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The Honorable Penny Pritzker
Secretary of Commerce
Attn: Enforcement & Compliance
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

Attn: Charles Vannatta and Melissa Brewer

Re: Nucor's Comments on the Department's Differential Pricing Test

Dear Madame Secretary:

On behalf of the Nucor Corporation ("Petitioner" or "Nucor") and as requested by the Department, we hereby submit our comments on the Department's differential pricing test and offer the following suggestions.[1]

[1] *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (May 9, 2014).

The Department Should Maintain Flexibility in Its Differential Pricing Test

If run appropriately, the Department's Cohen's *d* test is a statistically valid and useful way to determine whether there is a pattern of U.S. prices that differ significantly among purchasers, regions, or time periods. However, respondents can potentially manipulate its pricing such that an insufficient number of sales are found to pass the Cohen's *d* test, especially given the high thresholds and the many limitations incorporated into the test by the Department as explained below. There are a number of potential statistical tools which could be used by the Department to find differential pricing (*e.g.*, Pearson *r* (correlation), Hedges' *g* test). Thus, in making any changes, the Department should explicitly find that it has the authority to change the specific test used within the confines of any particular proceeding. This would prohibit respondents from engineering their prices to exploit any weaknesses of the Cohen's *d* test.

The Department should also maintain flexibility when it comes to the acceptable thresholds, if any, that are allowable for a particular industry. The Cohen's *d* test was originally developed for measuring IQ results in given populations and the significance of the results. The same degree of significance may not be applied in other populations like steel pipe. The Department's "one size fits all" approach is inconsistent with the realities of particular industries. For example, a certain level of differential pricing might be acceptable in the steel pipe industry where pricing tends to be more homogenous, but a different level might be appropriate for agricultural products with fluctuating prices. The Department does not need to wed itself to certain thresholds and should consider the particularities of the different industries in establishing thresholds on a case-by-case basis.

The Ratio Test Is Unnecessary and Should Be Eliminated from the Differential Pricing Test

The Department's Cohen's *d* test is sufficient to establish a pattern of differential pricing by itself, and as such, there is no need to undertake the "ratio test." The Cohen's *d* test is a statistical analysis used to measure the relationship between statistical populations and is the only mechanism employed by the Department which actually determines if prices differ significantly by comparison group. There is no justification for further defining the sales that pass the Cohen's *d* test as the test already measures the significance of the differential pricing. The ratio test is unrelated to differential pricing. Thus, there is no need for the Department to take the second step and limit its analysis based on the relative size of the sales that pass the Cohen's *d* test. For these reasons, the ratio test should be eliminated.

The Department's Thresholds Are Too High and Should Be Lowered Significantly If Not Eliminated Completely

The 33 and 66 percent threshold levels are arbitrary and have no basis in the statute or regulations. As mentioned above, the Cohen's *d* test already measures the significance in differential pricing in a population. There is no need to measure the significance of the differential pricing again with the second test. It is not clear why the thresholds are necessary at all, but to the extent the Department maintains them, they should be significantly revised. The Department should only have one threshold, above which it changes its margin calculation methodology from Average-to-Average ("A-A") to Average-to-Transaction ("A-T"). The statute seems to envision this scenario when it states that the Department may compare weighted average normal values to individual transactions of comparable merchandise if certain conditions are met.[2] The statute does not discuss a methodology which blends A-A and A-T. The mixed methodology is unnecessary, uncalled for, and should be eliminated from the differential pricing test.

More importantly, the threshold amounts should be lowered considerably to 10 percent and 20 percent if both thresholds are maintained and to 15 percent if a single threshold is used. Under the *Nails* test, if a single sale was found to be targeted, the Department applied A-T to the entire sales database. With the new test, the Department has overcompensated by requiring 66% of the total sales to be found differentially priced in order to apply A-T to all sales. History has revealed that the Department's new test is far too restrictive and does not account for the masked dumping taking place, as few companies are found to be engaged in differential pricing. It is not apparent why 66% of a company's sales must be found to be differentially priced for the Department to even consider accounting for the price differences through the A-T methodology. By definition, sales that pass the Cohen's *d* test deviate substantially from the existing population and have a significant effect on the overall population. Requiring that those sales that pass the test also represent 66% or more of a company's U.S. sales more than establishes a

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2 19 CFR § 351.414

pattern; it creates a super-majority. It is the Petitioner's view that one out of ten U.S. sales is more than sufficient to establish a significant pattern. The Department should alter its thresholds to ensure that they are reasonable and include all patterns that exist in the data, not just the most obvious ones.

The Department Should Eliminate the Five Percent Rule

The Department currently applies a five percent rule to the comparison group even before the Cohen's *d* test can commence. When testing whether sales to a particular customer, region, or time period have significant price differences, the comparison group must represent at least five percent of the entire sales database by quantity. Consequently, if there are two sales of product A to a particular customer that are being tested, the sales of product A to all other customers must represent at least five percent of total sales. In this way, before the Cohen's *d* test is even applied, the Department is greatly limiting the number of possible comparisons. The Cohen's *d* test does not inherently place any such limitation on the analysis; rather, this is a construct applied by the Department on its own accord that has no relation to the Cohen's *d* test.

This rule eliminates the possibility of a finding of differential pricing for many situations where it is likely to occur. For example, any CONNUM that is less than five percent of the total sales database cannot be found to be differentially priced. This is particularly problematic for sales databases with a large number of CONNUMs, where it is not uncommon for only a few CONNUMs to be sold in quantities greater than five percent of the total sales. Small-volume CONNUMs could be sold to particular customers, regions or time periods at any price with absolute impunity. Similarly, large-volume CONNUMs could be sold at any price to any individual customer so long as the volumes sold to other customers do not exceed five percent of the total sales database. These are precisely the type of scenarios which are supposed to be detected by the Department's differential pricing test.

This five percent rule is unnecessary and limits the sales that could pass the Cohen's *d* test for no legitimate reason. While the Department is perhaps attempting to limit the comparisons when only a small amount of data is available, the amount and effect of these sales would also likely be small and the Department's current thresholds under the ratio test would sufficiently address this concern. Thus, it is not clear why the five percent rule exists as it serves no justifiable purpose, and it should be eliminated. If the Department does maintain this limitation, the threshold should certainly be lowered considerably.

Total Sales Should Not Be Used as the Denominator When Calculating the Percentage of Sales That Pass the Cohen's *d* Test

The number of sales used by the Department in its differential pricing test is limited. As explained above, the five percent rule prohibits any comparison when the comparison group represents less than five percent of the total sales database by quantity. In addition, there must be two sales in the group analyzed. And, as explained below, where the destination is unreported or where there is only one customer, no sales would pass the Cohen's *d* test when tested for region or customer, as the case may be. As a result, the number of sales that actually are tested for all three bases (*i.e.*, region, customer, and time period) can be surprisingly small. Even though these sales are not included in the Cohen's *d* test, the Department calculates the percentage of sales which pass the Cohen's *d* test by comparing them to the total amount of U.S. sales. This methodology is unjustified as the numerator and denominator are on different bases. The Department should calculate this percentage by excluding these sales from the denominator.

The Meaningful Difference Test Should Be Eliminated

Under Section 777A(d)(1)(B)(ii) of the Act, the Department may use the A-T methodology when it finds a pattern of differential pricing if it explains why those price differences cannot be taken into account under the A-A and the transaction-to-transaction ("T-T") methodologies. The Department's current practice is to compare the A-A margins to the A-T margins in order to determine whether there is a meaningful difference between the two. The Department defines meaningful difference as crossing the *de minimis* threshold or a change of 25% in the margin. If the difference is meaningful, the Department finds that A-A cannot account for differential pricing and opts for the A-T methodology.

The Department should eliminate this step in its current differential pricing test because the A-A methodology inherently cannot account for the occurrence of differential pricing. A-A eliminates the appearance of differential pricing by averaging individual sales together. The only way to unmask differential pricing is to compare individual U.S. sales to normal value (*i.e.*, A-T). It is the individual sales which are targeted, not the average of those sales. When the sales prices of individual sales are weight-averaged with other sales of the same CONNUM, regardless of customer or region, the margin on those targeted sales unfairly disappears. As such, A-A simply cannot account for the occurrence of differential pricing.

In addition, the Department should find that any difference in the margin is sufficient to establish that price differences cannot be taken into account under the A-A methodology. The Department has a statutory obligation, upheld and enforced by the courts, to calculate AD margins as accurately as possible. Indeed, the Department utilizes significant amounts of time and resources to ensure that all adjustments are properly calculated. Such time and money is spent in order to ensure that the calculations are as accurate as possible and because a slight change in the calculated margins can have significant effects in the commercial world. Thus, any difference in the margin is a meaningful difference.

The Department's current threshold of a 25% change in the margin is excessive. If the Department does not find that any margin change is meaningful, it should significantly lower this 25% threshold. It is the Petitioner's view that even a five percent margin change is very meaningful.

The Thresholds Should Change When Differential Pricing Is Calculated on Less Than Three Bases

The Department's differential pricing test is run on three separate bases – customer, region, and time period – and has established thresholds (*i.e.*, 33% and 66%) which

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determine the comparison method the Department will use. When performing the differential pricing test, the Department should alter the thresholds it uses when the test is not run on all three bases. This could occur for whatever reason (*e.g.*, the existence of only one U.S. customer). While this may not necessarily be the fault of respondents, it does give respondents a strong incentive to claim lack of knowledge of product destination, for example, which we have seen in many cases since the Department's first targeted dumping test was adopted. Respondents should not be rewarded by assuming that none of the sales would have passed the Cohen's *d* test if sufficient data was available. Regardless, the fact remains that when the Department does not have information to run the test on a particular basis, fewer sales will pass the Cohen's *d* test. Logically, the thresholds should be altered to account for this fact. In particular, if only two of the three tests were performed under the current test, the thresholds should be 22% and 44%.[3] This approach would neither reward nor punish respondents, but simply neutralize the effect on the differential pricing calculations when such situations occur. The Department should adopt this simple and logical alteration to its differential pricing test.

[3] Proportionally, three tests are to 33% as two tests are to 22%.

For all of the forgoing reasons, we urge the Department to make the above changes to its current differential pricing test.

Respectfully submitted,

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