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

Attn: Charles Vannatta, Melissa Brewer

Re: Comments on the Department's Differential Pricing Analysis

Dear Madam Secretary:

This submission is made in response to the Department of Commerce ("Department") request for comments regarding the differential pricing analysis currently being applied in less-than-fair-value investigations and certain reviews, including administrative reviews. See Differential Pricing Analysis; Request for Comments, Commerce Department, International Trade Administration, 79 Fed. Reg. 26,720 (May 9, 2014) ("DP Request for Comments").

I. THE DEPARTMENT’S “DIFFERENTIAL PRICING” ANALYSIS PROPERLY ADDRESSES THE STATUTORILY-PERMITTED PROCEDURES FOR RESORTING TO AN ALTERNATIVE PRICE COMPARISON METHODOLOGY

A. Procedural History of the Department’s “Differential Pricing” Analysis

The Department initiated the use of its “differential pricing” analysis subsequent to the withdrawal of its “targeted dumping” analysis.¹ Consistent with the United States’ international obligations, the Department developed its differential pricing methodology in conducting various investigations and annual reviews.

Specifically, in instances when the standard weighted-average price to weighted-average price comparison (“average-to-average”) method between the export (or constructed export) price and normal value cannot appropriately gauge the degree of dumping, the Department will resort to an alternative price comparison method, such as a “transaction-to-transaction” comparison methodology or a “transaction-to-weighted average” methodology.² The Department, however, will not apply an alternative comparison method unless certain criteria are satisfied, and even then will apply the alternative methodology only where Commerce additionally determines that the average-to-average methodology will not reasonably account for the observed price differences.³

¹ See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74,930 (Dec. 10, 2008); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification 77 Fed. Reg. 8101 (Feb. 14, 2012), (hereafter “Feb 14 Final Modification”); DP Request for Comments.

² See DP Request for Comments.

³ Id.

Previously, the Department relied on the “targeted dumping” analysis to determine, under the statute, whether there exists a pattern of export prices, or constructed export prices, for comparable merchandise that differ significantly among purchasers, regions, or time periods. 19 U.S.C. § 1677f-1(d)(1)(B)(i). If so, the statute requires the Department to explain why such differences cannot be taken into account by the standard average-to-average methodology and determine whether the alternative methodology is applicable. 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

The Department withdrew the “targeted dumping” analysis, after taking into consideration the comments provided by the interested parties.⁴ Among various complaints regarding the targeted dumping methodology were concerns regarding the cumbersome and unpredictable nature of the test, and a lack of transparency. Interested parties also argued that the Department’s analysis placed unreasonable burden on petitioners and respondents alike.⁵

B. The Department’s “Differential Pricing” Analysis Is a Widely-Recognized and Accepted Statistical Test For Comparing Two Groups and Is Superior to Its Former Targeted Dumping Analysis

The current “differential pricing” analysis overcomes many of the drawbacks associated with the Department’s former “targeted dumping” analysis. First, the Department considers

⁴ See e.g., Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Certain Steel Nails from the United Arab Emirates (June 6, 2008) at Comment 1, referenced in 73 Fed. Reg. 33,985 (June 16, 2008) (final determination); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People’s Republic of China (Oct. 11, 2011) at Comment 4, referenced in 76 Fed. Reg. 64,318 Oct. 18, 2011) (final determination); Mid Continent Nail Corp. v. United States, 34 CIT ___, ___, 712 F. Supp. 2d 1370 {Slip Op. 10-48} (May 4, 2010); Mid Continent Nail Corp. v. United States, 34 CIT ___, ___, 2010 Ct. Intl. Trade LEXIS 48 {Slip Op. 10-47} (May 4, 2010); see also Public Comments on Commerce’s Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations received Jan. 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html>

⁵ Id.

“differential pricing” an integral part of the margin analysis and has included the computer programming codes in its standard computer programs for antidumping proceedings.⁶ Given that the programming codes are disclosed publically on the internet, information regarding the application and operation of the analysis are transparent and accessible to the general public, including practitioners before the Commerce Department and observers of the U.S. trade laws and WTO agreements.

Second, the Department relies on pricing data provided by a respondent in a given segment of the administrative proceeding when conducting the “differential pricing” analysis. As a result, the investigated respondent is able to know and predict the results of the differential pricing analysis well before the Department releases its preliminary findings. As the party that has the control of the data placed on the record, the respondent bears the burden of proof to provide necessary and reliable information for the Department’s margin analysis, including the differential pricing analysis. In providing that data, the respondent is able to also apply the differential pricing analysis. To the extent a respondent fails to provide the necessary data, such as customer codes or geographic locales, then Commerce should make necessary inferences about the missing data and apply the alternative methodology to those sales.

Third, the Department’s application of the *Cohen’s d* test is measured and reasonable. For example, the Department’s application of the test measures the significance of the pattern of price differences but limits the application of the alternative method (use of average-to-transaction prices) to comparison groups with at least two observations and where the

⁶ See <http://enforcement.trade.gov/SAS/programs/amcp.html>, margin programs (hereafter “Margin Programs”) at Part-11 (Cohen’s d Test).

comparison group accounts for at least five percent of the total sales of the quantity of the comparable merchandise.⁷ The *Cohen's d* test also allows differences between groups to be quantified by three fixed thresholds; small; medium and large, yet the Department's application of the test finds a "significant" difference in the prices compared only when the *Cohen's d* coefficient is "large," notwithstanding that it would have been equally reasonable for the Department to have applied another, standard coefficient.

Fourth, the Department has determined to strictly apply the *ratio test* as well. The *ratio test* assesses the extent of the price differences for all sales as measured by the *Cohen's d* test. The pattern is found to be significant, and the alternative methodology used for *all* sales, only when the affected value of U.S. sales account for more than 66 percent of the total sales.⁸ In a more measured application of the test, Commerce applies the alternative methodology only to the affected sales when the value of sales to purchasers, regions or time periods that pass the *Cohen's d* test account for more than 33 percent, and less than 66 percent, of the value of total sales. Below 33 percent, the alternative methodology is not applied at all, notwithstanding the demonstrable pattern of significant price differences in that subgroup. While the foregoing application of the ratio test is reasonable, it raises legitimate questions as to why the agency applies the ratio test all, given that the statute allows Commerce to rely on the alternative methodology whenever a pattern of significant prices differences is found, and the ratio test as currently applied appears to allow some masking of dumped sales to occur.

⁷ See DP Request for Comments at 26,723.

⁸ See DP Request for Comments at 26,723.

Finally, the Department will resort to the alternative method only after the agency determines that the standard, average-to-average comparison methodology will not appropriately account for the observed, consistent pattern of price differences. Here, the Department compares the average-to-average margins to the average-to-transaction margins to determine if a “meaningful difference” is found, which Commerce defines as margins that either 1) cross the *de minimis* threshold; or 2) result in a 25 percent change in the margin. If the difference is meaningful, only then will Commerce apply the alternative methodology. This step, however, is not required by statute and unnecessarily adds another hurdle to applying the average-to-transaction methodology. Indeed, application of this step leads to a less accurate margin, as targeted sales are unfairly averaged with non-targeted sales, as the application of the average-to-average methodology fails to account for meaningful differential pricing.⁹ Consequently, Commerce should significantly lower the “25 percent change” in margins needed to find a “meaningful” difference.

In sum, the Department’s current “differential pricing” analysis is a measured and refined application of a longstanding, well-known statistical analysis concept that identifies, as the statute requires, a pattern of significant price differences, determines the significance of such a pattern, and determines whether the application of the alternative method is needed to remedy the observed pricing disparities. The Department’s “differential pricing” analysis properly addresses the Congressional intention to empower the agency to detect and address the

⁹ The Department’s normal rule for the *adjustments* having an insignificant effect on the margin is an individual adjustment of 0.33 percent *ad valorem*, or a group of adjustments have a less than one percent effect on either the export price, constructed export price, or normal value under consideration. 19 C.F.R. §351.413. Moreover, in reviews *ad valorem* dumping and countervail margins are generally considered *de minimis*, and therefore ignored by Commerce, only when they are 0.5 percent *ad valorem* or less. 19 C.F.R. §351.106(c).

discriminatory pricing practice of relying on price differentials among purchasers, time periods or regions to mask the full extent of discriminatory pricing – dumping – in the United States. While the Department’s differential pricing analysis is also transparent, the “ratio test” should be eliminated and the “meaningful difference” test should be significantly lowered from the current 25 percent threshold, as noted above, to allow for more accurate margins to be calculated.

II. THE DEPARTMENT’S PRACTICE PERMITS INTERESTED PARTIES THE OPPORTUNITY TO PROVIDE CASE-SPECIFIC COMMENTS

In the DP Request for Comments, the Department solicited *public* comments on the “differential pricing” methodology.¹⁰ Antidumping proceedings are complicated and lengthy investigations, involving different products manufactured by various producers under different economic structures (e.g., market economy, non-market economy). Subject merchandise is sold to purchasers at different levels of trade located in different regions in the U.S. market. Consequently, each proceeding will have its own unique fact pattern, which is one reason the Department allows interested parties to provide comments on a case-specific basis using business proprietary information released under an administrative protective order (“APO”). The Department is obliged to consider and address these in-depth discussions under APO when reaching its decisions.

Given the “public” nature of the comments Commerce has solicited, the parameters of the differential pricing methodology must be comprehensive yet flexible so that the Department may retain the discretion to apply any of the three comparison methods in any context.¹¹ For

¹⁰ Id. at 26,720.

¹¹ See 19 C.F.R. 351.414; Feb. 14 Final Modification at “Comments on the Proposed Regulations.”

example, a pattern of price differences may arise when two or more prices are compared. Setting a rigid minimum sample size, for example thirty (30), as some have advocated, unnecessarily limits the Department's discretion and prevents a proper analysis of smaller comparison groups, and would allow for the manipulation of datasets.

III. THE DEPARTMENT RELIES ON PROPER STATISTICAL INDICATORS WHEN CONDUCTING ITS DIFFERENTIAL PRICING ANALYSIS

As noted above, the Department's methodology relies on the statistical indicator *Cohen's d*, which is commonly used to assess effect size when determining the significance of price differences based on purchasers, regions and timing.¹² The Department also conducts a *ratio test* analysis, in conjunction with the *Cohen's d*, when measuring the significance of the statistical differences.¹³ Both the effect size and ratio analyses are valid statistical instruments, widely used in scientific, economic, industrial, educational and other research, as well as in legal contexts.¹⁴

In addition to the *quantitative* analyses using these statistical measurements, the Department conducts the *qualitative* analyses, as noted above, based on input provided by interested parties. Each interested party involved in a proceeding has the opportunity to comment on the differential pricing analysis. Thus, whether a respondent is found to be engaged in an unfair trade practice will be dependent upon the respondent's past pricing behavior during

¹² See e.g., the Department's Margin Programs.

¹³ *Id.*

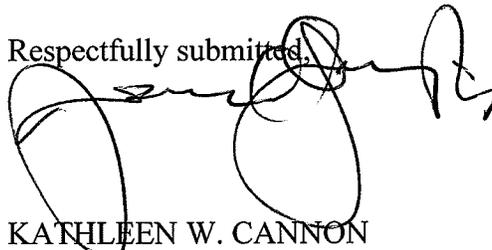
¹⁴ See e.g., *Effect Sizes for Research, A Broad Practical Approach*, Robert J. Grissom and John J. Kim; *It's the Effect Size, Stupid, What Effect Size is and Why it is Important*, Robert Coe, School of Education, University of Durham, Paper Presented at Annual Conference of the British Educational Research Association, University of Exeter, England, 12-14 September 2002; *Understanding Effect Size, How It's Measured and What it Means*, Stephen V. Faraone, PHD; *Understanding Effect Sizes in User Research* by Jeff Sauro, Founding Principal of Measuring Usability LLC.

the period of investigation/review, as well as upon the degree of cooperation by the respondent in providing complete and accurate pricing information during the administrative proceeding.

* * *

We appreciate the Department's consideration of these comments. Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathleen W. Cannon', written over the text 'Respectfully submitted,'.

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