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Administrative Review
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October 11, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review; 2014-2015: Certain
Steel Nails from the United Arab Emirates

SUMMARY

The Department of Commerce (the Department) analyzed the case and rebuttal briefs submitted by interested parties in this administrative review of the antidumping duty (AD) order on certain steel nails (nails) from the United Arab Emirates (UAE) covering the period of review (POR) May 1, 2014, through April 30, 2015. As a result of our analysis, we made changes to the margin calculations. We recommend that you approve the positions we have developed in the *Discussion of the Issues* section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties:

- Comment 1: Selection of Financial Statements to Calculate Constructed Value Selling Expenses and Profit
- Comment 2: Errors in Calculation of Constructed Value Selling Expense and Profit Ratios
- Comment 3: Appropriate Universe of Sales
- Comment 4: Consideration of an Alternative Comparison Method in an Administrative Review
- Comment 5: Differential Pricing Analysis



BACKGROUND

On June 10, 2016, the Department published the preliminary results of the administrative review of the AD order on nails from the UAE.¹ We invited parties to comment on the *Preliminary Results*. In July 2016, we received case and rebuttal briefs from Mid Continent Steel & Wire, Inc. (Mid Continent), a domestic interested party, and Overseas Distribution Services, Inc. (ODS), the only mandatory respondent selected for individual examination in this review.² ODS requested a hearing, but the request was withdrawn.³

SCOPE OF THE ORDER

The merchandise covered by this order⁴ includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this order are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Certain steel nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire.

Certain steel nails subject to this order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55, 7317.00.65, and 7317.00.75. On April 16, 2012, the Department added classification number 7806.00.80.00 and 7907.00.60.00 to the customs case reference file pursuant to a request by U.S. Customs and Border Protection (CBP).

Excluded from the scope of this order are steel nails specifically enumerated and identified in ASTM Standard F 1667 (2011 revision) as Type I, Style 20 nails, whether collated or in bulk, and whether or not galvanized.

¹ See *Certain Steel Nails From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015*, 81 FR 37571 (June 10, 2016) and accompanying Preliminary Decision Memorandum, and Memorandum to the File, “Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the United Arab Emirates; 2014–2015: Preliminary Results Analysis Memorandum for Overseas Distribution Services Inc.,” dated June 3, 2016 (collectively, *Preliminary Results*).

² See case briefs from Mid Continent and ODS dated July 18, 2016, and rebuttal briefs from Mid Continent and ODS dated July 25, 2016.

³ See Letter to the Secretary of Commerce regarding “Certain Steel Nails from the United Arab Emirates, A-520-804; Request for Hearing” dated July 8, 2016, and Letter to the Secretary of Commerce regarding “Certain Steel Nails from the United Arab Emirates, A-520-804; Withdrawal of Hearing Request” dated August 8, 2016, respectively.

⁴ See *Certain Steel Nails From the United Arab Emirates: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 77 FR 27421 (May 10, 2012) (*Order*).

Also excluded from the scope of this order are the following products:

- non-collated (*i.e.*, hand-drive or bulk), two-piece steel nails having plastic or steel washers (“caps”) already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500” to 8”, inclusive; an actual shank diameter of 0.1015” to 0.166”, inclusive; and an actual washer or cap diameter of 0.900” to 1.10”, inclusive;
- non-collated (*i.e.*, hand-drive or bulk), steel nails having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500” to 4”, inclusive; an actual shank diameter of 0.1015” to 0.166”, inclusive; and an actual head diameter of 0.3375” to 0.500”, inclusive;
- wire collated steel nails, in coils, having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500” to 1.75”, inclusive; an actual shank diameter of 0.116” to 0.166”, inclusive; and an actual head diameter of 0.3375” to 0.500”, inclusive;
- non-collated (*i.e.*, hand-drive or bulk), steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75” to 3”, inclusive; an actual shank diameter of 0.131” to 0.152”, inclusive; and an actual head diameter of 0.450” to 0.813”, inclusive;
- corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side;
- thumb tacks, which are currently classified under HTSUS 7317.00.10.00;
- fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30;
- certain steel nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive; and
- fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.⁵

DISCUSSION OF THE ISSUES

Comment 1: Selection of Financial Statements to Calculate Constructed Value Selling Expenses and Profit

ODS argues that the Department should not use the financial statements of Overseas International Steel Industry LLC (OISI), ODS’ affiliate in Oman, to calculate the constructed value (CV) selling expense ratio and CV profit ratio, because OISI’s financial statements are not contemporaneous with the POR and the business operations of the two firms are fundamentally different.

⁵The HTSUS numbers provided in the scope changed since the publication of the *Order*.

ODS argues that OISI's financial statements cover only two months of the POR and, considering that ODS' production of nails began in October 2014, OISI's financial statements are not reflective of the period ODS produced nails. ODS argues that in picking financial statements, the Department places significant weight on whether financial statements are contemporaneous. The Department has explained that "contemporaneity is a concern because the market changes over time and the more current the data the more reflective it would be of the market in which respondent is operating in."⁶ ODS contends that the Department's contemporaneity requirement is particularly relevant here, as OISI's financial statements do not cover a period of time where ODS produced the subject merchandise.

Furthermore, ODS argues that, while OISI does manufacture merchandise in the same general category of products as the subject merchandise, its financial statements as used by the Department do not reflect sales and all expenses associated with the manufacture and sales of ODS's nails. As demonstrated by the administrative record and further verified by the Department during its sales and cost verification, OISI operates as a "job worker," or toller for ODS.

ODS explains that OISI issues a debit note to ODS for the cost of labor, electricity and consumables incurred by OISI in Oman; ODS reimburses OISI for these costs; and ODS owns the materials OISI consumes to produce the nails. ODS argues that OISI's financial statements do not show cost of materials consumed, which is the main element of cost in the profit and loss account, and there is no opening and closing stock because OISI does not own stock in any form, as ODS maintains ownership of all materials processed by OISI. ODS argues that, because the income and expenses in the financial statements of OISI relate to job work (*i.e.*, tolling), they should not be considered as being in the same general category with respect to subject merchandise, as they bear no similarity to ODS' business operations, and using them to calculate CV would inflate the profit and selling expenses ratios in a manner that does not reflect home market sales of the subject merchandise. Moreover, citing to the Department's 2015 Antidumping Manual, Chapter 7 page at 31, ODS argues that the Department itself recognizes that a toller is not a manufacturer for antidumping purposes where the toller or subcontractor does not acquire ownership of the subject merchandise and does not control the relevant sale of the subject merchandise or foreign like product.

ODS notes that it is the Department's well-established practice that "the sales used as the basis for CV profit {and selling expense ratios} should not lead to irrational or unrepresentative results,"⁷ and argues that the court has found this practice to be consistent with the antidumping statute's mandate to calculate dumping margins as accurately as possible.⁸ ODS argues that, because OISI operates as a toller for ODS and the cost of materials consumed is not included in OISI's financial statements, there is a fundamental difference between ODS' and OISI's

⁶ See Letter to the Secretary of Commerce regarding "Certain Steel Nails from the United Arab Emirates: Rebuttal Brief," dated July 25, 2016 (ODS Rebuttal Brief) at 9 (citing to Memorandum to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum in the Antidumping Duty Investigation of Pure Magnesium from Israel," dated September 14, 2001, at Comment 8).

⁷ See ODS Rebuttal Brief at 3 (citing to *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27360 (May 19, 1997) (*Final Rule*)).

⁸ See ODS Rebuttal Brief at 3 (citing to *Rhone Poulenc, Inc. v United States*, 899 F.2d 1185, 1191 (CAFC 1990); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1322 (CIT 2001); and *Timken U.S. Corp. v. United States*, 318 F. Supp. 2d 1271, 1275 (CIT 2004)).

operations, so OISI financial data may not be considered representative of profits and selling expenses of UAE producers of the subject merchandise. For example, ODS states that OISI never owned any raw material it consumed for the purpose of producing nails, and its financial statements do not show any cost of materials consumed, which is an important factor that producers in the UAE would consider when pricing and selling subject merchandise in the home market. ODS also argues that selection of a company whose financial statements the Department would use as a basis for CV that bears little similarity to the respondent company would unlawfully distort the Department's calculations.⁹ Moreover, ODS argues that, because section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (the Act) specifies that the amount allowed for profit may not exceed the amount normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of merchandise in the same general category of products as the subject merchandise, and the U.S. Court of International Trade (CIT) explains that "the overarching statutory goal {of the statute is} approximating the respondent's home market experience,"¹⁰ OISI's function as a toller places OISI outside the scope of companies that maybe considered for CV purposes. ODS argues that the Department routinely rejects companies where their business realities do not reflect the sale of goods in the home market and use of their financial statements would lead to irrational and unrepresentative results.¹¹

ODS argues that Mid Continent points to only parts of the administrative record to support its request to base CV profit and selling expenses on OISI's financial statements, *i.e.*, that OISI produces nails and the same managers make business decisions for both companies. ODS argues that antidumping determinations, including the appropriate financial statements to use to calculate CV profit and selling expenses, must be based on the full administrative record.¹² ODS maintains that the fact that ODS is related to OISI in no way overcomes the above deficiencies in OISI's financial statements for CV purposes or in any way makes it a superior proxy for the Department's CV calculations.

ODS argues that the Department should use ODS' data in its CV selling expense calculation, not those of OISI and L.S. Industry, a Thai producer of nails, which lack sufficient details to calculate appropriate selling expense ratios, and the financial statements of L.S. Industry for the CV profit ratio. ODS argues that Mid Continent's reasons to use OISI's selling expense ratios to construct CV are the reasons why the Department should use ODS' selling expense ratios. ODS argues that ODS' data reflect all the sales, costs of material consumed, selling expenses and administrative expenses related to the production and sales of both subject and non-subject merchandise, whether produced by ODS or OISI, are accounted for in the books of ODS which were verified at the Department's cost and sales verifications, and are the most suitable data on the record in the POR as they reflect ODS's company-wide actual selling experience, including sales to the home market. ODS argues that section 773(e)(2) of the Act reflects a statutory preference for CV profit and selling expense data from the respondent itself, requiring, where

⁹ ODS Rebuttal Brief at 7 (citing to *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 FR 20592 (April 16, 2004) (*Television Receivers from Malaysia*)).

¹⁰ *Id.* at 5 (citing to *Geum Poong Corp. v. United States*, 26 CIT 991, 996, 2002 CIT LEXIS 94 at 11 (CIT 2002) (*Geum Poong*), *aff'd* 2003 LEXIS 2143 (CAFC 2003)).

¹¹ *Id.* at 6 (citing to *Final Rule* at 27360 and *Television Receivers from Malaysia*).

¹² *Id.* at 7 (citing to *E.I. DuPont De Nemours & Co. v. United States*, 20 CIT 373 (March 20, 1996)).

available, the use of ‘the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general and administrative expenses and for profits. ODS notes that the Department has in other proceedings used the respondent’s data to calculate CV selling expenses and profit.¹³ ODS further notes that the Department relied upon the respondent’s data to calculate CV selling expenses in the original investigation of this case.¹⁴

Furthermore, ODS argues that the Department should use the financial statements of L.S. Industry to calculate CV profit, because they reflect a manufacturer and seller of nails in its home market and are contemporaneous with the production and sale of subject merchandise and foreign like product during the POR.

ODS also argues that the Department should use the financial statements of Bangkok Fastening Co., Ltd. (Bangkok Fastening), a Thai company, in its CV profit and selling expense calculations, because Bangkok Fastening produces and supplies screws, which fall in the same general category of products as the subject merchandise.¹⁵ ODS notes that the Department has not explained why it did not rely upon Bangkok Fastening’s financial statements in the present case when it relied upon Bangkok Fastening’s financial statements in other subject merchandise related cases after concluding that the company is a producer of comparable merchandise, *i.e.*, nails and similar products.

Mid Continent argues that the Department should not use ODS’ data to calculate CV profit and selling expenses for the final results, because the Department has a superior source on the record: the OISI financial statements. Mid Continent acknowledges that the Department used a respondent’s own data to calculate CV profit and selling expenses in the original investigation because it had no viable alternative data sources, but notes that this is not the situation in this review.

Mid Continent argues that the Department’s determination that the record does not provide a basis for differentiating between OISI and L.S. Industry is in error. Mid Continent further disputes ODS’ claim that, because OISI manufactures nails on a tolling basis for ODS, its operations fundamentally differ from that of ODS and therefore OISI’s financial statements should not be used as a source of CV profit and selling expense data. Mid Continent argues that the Department should rely solely on OISI as the source of CV profit and selling expense data, instead of both OISI and L.S. Industry, because OISI is the superior source to L.S. Industry for CV profit and selling expense data. First, OISI is ODS’s affiliate, and the production and selling experiences of the two companies are interconnected and interdependent and controlled by the

¹³ ODS rebuttal brief at 11-12, citing to Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, “Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Magnesium Metal from the Russian Federation for the Period of Review April 1, 2009 through March 31, 2010,” dated September 6, 2011, at Comment 1.B; Memorandum to Paul Piquado, Assistant Secretary for Import Administration, “Issues and Decision Memorandum for Less than Fair Value Investigation of Certain Steel Nails from the United Arab Emirates,” dated March 19, 2012 (Nails UAE LTFV) at Comment 7.

¹⁴ See Letter to the Secretary of Commerce regarding “Certain Steel Nails from the United Arab Emirates: Case Brief,” dated July 18, 2016 (ODS case brief), at 10, citing to Nails UAE LTFV at Comment 7.

¹⁵ ODS case brief at 7, citing to *Certain Steel Nails from the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316, (April 8, 2014); and *Certain Steel Nails From the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010-2011*, 78 FR 16651 (March, 19, 2013).

same managers and factors. In contrast, L.S. Industry is a company wholly unrelated to ODS, whose production and selling experiences are controlled by entirely different managers and factors.

Second, while both OISI and L.S. Industry produce steel nails, OISI produces them for ODS, and while raw material purchases and expense may be recorded on ODS's books, this is little more than an accounting fiction undertaken for unclear reasons, as raw materials are jointly ordered and commonly stored and common management decides what to produce and which company will produce, invoice, and ship. As such, Mid-Continent argues, OISI does not function merely as a toller, but as a fully functioning producer/exporter, and OISI's profit and selling expense experience is a direct function of ODS' profit and selling expense experience, which constitutes the best approximation of ODS' home market experience that the statute prefers. With respect to ODS' argument to use Bangkok Fasteners' financial statements as a basis for calculating CV profit and selling expenses for the final results as ODS argues, Mid Continent contends that the Department should also use the financial statements of other producers of non-nail fasteners producers on the record, including those of Sumeeko Industry Co., Ltd. and Hitech Fastener Manufacture (Thailand) Co., Ltd., because they are equivalent to Bangkok Fasteners' financial statements as sources of CV profit and selling expense data.

Third, because the Act generally reflects a desire to rely on CV profit and selling expense data that are as reflective as possible of the experience a respondent would have had in its home market, relying solely on OISI is consistent with the statutory preference for approximating the respondent's home market profit experience as closely as possible.¹⁶ Moreover, Mid Continent argues, data from OISI, an affiliated producer of the same product that it produces for ODS, are uniquely qualified for this purpose and superior to that from L.S. Industry.

Fourth, using OISI data alone does not reveal one party's business proprietary data to another, as ODS is privy to its affiliate OISI's data. Finally, Mid Continent argues, OISI's financial statements are contemporaneous with the POR because they cover two months, or 17 percent, of the POR. Mid Continent argues that the Department has used partially contemporaneous financial statements in prior determinations and should continue to use the OISI financial statements in the final results.¹⁷ Moreover, the Department has to resort to the "any other reasonable method" for determining CV profit and selling expenses under section 773(e)(2)(B)(iii) of the Act, which does not contain any temporal reference to the POR. Therefore, even assuming the OISI financial statements were not contemporaneous with the POR

¹⁶ See Letter to the Secretary of Commerce regarding "Administrative Review of Certain Steel Nails from the United Arab Emirates: Petitioner's Case Brief" dated July 18, 2016 (Mid Continent case brief), at 5, citing to sections 773(e)(2)(A) and (B)(i) and (ii); *Geum Poong*, 193 F.Supp.2d 1363, 1370 ("the goal in calculating CV profit is to approximate the home market profit experience."); *Husteel Co., Ltd. v. United States*, 98 F.Supp.3d 1315, 1349 (CIT 2015) (citing *Geum Poong*).

¹⁷ See Letter to the Secretary of Commerce regarding "Administrative Review of Certain Steel Nails from the United Arab Emirates: Petitioner's Rebuttal Brief" dated July 25, 2016 (Mid Continent rebuttal brief), at 8, citing to *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 FR 9753 (February 22, 2011) and accompanying Issues and Decision Memorandum at Issue 1, footnote 17 (noting that all six Indian financial statements on the record were all partially contemporaneous with the period of review and were thus eligible for consideration for purposes of calculating surrogate financial ratios); *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 77 FR 14493 (March 12, 2012) and accompanying Issues and Decision Memorandum at Issue 2.

at all, they could still provide a “reasonable method” for calculating CV profit and selling expenses. Inherent in the Department’s discretion in selecting a source or sources of CV profit and selling expenses under Section 773(e)(2)(B)(iii) of the Act is the ability and obligation to observe and give weight to significant differences, which, Mid Continent argues, favor the use of OISI’s financial statements over those of L.S. Industry. Not doing so, Mid Continent argues, has the effect of reducing the accuracy of the dumping calculations, which is contrary to the Department’s statutory obligations.¹⁸

Department’s Position: For the *Preliminary Results*, we calculated CV selling expenses and profit for ODS, the sole mandatory respondent in this review, “based on any other reasonable method,” pursuant to section 773(e)(2)(B)(iii) of the Act using the average of the selling expense and profit ratios derived from the 2014 audited financial statements of two nails producers, L.S. Industry in Thailand and OISI in Oman, out of the pool of third-party financial statements on the record.¹⁹ At the time, we found that, while complete, the financial statements contained limited information regarding the overall operations and one was not preferable over the other. However, after consideration of arguments raised in the case and rebuttal briefs and our further analysis of OISI’s financial statements, we agree with ODS and find that the OISI financial statements are not an appropriate source for CV profit, because a more suitable source is on the record. Specifically, OISI’s financial statements do not include any inventory accounts, and the cost of sales figure does not include raw material costs.²⁰ The absence of any inventory and material costs indicates that OISI’s financial results and profit are more reflective of a company providing a service, not a good, and as such, are not a good surrogate for CV profit, when compared with ODS.

On the record of this proceeding, in addition to OISI’s financial statements submitted as part of ODS’ questionnaire response, are seven alternative sources for CV profit and selling expenses under section 773(e)(2)(B)(iii) of the Act. Those sources are: 1) the 2014 financial statements of L.S. Industry, a producer of nails, iron chain and iron sheet in Thailand; 2) the 2014 financial statements of Bangkok Fastening, a producer of screws and knots in Thailand; 3) the financial statements for the fiscal year ending March 31, 2015, of Sagar Fasteners Private Limited, a producer of nuts and bolts in India; 4) the financial statements for the fiscal year ending March 31, 2015 of Jai Fasteners Private Limited, a producer of fasteners in India; 5) the financial statements for the fiscal year ending March 31, 2014 of Bhuwalka Steel Industries FZC, a producer of ferrous and non-ferrous metals in the UAE; 6) the 2014 financial statements of Sumeeko Industries Co., Ltd., a producer of automobile parts, hardware parts, and machinery parts in Taiwan; and 7) the 2014 financial statements of Hitech Fastener Manufacture (Thailand) Co., Ltd., a producer of wire products and metal wire in Thailand.

¹⁸ Mid Continent case brief at 6-7, citing to *Rhone Poulanc; Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (CAFC 1994); *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (CAFC 2001).

¹⁹ For a detailed discussion concerning our decision to calculate CV selling expenses and profit, including our decision not to calculate a profit cap, pursuant to section 773(e)(2)(B)(iii) of the Act, see the “Calculation of Normal Value Based on Constructed Value” section of the Preliminary Decision Memorandum.

²⁰ See Letter to the Secretary of Commerce regarding Certain Steel Nails from the United Emirates: 3rd Administrative Review Response to Supplemental Questionnaire” dated January 12, 2016, at Exhibit S1-1(e) (OISI FY2014 Financial Statements).

In evaluating each of the available alternatives under section 773(e)(2)(B)(iii) of the Act, we followed the analysis established in *Pure Magnesium from Israel*.²¹ In *Pure Magnesium from Israel*, the Department set out three criteria for choosing among surrogate data under section 773(e)(2)(B)(iii) of the Act: 1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; 2) the extent to which the financial data of the surrogate company reflect sales in the United States, as well as the home market; and 3) the contemporaneity of the surrogate data to the POI. In *CTVs from Malaysia*, the Department considered a fourth criterion, which is the extent to which the customer base of the surrogate company and the respondent are similar (*e.g.*, original equipment manufacturers versus retailers).²² In subsequent cases, we have used these four criteria to assess the appropriateness of using various financial statements on the record of a given case to determine CV profit and selling expenses under section 773(e)(2)(B)(iii) of the Act.²³ Additionally, it is the Department's preference, when possible, to derive CV selling expense data from the same source we derive CV profit data.²⁴

Because the financial statements on the record provide little information with respect to the companies' business operations, a breakdown of the volume of sales between their respective home markets and export sales, and details on the customer base, we are left with determining which financial statements are good sources for CV data based simply on the criteria of contemporaneity and products manufactured and sold.

In weighing the available information and determining which source of information to use under alternative (iii), we first considered which of the proposed companies produced products that are identical to the subject merchandise, nails. As a result of our analysis, we find that the financial statements of L.S. Industry is the only viable source for CV profit because, in the pool of third-party financial statements, L.S. Industry is the only company we can conclude, based on record evidence, is a producer of nails during the POR.

We disagree with ODS that Bangkok Fastening's financial statements are a good source for CV selling expenses and profit. Bangkok Fastening's financial statements, just as is the case for the other six financial statements on the record, do not reflect the production of identical merchandise, nails.²⁵ When compared to L.S. Industry's financial statements, therefore, we find that L.S. Industry's financial statements are preferable because L.S. Industry produces identical merchandise as that produced by ODS.²⁶

²¹ See *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001) (*Pure Magnesium from Israel*) and accompanying decision memorandum at Comment 8

²² See *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 FR 20592 (April 16, 2004) (*CTVs from Malaysia*) and accompanying Issues and Decision Memorandum at Comment 26.

²³ See, *e.g.*, *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) (*OCTG from Korea*) and accompanying Issues and Decision Memorandum at Comment 1.

²⁴ See, *e.g.*, *Nails UAE LTFV* at Comment 7.

²⁵ See Letter to the Secretary of Commerce regarding "Certain Steel Nails from the United Arab Emirates: 3rd Administrative Review: CV Profit Comments" dated April 28, 2016 (ODS CV Comments) at Exhibits CV-3(b) and CV-3(c) (Bangkok Fastening is established for the production and supply of "screw and knot.")

²⁶ See ODS CV Comments at Exhibits CV-2(b) and CV-2(c) (L.S. Industry FY2014 Financial Statements) (L.S. Industry has income from producing "nail, iron chain and iron sheet.").

With respect to ODS' argument that we should use its own selling expense data to calculate CV selling expenses, because the financial statements of OISI and L.S. Industry lack sufficient details to calculate appropriate selling expense ratios, we disagree. Notwithstanding our determination not to use OISI's financial statements for the reasons articulated below, we find that the financial statements of OISI and L.S. Industry sufficiently identify income statement line items for direct selling expenses and indirect selling expenses, and non-selling related expenses necessary to calculate selling expense ratios.²⁷

With respect to ODS' argument that ODS' data are the most suitable data on the record in the POR, as they reflect ODS's company-wide actual selling experience, including sales to the home market and, therefore, best reflect the statutory preference for CV profit and selling expense data from the respondent itself, we disagree. It is true that 773(e)(2) of the Act reflects a statutory preference for CV profit and selling expense data from the respondent itself. However, because ODS had no home-market sales of nails during the POR, and its selling expense and profit data are not reflective of sales of nails in the UAE during the POR, we have calculated CV selling expenses and profit for ODS "based on any other reasonable method" pursuant to section 773(e)(2)(B)(iii) of the Act. In doing so, we have elected to evaluate the third-party financial statements on the record, and have determined that the financial statements of L.S. Industry reflect as best as possible sales of nails in the UAE during the POR.

Moreover, we find no merit in ODS' attempt to support its argument by noting that the Department has used a respondent's own data to calculate CV selling expenses and profit in the past, including using the respondent's own selling expense data in the original investigation. As noted above, the Department's preference, when possible, is to derive CV selling expense data from the same source from which we derive CV profit data.²⁸ Mid Continent correctly notes that we decided to use the respondent's own data in the original investigation, because we had no viable alternative data sources and that the facts are different for this review.²⁹ Because L.S. Industry's financial statements provide sufficient selling expense data to calculate CV selling expenses, we find it appropriate to rely on L.S. Industry's selling expense data to calculate CV selling expenses in this review.

Accordingly, for these final results, we have calculated CV selling expenses and profit using the data of the nail producer, L.S. Industry, because L.S. Industry's data best reflect the sale of nails during the POR.³⁰

Comment 2: Errors in Calculation of Constructed Value Selling Expense and Profit Ratios

Notwithstanding its arguments challenging use of OISI's financial statements to calculate CV selling expenses, ODS argues that the Department made certain errors in its calculation. ODS argues that the Department's calculation of CV selling expense ratios using the financial statements of OISI and LS Industry is distortive and unreasonable because it includes expenses

²⁷ See OISI FY2014 Financial Statements and L.S. Industry FY2014 Financial Statements, respectively.

²⁸ See, e.g., Nails UAE LTFV at Comment 7.

²⁹ See Nails UAE LTFV at Comment 7.

³⁰ For details on our calculation of CV selling expenses and profit, see Memorandum to the File entitled, "Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the United Arab Emirates; 2014-2015: Final Results Analysis Memorandum for Overseas Distribution Services Inc.," dated concurrently with this memorandum (ODS Final Results Analysis Memo).

not related to indirect selling expenses, such as office expense, direct selling expenses and general and administrative expenses, which is contrary to 773(e)(2) of the Act, and results in higher expense ratios. In calculating OISI's selling expense ratio, ODS argues, the Department used OISI's "Office, selling and administration expenses" which does not segregate between direct and indirect selling expenses. Similarly, in calculating L.S. Industry's selling expense ratio, ODS argues, the Department included as indirect selling expenses "Salary and bonus," "Telephone bill," "Transportation fee," and "Transportation expense." ODS argues that "Transportation fee" and "Transportation expense" can be considered direct selling expenses, and it is not clear whether "Salary and bonus" is exclusive of administrative staff salaries.

Mid Continent argues that the Department's CV selling expense calculations are not flawed, as ODS argues. Mid Continent argues that the Department properly removed the freight item "Carriage expenses" from OISI's overall selling, general, and administrative expense value before calculating CV profit. Mid Continent argues that ODS' claim that the Department included non-indirect selling expenses in its calculation has no record support. Mid Continent argues that the Department's approach was consistent with the notion that it will not seek to deconstruct financial statements, and will not look behind the values presented.³¹

Department's Position: We agree with ODS that our calculations of L.S. Industry's selling expense and profit ratios contained certain errors. We have addressed the errors in the ODS company-specific analysis memorandum by deducting the amounts for "Transportation fee" and "Transportation expense" from L.S. Industry's "Office, selling and administration expenses" prior to calculating L.S. Industry's selling expense ratio.³² With respect to ODS' concern that the amount for "Salary and bonus" in L.S. Industry's financial statements may not be exclusive of administrative staff salaries, we find it reasonable to not seek to deconstruct financial statements and will not look behind the values presented.³³ Because we are only using L.S. Industry's data to calculate CV selling expenses and profit for these final results, arguments concerning our calculation of OISI's selling expense and profit ratios are moot.

Comment 3: Appropriate Universe of Sales

ODS argues that the Department incorrectly excluded from its dumping analysis certain POR sales where the sale entered outside the POR. ODS argues that the Department must include all POR sales in its antidumping calculations, consistent with the Department's regulations and practice, where in determining the appropriate date of sale, the Department looks for the date where the "material terms of sale are set."³⁴

³¹ Mid Continent rebuttal brief at 13, citing to *Certain Uncoated Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 81 FR 3112 (January 20, 2016) and accompanying Issues and Decision Memorandum (*Uncoated Paper PRC*) at Comment 19; *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272 (April 20, 2016) and accompanying Issues and Decision Memorandum (*Pneumatic Tires PRC*) at Comment 8.

³² For details on our recalculation of L.S. Industry's selling expense and profit ratios, see ODS Final Results Analysis Memo.

³³ See *Uncoated Paper PRC* at Comment 19; *Pneumatic Tires PRC* at Comment 8.

³⁴ ODS case brief at 11, citing to 19 CFR 351.401(i); *Seah Steel Corp. v. United States*, 25 CIT 133, 134 2001 CIT LEXIS 24 (February 23, 2001).

Mid Continent argues that the Department properly based its calculations on all entries instead of all sales invoiced during the POR. Mid Continent argues that the Department has a well-established practice of calculating dumping margins based on all entries of subject merchandise during the POR, which is in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.213(e)(1).³⁵

Department's Position: We do not agree with ODS' assertion that the Department must include all sales with a date setting the material terms of sale that falls within the POR in its margin calculations. The Department notes the distinction between 19 CFR 351.401(i), the regulation which provides guidance on identifying the date of sale, and 19 CFR 351.213(e)(1), the regulation which provides guidance on identifying the 12-month period, *i.e.*, "universe of sales." Section 751(a)(2)(C) of the Act indicates that the Department shall assess "antidumping duties on entries of merchandise covered by the {review} and for deposits of estimated duties," and 19 CFR 351.213(e)(1) indicates that an administrative review "normally will cover, as appropriate, entries, exports, or sales of the subject merchandise, for the assessment of antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."³⁶ Because 19 CFR 351.213(e)(1) does not establish a hierarchy as to whether this universe of sales should be based on entry date, export date, or sale date – it only instructs "as appropriate" – and because section 751(a)(2)(C) of the Act makes clear that the Department is to assess antidumping duties on "entries" of merchandise, it has been the Department's preferred practice, when the facts of the case permit, to use as the universe of sales all *entries* of subject merchandise during the POR.³⁷

In this review, ODS had only export price (EP) sales to the United States and, because it was the importer of record for every sale, it was able to report an entry date for every sale. Moreover, this is the first time ODS has been reviewed, so we are not restricted in defining the universe of

³⁵ Mid Continent rebuttal brief at 15-16, citing to Memorandum to Paul Piquado, Assistant Secretary for Import Administration, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Potassium Permanganate from the People's Republic of China," dated February 2, 2014 (*Potassium from the PRC*); *Final Rule*.

³⁶ See 19 CFR 351.213(e)(1); *Final Rule* at 62 FR 27314.

³⁷ See *Final Rule* 62 at 27314 ("{T}he Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments. However, on a case-by-case basis, the Department may consider whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review. These two approaches differ, because, in the case of {constructed export price} sales, the delay between importation and resale to an unaffiliated customer means that merchandise entered during the review period often is different from the merchandise sold during that period. Because of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review. Where a respondent can tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis. However, the determination of whether to review sales of merchandise entered during the period of review hinges on such case-specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during that review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews. The Department must consider these factors because of the distortions that could arise by switching from one method to another in different review periods."); see also, *e.g.*, *Potassium from the PRC* at 3-5.

sales based on a date other than the entry date used in a previous review, *e.g.*, invoice date, and are free to establish the universe of sales based on the preferred method of using entry date.³⁸

Therefore, we agree with Mid Continent that we properly based our calculations on all entries instead of all sales invoiced during the POR, in accordance with section 751(a)(2)(C) and 19 CFR 351.213(e)(1) and consistent with Department practice. Accordingly, we have made no changes from the *Preliminary Results* and, for these final results, will continue to base our margin calculations for ODS on reported sales with entry dates during the POR.

Comment 4: Consideration of an Alternative Comparison Method in an Administrative Review

ODS argues that the Department's targeted dumping methodology is fundamentally flawed, because the Department lacks statutory authority to conduct a targeted dumping analysis in this administrative review. ODS argues that, although section 777A(d)(1)(B)(i)-(ii) of the Act creates an exception to the Department's normal antidumping analysis in investigations, where the administrative record demonstrates that “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions or periods of time” and where the Department's normal methodology would not take these differences into account, this exception does not pertain to administrative reviews. ODS argues that section 777A(d) of the Act, which pertains to administrative reviews, does not carve out this methodological exception. ODS argues that it is a fundamental rule of statutory interpretation that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³⁹ ODS argues that the Department is presumed to have acted intentionally when including or excluding statutory language⁴⁰ and “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”⁴¹ ODS argues that this is particularly true in the present case where the provisions were enacted by Congress at the same time⁴² and the Department in this case may not exercise authority that is not granted by the antidumping statute. Furthermore, ODS argues, the U.S. Court of Appeals for the Federal Circuit (CAFC) has instructed the Department in similar situations that “{i}t is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority.”⁴³

Mid Continent argues that the courts have repeatedly affirmed that the Department has the authority to use the differential pricing analysis and apply the alternative average-to-transaction comparison method in administrative reviews in order to address targeted dumping.⁴⁴ Mid Continent argues that the CAFC reasoned that the statute is silent with respect to the specific methodology to be used in administrative reviews to compare normal value and the actual or

³⁸ *Id.*

³⁹ ODS case brief at 14, citing to *Nken v. Holder*, 556 U.S. 418, 430 (2009).

⁴⁰ *Id.* at 15, citing to *Bates v. United States*, 522 U.S. 23, 30 (1997).

⁴¹ *Id.* at 15, citing to *Hamden v. Rumsfeld*, 548 U.S. 557, 578 (2006).

⁴² *Id.* at 15, citing to *Lindh v. Murphy*, 521 U.S. 320, 330 (1997).

⁴³ *Id.* at 16, citing to *FAG Italia S.p.A v United States*, 291 F. 3d 806, 816 (CAFC 2002) (*FAG Italia*).

⁴⁴ Mid Continent rebuttal brief at 18, citing to *JBF RAK LLC v. United States*, 790 F.3d 1358, 1362-1365 (CAFC 2015) (*JBF RAK*); *Apex Frozen Foods Private Ltd. v. United States*, 144 F.Supp.3d 1308, 1314-1316 (CIT 2016) (*Apex*).

constructed export price,⁴⁵ and that when the statute is silent, the court’s inquiry focuses on *Chevron* step two: whether the Department’s interpretation “is based on a permissible construction of the statute,”⁴⁶ to which the CAFC ruled that, because Congress did not provide for any specific methodology to be used in administrative reviews, {the Department} properly exercised its gap-filling discretion by applying a comparison methodology, *i.e.*, average-to-transaction comparison method, in administrative reviews that parallels the methodology used in investigations.⁴⁷

Department’s Position: We disagree with ODS’ assertion that the Department lacks the authority to conduct a targeted dumping or differential pricing analysis in an administrative review pursuant to section 777A(d) of the Act. Mid Continent correctly notes that the courts have ruled that the Department does have the authority to conduct a targeted dumping analysis in an administrative review.⁴⁸ Furthermore, the CIT affirmed in *Apex* the CAFC’s ruling in *JBF RAK* is determinative that the Department has the authority to apply the alternative average-to-transaction method in an administrative review.⁴⁹

With respect to ODS’ assertion and reference to *FAG Italia*, that the Department lacks the authority to fill gaps in a statute that exist because of the absence of statutory authority,⁵⁰ the CAFC stated in *JBF RAK* that “{t}he fact that the statute is silent with regard to administrative reviews does not preclude {the Department} from filling gaps in the statute to properly calculate and assign antidumping duties.”⁵¹ Therefore, because 19 CFR 351.414(c)(1) provides that the Department will apply the average-to-average methodology to calculate dumping margins in investigations and reviews, unless another method is appropriate in a particular case but does not provide further guidance regarding what those circumstances may be, we have by practice chosen to adopt the approach we use in investigations, which follows the statutory directive under section 777A(d)(1)(B) of the Act. Accordingly, we will make no changes from the *Preliminary Results* and, for these final results, will continue to use the differential pricing analysis in this review.

Comment 5: Differential Pricing Analysis

ODS argues that the Department's differential pricing analysis can yield statistically biased and unreasonable results. ODS argues that the Cohen's *d* test “compares the standard deviations of the test and comparison groups of sales against one another”⁵² and that an “unbiased and statistically robust interpretation of the p-values is predicated on the assumption of normality consistent through all price distributions.”⁵³ Thus, ODS asserts that “{s}uch distortions can lead

⁴⁵ Mid Continent rebuttal brief at 18, citing to *JBF RAK*, 790 F.3d at 1363.

⁴⁶ *Id.*, citing to *JBF RAK*, 790 F.3d at 1363 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*)).

⁴⁷ Mid Continent rebuttal brief at 18-19, citing to *JBF RAK*, 790 F.3d at 1364; *Apex*, 144 F.Supp.3d at 1316.

⁴⁸ See *JBF RAK*, 790 F. 3d at 1362-65; *The Timken Company v. United States*, 2016 WL 2765448, Slip Op. 16-47 at 15 (Consol. Ct. No. 14-155) (CIT May 10, 2016) (*Timken Company*); *Apex*, 144 F. Supp. 3d at 1314-1316 (applying *JBF RAK*); and, *Nan Ya Plastics Corporation, Ltd. v. United States*, 128 F. Supp. 3d 1345 (CIT 2015).

⁴⁹ See *Apex*, 144 F. Supp. 3d at 1316.

⁵⁰ ODS case brief at 16.

⁵¹ See *JBF RAK*, 790 F.3d 1358, 1362-1365.

⁵² See ODS case brief at 16.

⁵³ *Id.* at 16-17.

to erroneous conclusions within ‘the meaning of any reasonable interpretation of the term’ ‘differentially prices’ wherein Type I and Type II errors could result.”⁵⁴

ODS continues that the Department, or the Cohen’s *d* test, “does not provide any causality or supposition as to why price distributions differ, only providing a probability that a difference exists, without regard to an analysis of what other underlying factors can contribute to a significant difference in mean prices across purchasers, regions or time periods.”⁵⁵ ODS argues that the Department’s determination must be based on record evidence, not “speculation and conjecture,”⁵⁶ because price differences may be caused by a plentitude of causes, and targeted dumping may be only one of many.⁵⁷ ODS also hypothesizes, because the Department relies on the Cohen’s *d* coefficient, a measure of effect size, that the “effect of differing sizes of variations can also lead to erroneous conclusions within the meaning of ‘differentially priced’ goods.”⁵⁸

This “meaningful difference” analysis, ODS argues, identifies differences in the calculated weighted-average dumping margins are only attributable to zeroing and not attributable to any purported “targeted dumping.” The Department’s approach “{does} not indicate that ‘targeted,’ masked or hidden dumping is present or present to an extent that is meaningful.”⁵⁹

Furthermore, ODS argues that the Department improperly distorts its analysis by including prices above the mean as passing the Cohen’s *d* test, which seems contrary to the intent of the “targeted dumping analysis” to find “targeted dumped” (*i.e.*, low priced) sales.

Mid Continent argues that ODS’s assertion that the differential pricing analysis (specifically, the Cohen’s *d* test) yields statistically biased and unreasonable results, because the Cohen’s *d* test does not consider causality, *i.e.*, why prices differ significantly among purchasers, regions, or time periods, and that price differences may be caused by causes other than targeted dumping, has been rejected by the courts. Mid Continent argues that the statute does not require the Department to determine the reasons why there is a pattern of export prices that differs significantly among purchasers, regions, or time periods,⁶⁰ and that “requiring {the Department} to determine the intent of a targeted dumping respondent ‘would create a tremendous burden on {the Department} that is not required or suggested by the statute.’”⁶¹

Mid Continent argues that ODS’ assertion, that the Department’s use of the Cohen’s *d* coefficient as a measure of effect size to determine whether the price differences are significant, has been repeatedly rejected by courts. Mid Continent argues that the use of the Cohen’s *d* coefficient is reasonable because “{t}he fact that the price differences between sales that pass and do not pass the Cohen’s *d* test were at times small in absolute terms does not undermine {the

⁵⁴ *Id.* at 17.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*, citing to *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Group Corp. v United States*, 32 CIT 673, (2008), and *Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1734, n.2, 358 F. Supp. 2d. 1236, 1241, n.2 (2004) (“Speculation is not support for finding ...”).

⁵⁸ *Id.* at 18.

⁵⁹ *Id.*

⁶⁰ Mid Continent rebuttal brief at 19, citing to *JBF RAK*, 790 F.3d at 1368; *Timken Company*, Slip Op. 16-47 at 15.

⁶¹ *Id.* at 19, citing to *JBF RAK*, 790 F.3d at 1368 (citing *JBF RAK*, 991 F.Supp.2d 1343, 1355).

Department's} pattern determination,⁶² and “{i}mplicit in {the Department}'s approach is that the relative significance of the differences is what matters.”⁶³

Mid Continent argues that ODS misapprehends the purpose of the meaningful difference test. Mid Continent argues that the Cohen's *d* analysis seeks to determine whether a pattern of prices that differ significantly among purchasers, regions, or periods of time exists, as specified in section 777A(d)(1)(B)(i) of the Act.⁶⁴ Mid Continent argues that the meaningful difference analysis speaks to section 777A(d)(1)(B)(ii) of the act, which requires the Department to determine whether “such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).”⁶⁵ In other words, Mid Continent argues, the meaningful difference analysis is used after a pattern has been identified, and seeks to determine whether the alternative calculation methodology may be employed, in part or in full.

Mid Continent argues that ODS' assertion, that the Department should not count sales at prices above the mean price as passing the Cohen's *d* test because non-dumped sales cannot be targeted sales, has been repeatedly rejected by courts.⁶⁶ Mid Continent argues that all sales are relevant to the Department's differential pricing analysis because higher-priced sales and lower-priced sales do not operate independently, but rather they should be considered and compared together to assess whether price differences are indeed significant.⁶⁷ Mid Continent also argues that ODS' assertion that non-dumped sales cannot be targeted sales “is inapposite because the function of the Cohen's *d* test is to determine if a respondent's export sales prices differ significantly, not to identify dumped sales.”⁶⁸

Department's Position: We disagree with ODS' assertion that the Cohen's *d* test yields statistically biased and unreasonable results. Furthermore, ODS' descriptions of the Cohen's *d* test amply demonstrates a flawed understanding of the Department's approach. First, the Cohen's *d* test measures the difference in the weighted-average (*i.e.*, mean) U.S. price to a test group (*i.e.*, to a specific purchaser, region or time period) and a comparison group (*i.e.*, all other sales) of comparable merchandise relative to the variances of the individual U.S. prices in both groups. The Cohen's *d* test does not compare “the standard deviations of the test and comparison groups against one another.”⁶⁹ Thus, ODS' statement is not relevant.

Next, ODS introduces the idea of an “unbiased and statistically robust interpretation of the p-values” where ODS has not identified what it means by “p-values.” Assuming that ODS is referring to concepts of probability, the purpose of the Cohen's *d* test is not to predict, with some

⁶² Mid Continent rebuttal brief at 20, citing to *Apex*, 144 F.Supp.3d at 1330-1331 (citing Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161 (in which the Department explained that its analysis has been developed to identify significant price differences depending on what is considered significant for a particular industry or product)).

⁶³ Mid Continent rebuttal brief at 20, citing to *Apex*, 144 F. Supp.3d at 1331; *Tri Union Frozen Products, Inc. v. United States*, ___ F. Supp. 3d ___, 2016 WL 1587333, Slip Op. 16-33 at 80-82 (Consol. Ct. No. 14-249) (CIT April 6, 2016) (*Tri Union*).

⁶⁴ Mid Continent rebuttal brief at 20, citing to 19 U.S.C. § 1677f-1(d)(1)(B)(i).

⁶⁵ *Id.* at 21, citing to 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

⁶⁶ *Id.* at 21-22, citing to *Apex*, 144 F.Supp.3d at 1328-1330.

⁶⁷ *Id.* at 22, citing to *Apex*, 144 F.Supp.3d at 1329; *Tri Union*, Slip Op. 16-33 at 85-86 (“Considering all sales allows {the Department} to fully assess the breadth of a respondent's price differences.”)

⁶⁸ *Id.* at 22, citing to *Tri Union*, Slip Op. 16-33 at 86.

⁶⁹ See ODS' case brief at 16.

probability of success, what another U.S. price might be or whether it will differ significantly from the mean price; rather the Cohen's *d* test is to ascertain whether the actual U.S. prices to a purchaser, region or time period differ significantly from the U.S. prices for all other sales of comparable merchandise. This analysis is performed on all U.S. sales which ODS has reported to have taken place during the POR, and thus, there are no other U.S. sales under examination which one would even make a prediction about their prices. Thus, ODS' statement is misplaced.

ODS also appears to infer that "the assumption of normality" is required "throughout all price distributions." However, "normality," which is only one of a number of potential distributions of data which might be approximated in a statistical analysis, is not relevant here. Like probability, the distribution of data, of which a normal or "Gaussian" distribution is the most common, is a characteristic of a data sample from a larger data population. Certainly in many statistical analyses, a normal distribution of the sampled data is the foundation of the analysis of that sampled data as well as the ability of that sample to predict other values of the data population. However, as noted above, the Department's analysis of ODS' sale prices in the U.S. market encompasses all of ODS' U.S. sales, *i.e.*, the entire data population. Accordingly, a "statistical" analysis, with resulting statistical inferences, including probability and confidence intervals, are properly not part of an analysis as performed here by the Department.

Further, ODS asserts that "{s}uch distortions can lead to erroneous conclusions...wherein Type I or Type II errors could result."⁷⁰ However, ODS fails to provide factual evidence to support its contention that the Department analysis resulted in "erroneous conclusions," or that there exists Type I or Type II errors (*i.e.*, a false positive error or a false negative error, respectively) as a result of the Department's analysis. Accordingly, ODS' claim is unsupported by the evidence on the record.

The Department disagrees with ODS that it must examine the cause behind the price differences which constitute a pattern of prices that differ significantly. The courts have repeatedly ruled that the statute does not require the Department to determine the reasons why there is a pattern of export prices that differs significantly among purchasers, regions, or time periods,⁷¹ and that "requiring {the Department} to determine the intent of a targeted dumping respondent 'would create a tremendous burden on {the Department} that is not required or suggested by the statute."⁷² The courts also have ruled that the use of the Cohen's *d* coefficient is reasonable because "{t}he fact that the price differences between sales that pass and do not pass the Cohen's *d* test were at times small in absolute terms does not undermine {the Department's} pattern determination,"⁷³ and "{i}mplicit in {the Department}'s approach is that the relative significance of the differences is what matters."⁷⁴

The Department disagrees that its "meaningful difference" test does not examine the question of whether there is "targeted," or masked, or hidden dumping when using the average-to-average method. Section 777A(d)(1)(B)(ii) states that the Department must explain why the average-to-

⁷⁰ *Id.* at 17.

⁷¹ See *Apex*, 144 F.Supp.3d at 1330-1331; *Tri Union*, Slip Op. 16-33 at 80-82.

⁷² See *JBF RAK*, 790 F.3d at 1368 (citing *JBF RAK 2014*, 991 F.Supp.2d at 1355).

⁷³ See *Apex*, 144 F.Supp.3d at 1330-1331 (citing SAA at 843 (in which the Department explained that its analysis has been developed to identify significant price differences depending on what is considered significant for a particular industry or product)).

⁷⁴ *Id.*, 144 F.Supp.3d at 1331; *Tri Union*, Slip Op. 16-33 at 81-82.

average method cannot account for “such differences.” Such differences relate to the prices that differ significantly under section 777A(d)(1)(B)(i), which the SAA states is “where targeted dumping may be occurring”⁷⁵ but which may be occurring elsewhere within the pricing behavior of the respondent in the U.S. market. The SAA also defines “targeted dumping” as a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁷⁶ Thus, the statute has provided a framework where if the Department has identified a pattern of prices that differ significantly (*i.e.*, where targeted dumping may be occurring) and finds that the standard average-to-average method cannot account for the price differences in the respondent’s pricing behavior in the U.S. market, then the Department may use the average-to-transaction method to unmask “targeted dumping.”⁷⁷

The simple comparison of the two calculated results belies the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the average-to-average method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price used for comparison, and the basis for normal value will be constant because the characteristics of the individual U.S. sales⁷⁸ remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

The CIT has affirmed the Department’s explanation of its “meaningful difference” test to determine whether average-to-average comparison results can account for significant price differences three times over the past year, holding that “such an explanation is reasonable and demonstrates why the Department believes average-to-average, which allows for offsets and might mask significant price differences, cannot account for these price differences.”⁷⁹

We disagree with ODS’ assertion that counting sales at prices above the mean as passing the test is contrary to the intent of the targeted dumping analysis to find targeted dumped sales. As noted above, the SAA has recognized “targeted dumping” as a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁸⁰ Thus, not only must there be lower-priced U.S. sales but also higher-priced U.S. sales, for “targeted dumping” to occur. Accordingly, a pattern of prices that differ significantly reasonably includes both lower-priced sales and higher-priced sales since both are required to result in “targeted dumping.” The courts have ruled that all sales are relevant to the

⁷⁵ See SAA at 843.

⁷⁶ *Id.* at 842.

⁷⁷ See *U.S. Steel Corp. v. United States*, 621 F. 3d 1351, 1363 (CAFC 2010).

⁷⁸ These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

⁷⁹ See *Timken Company*, Slip Op. 2016-47 at 24-25; see also *Apex*, 144 F. 3d at 1331-1335.

⁸⁰ See SAA at 842.

Department's differential pricing analysis because higher-priced sales and lower-priced sales should be considered to assess whether price differences are indeed significant,⁸¹ and that "the function of the Cohen's *d* test is to determine if a respondent's export sales prices differ significantly, not to identify dumped sales."⁸²

Accordingly, we have made no changes to the differential pricing analysis from the *Preliminary Results*.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the review and the final weighted-average dumping margins for all of the reviewed companies in the *Federal Register*.

Agree Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

11 October 2016
(Date)

⁸¹ See *Apex*, 144 F.Supp.3d at 1329; *Tri Union*, Slip Op. 16-33 at 85-86 ("Considering all sales allows {the Department} to fully assess the breadth of a respondent's price differences.").

⁸² See *Tri Union*, Slip Op. 16-33 at 86.