	Amount (units)	Total Purchase (\$)	Average Price (\$/unit)	Weighted Average Price (\$/unit)	Total Value (\$)
1	10	300	3000	10	10	12000
1	10	300	3000			
1	10	300	3000			
1	10	300	3000			
2	5	1000	5000	5	5	20000
2	5	1000	5000			
2	5	1000	5000			
2	5	1000	5000			
3	1	5500	5500	1	1	33000
3	1	5500	5500			
3	1	5500	5500			
3	1	5500	5500			
3	1	5500	5500			
3	1	5500	5500			

The hypothetical data yield the following:

Weighted Mean Price	\$1.70
Weighted Std. Dev.	\$1.93
Threshold for Potentially Targeted Prices	-\$0.23

Applying Commerce's test:

Table 2 provides a step-by-step demonstration of how Commerce would apply its test to our hypothetical example. The table below shows that Commerce's test would result in a finding of no targeted dumping even though the price to Customer 3 is 90% below the price charged to Customer 1, and 80% below Customer 2's price.

**Table 2**  
**Commerce Test of Hypothetical**

Step	Commerce's Test	Our Example
One	<ul style="list-style-type: none"> <li>Notes an allegation of targeting</li> </ul>	<ul style="list-style-type: none"> <li>Customer 3 is alleged to be a target.</li> </ul>
Two	<ul style="list-style-type: none"> <li>Checks to see that there are sales of the same (identical) CONNUM goods to both the alleged targeted and non-targeted customers.</li> </ul>	<ul style="list-style-type: none"> <li>Customers 1 and 2 have also bought goods of CONNUM 1, so there are matching sales in the CONNUM to non-targeted customers.</li> </ul>
Three	<ul style="list-style-type: none"> <li>Finds a volume-weighted average price for each customer in each CONNUM</li> </ul>	<ul style="list-style-type: none"> <li>Average prices are presented in the Average Price column in Table 1.<sup>5</sup></li> </ul>
Four	<ul style="list-style-type: none"> <li>Calculates a volume-weighted mean price for all sales of goods within each CONNUM.</li> </ul>	<ul style="list-style-type: none"> <li>The weighted mean price is \$1.70.</li> </ul>
Five	<ul style="list-style-type: none"> <li>Calculates a volume-weighted standard deviation for all sales of goods within each CONNUM.</li> </ul>	<ul style="list-style-type: none"> <li>The weighted standard deviation is \$1.93.</li> </ul>
Six	<ul style="list-style-type: none"> <li>Labels all sales with prices lower one standard deviation below the mean as sales exhibiting a potential pattern of targeting.</li> </ul>	<ul style="list-style-type: none"> <li>There are no sales with prices lower than one standard deviation below the mean, since there are no sales at prices less than <math>\\$1.70 - \\$1.93 = -\\$0.23</math>.</li> </ul>
Seven	<ul style="list-style-type: none"> <li>Conclusion</li> </ul>	<ul style="list-style-type: none"> <li>No pattern, therefore, no targeted dumping</li> </ul>

<sup>5</sup> In this example, the weighted price received by each customer equals the unweighted price. When units sold vary in price significantly from purchase to purchase, however, weighting may significantly change the results of Commerce's test.



As shown above, even when one customer is clearly receiving significantly lower prices for a good of a particular product type, Commerce's test fails to detect targeting. Since the test cannot detect a simple example of targeting, it cannot be expected to detect targeting when sellers learn how to mask their targeted sales more intricately.

In the Nails case, in response to petitioners' position that the Department's proposed methodology cannot detect obvious targeting, the Department's response was that the petitioners' analysis was "predicated on a finding of targeted dumping applying the P/2 test." Nails Targeted Dumping Analysis at 22 (Comment 7).<sup>6</sup> The Department's objections to the petitioners' point did not properly address the issue. In fact, the Department did not address the hypothetical situation discussed in this section; this hypothetical is based on an analysis of the data and is not based on a finding of targeting as defined by the P/2 test. Stated differently, the example given above is based on a review of hypothetical data and the application of the Department's methodology to that data. A review of the data shows that targeting as defined by the statute is occurring – that is, the prices differ significantly by customer. Yet, inputting the data into the Department's formula results in a finding that targeting is not occurring.

## 2. The Test Unlawfully Allows High-Priced Sales to Mask Targeting

Another flaw with the Department's proposed methodology is that a few non-targeted higher priced sales can skew the threshold away from a finding of targeting. This result occurs because the calculation of a standard deviation is influenced not only by the dispersion of low-

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<sup>6</sup> See Certain Steel Nails from the United Arab Emirates, 73 Fed. Reg. 33,985 (June 16, 2008) (Dep't Commerce Final Determination), Issues and Decision Memorandum (hereinafter Nails Targeted Dumping Analysis).

priced sales, but also by the dispersion of high-priced sales. Thus, if a respondent prices some sales at particularly high prices, then the standard deviation that is calculated will increase and potentially result in a finding that extremely low-priced sales are not more than one standard deviation away from the mean. Therefore, even though some prices are extremely low, they would not be found to be targeted. Again, an illustration of this point is laid out in the following hypothetical example and is depicted graphically in Chart 2 (at Enclosure 2).

**Table 3**  
**Hypothetical Example**

Customer	Prices (\$/unit)
1	5
1	5
1	5
1	5
2	4
2	4
2	4
2	4
3	1
3	1
3	1
3	1
3	1
3	1

This hypothetical data yields:

Mean	\$3.00
Standard Deviation	\$1.77
Threshold for Potentially Targeted Prices	\$1.23

With the current distribution of prices, the seller is found to be targeting Customer 3, yet a respondent could avoid a finding of targeting simply by increasing its price to Customer 1, as shown in the following modification to the above example:

**Table 4**  
**Hypothetical Example**

Customer	Prices (\$/unit)
1	10
1	10
1	10
1	5
2	4
2	4
2	4
2	4
3	1
3	1
3	1
3	1
3	1
3	1

This hypothetical data yields:

Mean	\$4.07
Standard Deviation	\$3.41
Threshold for Potentially Targeted Prices	\$0.66

As this comparison shows, even when a respondent is selling to one customer at a price that is significantly below the prices to two other customers, the use of the Department's proposed methodology allows a respondent to avoid a finding of targeting simply by increasing its price to one customer. In effect, the respondent is increasing the degree of targeting but the operation of the standard deviation test results in a finding of no targeting. Again, these clearly

aberrational results make clear that the Department's proposed methodology is not in accordance with the statute.

3. **The Test Eliminates Most Sales from Consideration Before Testing for a Pattern or a Significant Difference in Price**

The Department's proposed methodology is also invalid because before the Department begins any analysis of targeting, that is, analyzing whether a pattern exists or whether there is a significant difference in price, the Department's use of a standard deviation cut-off point results in an automatic finding that only a small portion of outlier sales could ever be found to be targeted. In other words, at the very outset, the Department's methodology automatically eliminates the majority of sales from consideration of a targeting analysis.<sup>7</sup> By using this particular cut-off point, the Department appears to be presuming that most U.S. sales will be distributed close to the mean and, if targeting exists, then it will manifest itself in a small, select group of "outlier" sales. This un rebuttable presumption is, however, not in accordance with the statutory provision on targeting. Neither the statute nor the legislative history presumes that "targeted" sales will be only to a small group of outlier sales.

Thus, by using this test at the outset, the Department has automatically limited the number of sales that can be found to be targeted. The goal of limiting the number of sales that

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<sup>7</sup> Commerce said it was seeking to strike "a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others (as may be the case under the P/2 test), and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others (as may be the case under the Pasta Test)." Nails Targeted Dumping Analysis at 16 (Comment 3). The method chosen by the Department does not satisfy this stated objective of striking a balance of two alleged extremes, because the proposed methodology eliminates the vast majority of sales from consideration as being targeted and by doing so prohibits the targeting provision of the statute from unmasking targeted sales.

can found to be targeted is certainly not found in the statutory language or evidenced in the statutory intent. Instead, as a matter of law, the targeted dumping provision was intended to recognize and address targeted dumping to the greatest extent possible, not to avoid addressing the issue for all but the smallest number of sales. As such, given that the proposed methodology begins by automatically limiting the pool of sales that can be viewed to be “targeted,” the Department’s test is not in accordance with the statute and should be rejected.

**B. The Use of A Standard Deviation Test To Measure Targeting Is Not an Appropriate Technique to Determine Whether Targeting Is Occurring**

**1. A Standard Deviation Test Cannot Measure Targeting**

As explained in detail below, while a standard deviation test is, in general, a statistical technique that is appropriately used when making statistical inferences about the data or when measuring the spread or variance of data, a standard deviation is not an appropriate statistical technique to determine whether targeted dumping exists.

In attempting to measure whether targeted dumping has occurred, the Department has stated that it intends to begin its analysis by using a standard deviation test to determine:

the share of the allegedly targeted customer’s purchases of subject merchandise, by sales value, that are at prices more than one standard deviation below the weighted-average price to all customers of that exporter, targeted and untargeted.

Targeted Dumping Notice, 73 Fed. Reg. 26,372.

In an effort to explain the use of this methodology, the Department stated:

The Department is not using the standard deviation measure to make statistical inferences. Rather, we are employing the standard deviation as a relative measure of the differences between the price to the alleged target and to the non-targeted group to determine if the price to the alleged target is “low,” which is consistent with the requirement under 19 CFR 351.414(f)(1)(i).

Nails Targeted Dumping Analysis at 16 (Comment 3).

The Department further explained that:

We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because . . . it is a measure of “low” relative to the spread or dispersion of prices in the market in question . . . .

Id.

The Department’s explanation that the test has been used as a relative measure for determining whether prices are “low”<sup>8</sup> has no statistical or economic validity or meaning. It is apparent that the Department wants to conclude that one standard deviation enables it to *infer* that some proportion of prices is below the mean price less one standard deviation threshold. However, there is no known statistical science to support the Department’s notion. In fact, the well-known Tchebysheff’s Inequality establishes that little or nothing can be inferred about the proportion of a distribution that falls outside or inside of the one-standard deviation threshold for non-normally distributed data.<sup>9</sup> As such, a standard deviation is simply a descriptive measure of

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<sup>8</sup> Throughout Commerce’s memorandum on Nails, it places quotes around the word “low” as if to suggest that the word “low” appears in the statute and regulations. The word “low” does not appear at any point in the statute or regulations, and therefore at the very outset, the Department’s explanation of its methodology is flawed because under the statute at 19 U.S.C. § 1677f-1(d)(1)(B)(i) the sole objective of the Department is to determine whether the U.S. prices “differ significantly.”

<sup>9</sup> This theorem states that for a random variable Y with a finite mean,  $\mu$ , and a finite standard deviation,  $\sigma$ , for any  $k > 0$ , the probability,  $P(*)$ , of an observation being  $k$  standard deviations from the mean is:

$P(|Y - \mu| < \sigma k) \geq 1 - (1/k^2)$  or  $P(|Y - \mu| \geq \sigma k) \leq 1/k^2$  for all  $k > 0$ . Wackerly, Dennis D., William Mendenhall III, and Richard L. Sheaffer, *Mathematical Statistics with Applications* at 174 (5th ed. 1996).

a population;<sup>10</sup> however, the standard deviation measure does not provide any qualitative measure of whether certain prices should be considered “low” relative to any other price. Indeed, as discussed in detail above, the definition of “low” given by the standard deviation test could be altered if the respondent makes a few high- or low-priced sales. Thus, while the standard deviation evaluates the dispersion of the data, it provides no guidance or insight into whether prices should be considered relatively “low.” Thus, a standard deviation test is not an appropriate technique for use as a means to determine whether targeting exists, and so this test is not in compliance with the statute’s requirements.

**2. The Test Improperly Combines All Sales, Both Targeted and Non-Targeted, to Calculate the Average Price and Standard Deviation**

The manner in which the Department has applied this technique is particularly inappropriate because the Department has combined both targeted and non-targeted prices to create an artificially “low” mean price. As a result, the test is performing an incorrect comparison.

In particular, rather than comparing the prices paid by a targeted customer to the average price paid by non-targeted customers, the Department’s test compares the average price paid by the targeted customer to the average price paid by all customers, both targeted and non-targeted. The Department’s average is therefore a biased estimator, because this average includes the low

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<sup>10</sup> Stated another way, the standard deviation of a list of prices is a calculated measure of how much prices diverge from the mean. When prices are close to the mean, there will be a small deviation; when prices are far from the mean, there will be a large deviation. See Chart 3 (at Enclosure 3). Yet, the spread of the distribution of prices does not, as a statistical measure, determine which prices are “low” or which prices are “high.”

prices paid by the targeted customer. In statistical terms, bias is a “systematic tendency for an estimate to be too high or too low.”<sup>11</sup> In this case, the calculated average mean price is too low because it includes the targeted prices.

Moreover, the statistical bias inherent in the Department’s methodology becomes more pronounced as the percent of targeted sales increases. For example, the targeted sales have a greater role in the determination of the overall mean price (and exhibit a smaller deviation from the overall mean) when they account for 60 percent of a respondent’s sales than when they account for 20 percent of the respondent’s overall sales. The effect of this statistical bias is that the higher the percent of sales that are targeted, the more closely the targeted sales will approximate the overall mean price, and the less likely the Department’s method will reveal targeting. Again, as this statistical correlation demonstrates, the Department’s method for calculating a standard deviation is particularly not appropriate in this context and therefore is not in accordance with the goal of the statute.

In the Nails case, the Department recognized and corrected a similar flaw with respect to the pattern test methodology. Specifically, the Department noted that it revised the methodology to aggregate the pattern test results on the basis of volume, rather than value, across different products. As the Department stated, “A volume-based aggregation method is free from being skewed by potentially dumped, or targeted dumped, sales values and, therefore, provides an appropriate measure.” Nails Targeted Dumping Analysis, at 19 (Comment 5). In this case too,

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<sup>11</sup> D. Kaye and D. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* at 160 (2000).



including the targeted sales in the standard deviation calculation skews the calculation and therefore is not a statistically valid measure.

**C. The Other Components of the Test, the 33% and 5% Tests Within the Targeted Dumping Analysis, Also Rely on Unfounded Assumptions That Are at Odds With the Statute**

The use of the standard deviation test alone is sufficient to reject the Department's new methodology. In addition, the other parts of the test are also flawed. In particular, the Department relies on unexplained assumptions and ratios (*i.e.*, the 33-percent threshold and 5-percent threshold) to measure the pattern of sales and price differences, without providing any statutory or rational basis for these thresholds. As described below, these other two portions of the test also act to defeat the statutory purpose of identifying masked dumping.

**1. The 33-Percent Test is Unexplained and Unreasonable**

Although concerns were raised about the basis for a 33-percent test in the Nails case, the Department did not provide any support for the selection of this percentage but instead stated simply:

We consider the requirement under our targeted dumping methodology that the "low" prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping.

Nails Targeted Dumping Analysis at Comment 5 (p. 19).

As this discussion makes clear, the Department has provided no statutory, statistical, economic or any other theoretical basis for relying on a 33% threshold, because none exists. Accordingly, this portion of the test cannot stand.

2. **The 5-Percent Test for “Significant” Price Differences Should be Abandoned**

As the third step in the targeted dumping analysis, the Department next undertakes to determine whether there are significant price differences distinguishing the targeted and non-targeted sales. See Targeted Dumping Notice, 73 Fed. Reg. at 26,372.

As with the Department’s unexplained use of a 33-percent benchmark to measure a pattern, the Department also failed to explain why a 5-percent-price-gap test properly implements the statutory objectives. The failure to explain the Department’s reasoning behind the selection of a particular ratio does not permit parties the opportunity to offer any reasonable analysis of the validity of this selection. This flaw in the Department’s analysis is particularly relevant to this 5-percent gap test, because the Department has failed to explain how the test was derived and why a gap between the lowest non-targeted price and the targeted price is any measure of significance.

As an example of the problematic nature of the price-gap test, compare two hypothetical price patterns, both of which are reflective of targeted dumping. In both hypotheticals, the targeted customer pays a price of \$1. In the first hypothetical, there are two non-targeted customers who pay prices of \$7 and \$11, respectively. Because the price gap between the targeted customer and the first non-targeted customer is \$6, and given that the price gap between the two non-targeted customers is \$4, in this situation the price-gap test would confirm the presence of targeting. In the very similar situation in which the non-targeted customers pay prices of \$6 and \$12, however, the price-gap test would find targeting did not exist. As this example demonstrates, the Department’s price-gap test is unnecessary and rejects obvious

examples of targeting. As with the standard deviation test, under the price-gap test, price differences among non-targeted sales affect a finding of whether targeting exists.

Another problem with the price-gap test occurs if there is only one non-targeted price. In that case, since no “price gap” exists for non-targeted sales, the Department’s test also rejects a finding of targeting in that situation. Again, this arbitrary result further confirms that the Department’s test is unusable and unlawful.

Apart from these problems, the most important flaw with this portion of the test is that it is redundant and unnecessary. In particular, if the Department decides to go forward with the use of a standard deviation test, this test (although flawed in numerous respects as discussed earlier) has already established to the Department’s apparent satisfaction that significant price differences exist between the targeted and non-targeted sales. Thus, these sales have already satisfied the statutory criterion that significant price differences exist. The final 5% gap test is an extra-statutory test that has the effect of further limiting the number of sales that would be found to be targeted. Given that this portion of the test has no statutory basis, it should be abandoned.

**D. In Sum, the Department’s Proposed Method for Identifying Targeted Dumping Is Complicated and, Redundant, Acts Contrary to the Statute, and Should Be Abandoned.**

The targeted dumping analysis forces the potentially “targeted” sales to survive several hurdles before qualifying as “targeted.” The goal of the Department in implementing not only this but other provisions of the dumping law should be to increase transparency in the process and to ensure that domestic industries can secure relief from unfair pricing practices. The Department’s proposed test serves the opposite goal and therefore should not be implemented.

IV. **THE DEPARTMENT SHOULD APPLY THE ALTERNATIVE CALCULATION METHODOLOGY TO ALL SALES**

In its original request for comments, the Department asked whether it should apply the alternative methodology (average-to-transaction comparisons) to all sales to the target even if some sales do not survive the targeted dumping test. In its most recent notice, the Department again noted that the thresholds or criteria established may have prevented the use of this comparison methodology to unmask dumping. Targeted Dumping Withdrawal Notice, 73 Fed. Reg. at 74,931.

Domestic producers agree that the current methodology does not properly implement the statutory intent of unmasking dumping. To implement the statute properly once targeted dumping is found, the Department should apply the alternative methodology to all of the sales. Once a customer, time period, or region has been identified as being targeted by a respondent and the Department's analysis confirms that this customer, time period or region is subject to targeted dumping, the Department should rely on the alternative calculation methodology to calculate the dumping margins for that respondent.

As a general principle, the Department should not endeavor to limit application of the average-to-transaction methodology as much as it possibly can. The statute does not contemplate any such limitations; it envisions the application of the average-to-transaction methodology to all sales whenever there is a pattern of significant price differences. 19 U.S.C. § 1677f-1(d)(1)(B). Indeed, any limitation on application of the average-to-transaction

methodology only serves to frustrate the purpose of the statute, which is to avoid the problem of masked dumping margins.<sup>12</sup>

Finally, the current limitation on application of the average-to-transaction methodology on a product-specific basis (i.e., as applied only to specific CONNUMUs) is fundamentally in violation of the principles governing the analysis of targeted dumping. Rather than providing relief from targeting on the basis of the pattern examined, i.e., targeting by purchaser, region or period of time, the Department's withdrawn methodology would provide relief only on specific products and thus would violate the spirit and letter of the law.

By way of comparison, it is instructive that establishing which affiliated customers engage in pricing that is not at arm's length requires a test that accounts for product differences, but results in the treatment of all sales across all products sold to an affiliated customer as not being at arm's length when the pattern for a customer as a whole defines that customer as a non-arm's-length entity. The relief (from non-bona-fide normal value) is applied universally on the basis of the pattern tested (the customer as a whole) even though other basic parameters of the tested affiliated pricing pattern, such as product attributes, were taken into account when testing the pattern. Similarly, the relief (from targeting by region, customer or period) should be applied universally on the basis of the pattern tested (the region, customer or period as a whole), even though other basic parameters of the tested targeted pricing pattern, such as product attributes, were taken into account when testing the pattern.

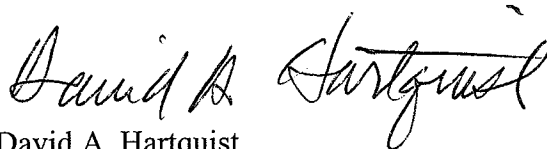
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<sup>12</sup> See also Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Doc. 103-316, Vol. 1 at 842-843 (1994).

**V. CONCLUSION**

For the foregoing reasons, domestic producers strongly support the Department's decision to withdraw its current regulatory provisions and requests that the Department decide not to implement its proposed targeted dumping methodology. We urge the Department to conduct a targeted dumping inquiry in all original investigations. Second, we urge the Department to develop methods that simply and effectively identify targeted dumping wherever it occurs. Finally, if targeting is found, we urge the Department to apply the alternative calculation methodology to all of the respondent's sales when calculating the dumping margin.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Hartquist". The signature is written in a cursive style with a prominent flourish at the end.

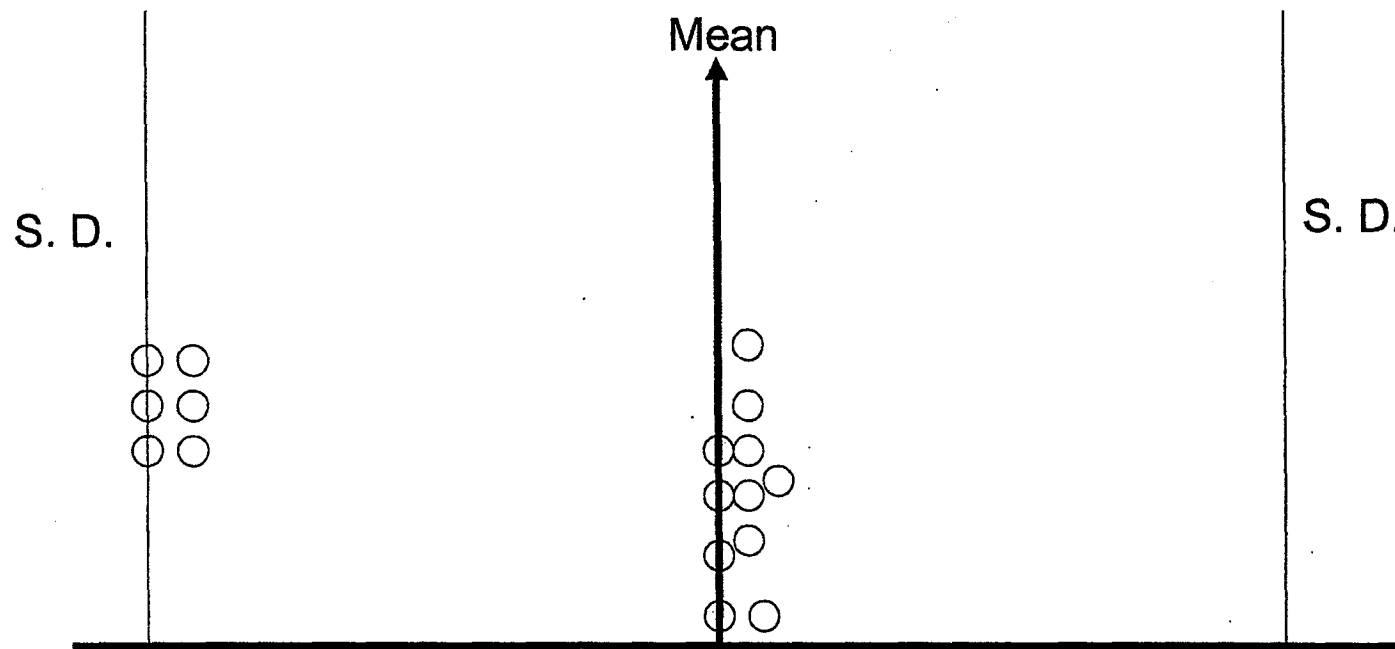
David A. Hartquist  
Kelley Drye & Warren LLP

# **ATTACHMENTS**

## Chart 1

### The Department's Standard Deviation Test Eliminates Obviously Targeted Sales from Consideration

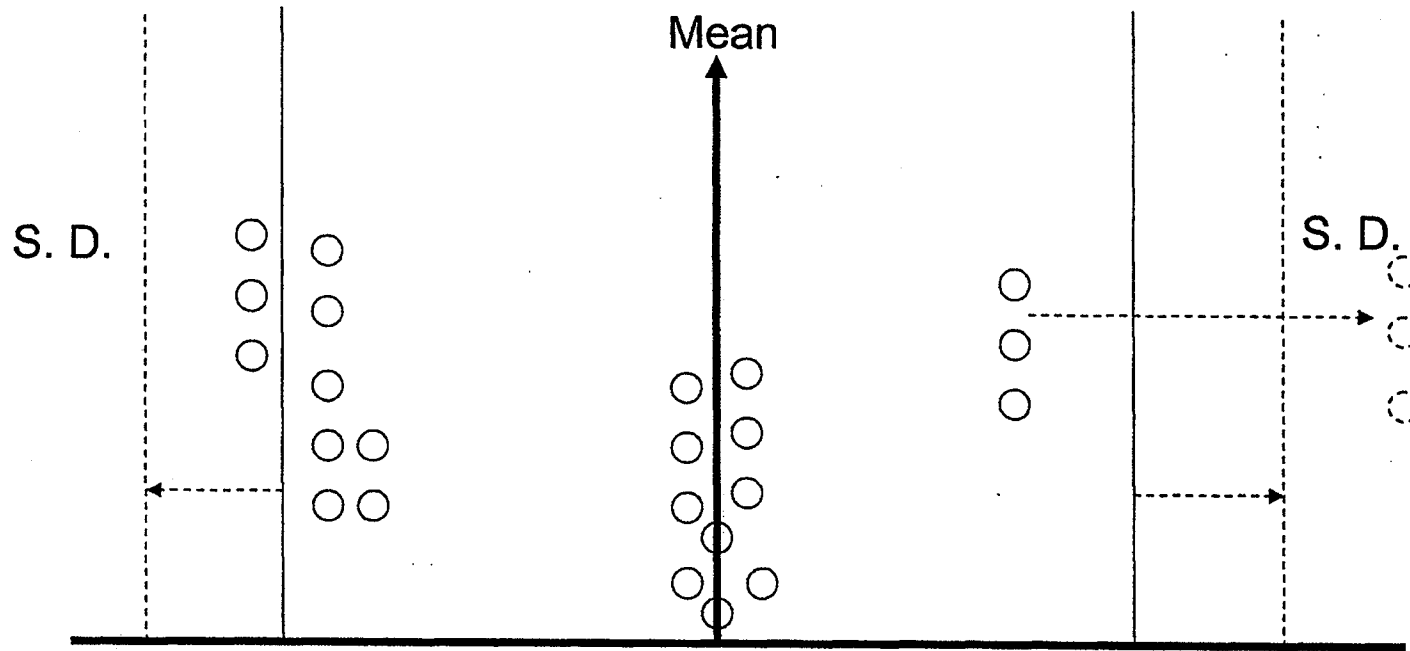
- A few low prices can prevent a finding of targeting





## Chart 2

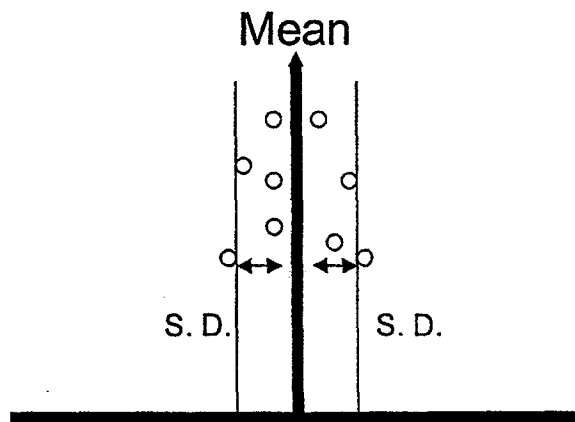
The Department's Standard Deviation Test Allows Even A Few High Priced Sales To Distort The Results



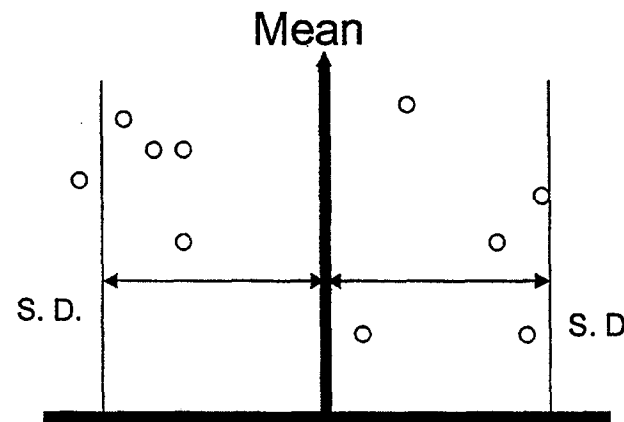
# Chart 3

## The Department's Test Is Not An "Appropriate" Statistical Technique for Measuring Targeting

- Standard deviation is a descriptive measure in a complete population
- Standard deviation measures how spread out prices are from the mean



Prices close to the mean =  
Small standard deviation



Prices far from the mean =  
Large standard deviation