KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

NEW YORK, NY
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

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AFFILIATE OFFICES
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

June 23, 2008

DELIVERY BY HAND

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

Attn: Anthony Hill, Michael Rill

Re: Comments on Targeted Dumping Methodology

Dear Mr. Secretary:

On behalf of various domestic producers,[1] these comments respond to the Department's May 9, 2008 Federal Register notice inviting public comment on the targeted dumping methodology for antidumping proceedings.[2]

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

I. OVERVIEW

The Department's new methodology for calculating targeted dumping should not be implemented. The new methodology cannot detect obvious patterns of targeting and thus does not fulfill, but is at odds with, explicit statutory directive. 19 U.S.C. § 1677f-1(d)(B)(i). In addition, the methodology does not rely on an "appropriate statistical technique" to determine whether targeted dumping exists and therefore does not satisfy the explicit regulatory requirement. 19 C.F.R. § 351.414(f). Furthermore, the methodology is complex, redundant and difficult to satisfy, thereby limiting domestic industries' ability to obtain relief from unfair trading practices, in contravention of legislative intent. For all these reasons, the Department should not adopt the new methodology in future investigations.

Instead, the Department should rely on the test developed and first approved and applied in Coated Free Sheet Paper from Korea, 72 Fed. Reg. 60,630 (Oct. 25, 2007) ("CFS Paper Test"), to determine whether targeted dumping is occurring. First, the CFS Paper Test succeeds in detecting obvious patterns of targeting whereas Commerce's proposed test does not. The CFS Paper Test relies on "appropriate statistical techniques" that properly indicate whether targeting is occurring. Moreover, the CFS Paper Test is easy to comprehend, transparent, and fair. In sum, the CFS Paper Test is consistent with the overall statutory objective because it provides a reasonable and fully explained method for establishing whether a pattern of targeting exists, and

(...continued)
[2] See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26,371 (Dep't Commerce May 9, 2008) ("Targeted Dumping Notice"); see also 73 Fed. Reg. 32,557 (Dep't Commerce June 9, 2008) (extending deadline for comments until June 23, 2008).

it provides a reasonable and fully explained method for establishing whether significant price differences exist between targeted and non-targeted sales.

If the Department nevertheless decides to use its proposed methodology, the test must be modified. First, instead of using a standard deviation method (given that this is susceptible to outlier values, e.g., abnormally high or low values), the Department should accept and employ alternatives to standard deviations that are less susceptible to outliers, such as a median absolute deviation (MAD). As part of this calculation, the Department should base the calculation (whether on a standard deviation or other) only on non-targeted sales and then analyze the extent to which alleged targeted sales fall below the deviation of non-targeted sales. Second, the Department should modify the "pattern" test by requiring that 20 percent of the sales (rather than 33 percent) be shown to fall below one standard deviation to qualify as a pattern, following the percentage used in cost investigations. Third, the Department should abandon the "price gap" test as redundant because with the implementation of the suggested modifications to the first stage, the calculation of the standard deviation on non-targeted prices would establish the average distance between these prices, i.e., the spread of the non-targeted prices, so as to make a second calculation of the spread between prices unnecessary. Fourth, the average-to-transaction dumping methodology should be applied to all sales within the targeted group (for example, to all targeted customers or to all sales within a targeted region), not just the specific products (or CONNUMs) that pass the test. Finally, when 20 percent of the U.S. sales quantity is sold to a single targeted customer, region, or time period, the targeting should be found to be "extensive," and the average-to transaction methodology should be applied to all sales.

II. THE DEPARTMENT'S PROPOSED METHODOLOGY DOES NOT FULFILL THE STATUTORY OR REGULATORY REQUIREMENTS FOR DETERMINING WHETHER TARGETING EXISTS

The targeted dumping provision of the statute directs Commerce to consider whether there is "a pattern for comparable merchandise that differs significantly among purchasers, regions or periods of time." 19 U.S.C. § 1677f-1(d)(B)(i). The regulations further clarify that the statute directs Commerce to use "standard and appropriate" statistical techniques to determine whether targeted dumping exists. 19 C.F.R. § 351.414(f). Neither of these provisions are satisfied by the Department's new methodology. Accordingly, the Department should either rely on a different methodology, such as the CFS Paper Test or it should modify its proposed methodology.

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

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

As noted above, when a respondent's sales exhibit a pattern that differs significantly among purchasers, regions or periods of time, the statute provides that the Department should

rely on an alternative method for calculating the dumping margins. In contravention of the statute, Commerce's proposed targeted dumping methodology cannot detect clear patterns of targeting. If a company engages in targeted dumping by making some sales at very low prices while making other sales at higher prices to "mask" its dumping (the classic example of targeting), the Department's application of its proposed methodology makes it difficult (as a mathematical matter) to find targeting. Similarly, in a situation in which a company primarily sells to a single important customer at prices that are below its prices to all other customers, the vast majority of those sales to that targeted customer would not, as a mathematical certainty, "survive" the Department's test. Thus, respondents who engage in the most pernicious type of targeted dumping will be found not to be engaging in targeted dumping under the Department's test. This predetermined outcome shows that the Department's methodology cannot accomplish the purpose of the statute.[6]

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

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

Consider a hypothetical example in which three customers purchase a particular CONNUM of subject merchandise during a specific time period from a foreign company.[7] Table 1 shows the prices, unit sales, and dollar sales to three U.S. purchasers by a foreign supplier. In our example, we assume that the foreign company sets its prices to $10, $5, and, $1 for customers 1, 2, and 3 respectively. Customer 3 is alleged to be targeted. Under the trade laws, Commerce should, at the very least, investigate the business practices of the hypothetical seller. Yet, applying Commerce's new "standard deviation" test results in a finding of no targeted dumping.

[7] Chart 1 depicts this point graphically. See Chart 1 (attached).

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Table 1
Hypothetical Example

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

The hypothetical data yield the following:

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

Applying Commerce's test:

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

Table 2
Commerce Test of Hypothetical

Step	Commerce's Test	Our Example
One	• Notes an allegation of targeting	• Customer 3 is alleged to be a target.
Two	• Checks to see that there are sales of the same (identical) CONNUM goods to both the alleged targeted and non-targeted customers.	• Customers 1 and 2 have also bought goods of CONNUM 1, so there are matching sales in the CONNUM to non-targeted customers.
Three	• Finds an volume-weighted average price for each customer in each CONNUM	• Average prices are presented in the Average Price column in Table 1.[9]
Four	• Calculates a volume-weighted mean price for all sales of goods within each CONNUM.	• The weighted mean price is $1.70.
Five	• Calculates a volume-weighted standard deviation for all sales of goods within each CONNUM.	• The weighted standard deviation is $1.93.
Six	• Labels all sales with prices lower one standard deviation below the mean as sales exhibiting a potential pattern of targeting.	• There are no sales with prices lower than one standard deviation below the mean, since there are no sales at prices less than $1.70 -$1.93= -$ 0.23.
Seven	• Conclusion	• No pattern, therefore, no targeted dumping

[9] In this example, the weighted price received by each customer equals the unweighted price. When units sold vary significantly from purchase to purchase, however, weighting may significantly change the results of Commerce's test.

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

In the Nails case, in response to petitioners' position that the Department's proposed methodology cannot detect obvious targeting, the Department's response was that the petitioners' analysis was "predicated on a finding of targeted dumping applying the P/2 test." Nails Targeted Dumping Analysis at 22 (Comment 7).[10] The Department's objections to the petitioners' point did not properly address the issue. In fact, the Department did not address the hypothetical situation discussed in this section; this hypothetical is based on an analysis of the data and is not based on a finding of targeting as defined by the P/2 test. Stated differently, the example given above is based on a review of hypothetical data and the application of the Department's methodology to that data. A review of the data show that targeting as defined by the statute is occurring – that is, the prices differ significantly by customer. Yet, inputting the data into the Department's formula results in a finding that targeting is not occurring.

As further proof that this example is not simply a finding of targeted dumping applying the P/2 test, if the standard deviation were calculated using non-targeted sales as an alternative methodology, this dataset would also show that targeting is occurring, as shown in the following example.

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

Table 3

Hypothetical Example

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

The hypothetical data yield the following:

Weighted mean Price for the Non-Targeted Sales	$6.15
Weighted Standard Deviation For the Non-Targeted Sales	$2.11
Threshold for Potentially Targeted Prices	$4.05

In this example customer three is found to be targeted because his price, $1.00 per unit, is below the threshold, $4.05 per unit.

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

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

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

Table 4
Hypothetical Example

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

This hypothetical data yields:

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

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

Table 5
Hypothetical Example

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

This hypothetical data yields:

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

As this comparison shows, even when a respondent is selling to one customer at a price that is significantly below the prices to two other customers, the use of the Department's proposed methodology allows a respondent to avoid a finding of targeting simply by increasing its price to one customer. In effect, the respondent is increasing the degree of targeting but the

operation of the standard deviation test results in a finding of no targeting. Again, these clearly aberrational results make clear that the Department's proposed methodology is not in accordance with the statute.

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

The Department's proposed methodology is also invalid because before the Department begins any analysis of targeting, that is, analyzing whether a pattern exists or whether there is a significant difference in price, the Department's use of a standard deviation cut-off point results in an automatic finding that only a small portion of outlier sales could ever be found to be targeted. In other words, at the very outset, the Department's methodology automatically eliminates the majority of sales from consideration of a targeting analysis.[11] By using this particular cut-off point, the Department appears to be presuming that most U.S. sales will be distributed close to the mean and, if targeting exists, then it will manifest itself in a small, select group of "outlier" sales. This unrebuttable presumption is, however, not in accordance with the statutory provision on targeting. Neither the statute nor the legislative history presumes that "targeted" sales will be only to a small group of outlier sales.

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

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

B. The Use Of A Standard Deviation Test To Measure Targeting Is Not an "Appropriate" Statistical Technique to Determine whether Targeting is Occurring

1. A Standard Deviation Test Cannot Measure Targeting

As noted earlier, the regulations direct Commerce to use "standard and appropriate" statistical techniques to determine whether targeted dumping exists. 19 C.F.R. § 351.414(f). As explained in detailed below, while a standard deviation test is, in general, a "standard" statistical technique that is appropriately used when making statistical inferences about the data or when measuring the spread or variance of data, a standard deviation is not an "appropriate" statistical technique to determine whether targeted dumping exists.

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

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

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

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

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

Nails Targeted Dumping Analysis at 16 (Comment 3).

The Department further explained that:

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

Id.

The Department's explanation that the test has been used as a relative measure for determining whether prices are "low"[12] has no statistical or economic validity or meaning. It is apparent that the Department wants to conclude that one standard deviation enables it to *infer* that some proportion of prices is below the mean price less one standard deviation threshold. However, there is no known statistical science to support the Department's notion. In fact, the well-known Tchebysheff's Inequality establishes that little or nothing can be inferred about the proportion of a distribution that falls outside or inside of the one-standard deviation threshold for

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[12] Throughout Commerce's memorandum on Nails, it places quotes around the word "low" as if to suggest that the word "low" appears in the statute and regulations. The word "low" does not appear at any point in the statute or regulations and therefore at the very outset, the Department's explanation of its methodology is flawed because the sole objective of the Department is to determine whether price "differs significantly."

non-normally distributed data.[13] As such, a standard deviation is simply a descriptive measure of a population;[14] however, the standard deviation measure does not provide any qualitative measure of whether certain prices should be considered "low" relative to any other price. Indeed, as discussed in detail above, the definition of "low" given by the standard deviation test could be altered if the respondent makes a few high or low priced sales. Thus, while the standard deviation evaluates the dispersion of the data, it provides no guidance or insight into whether prices should be considered relatively "low." Thus a standard deviation test is not an "appropriate statistical technique" for use as a means to determining whether targeting exists and thus this test is not in compliance with the regulatory requirements.

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

While, as noted, a standard deviation test is a "standard" statistical technique, the manner in which the Department has applied this technique is particularly inappropriate and thus contrary to the regulations because the Department has combined both targeted and non-targeted prices to create an artificially "low" mean price. As a result, the test is performing an incorrect

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[13] This theorem states that: for a random variable Y with a finite mean, μ, and a finite standard deviation, σ, for any $k>0$, the probability , P(*), of an observation being k standard deviations from the mean is:

$P(|Y-\mu|<\sigma k) \geq 1-(1/k^2)$ or $P(|Y-\mu|\geq\sigma k) \leq 1/k^2$ for all $k>0$. Wackerly, Dennis D., William Mendenhall III, and Richard L. Sheaffer, Mathematical Statistics with Applications, Fifth Edition. Belmont, California, Wadsworth Publishing Company, 1996. 174.

[14] Stated another way, the standard deviation of a list of prices is a calculated measure of how spread out prices are from the mean. When prices are close to the mean, there will be a small deviation; when prices are far from the mean, there will be a large deviation. See Chart 3 (attached). Yet, the spread of the distribution of prices does not, as a statistical measure, determine which prices are "low" or which prices are "high."

comparison. Instead of comparing the prices paid by a targeted customer to the average price paid by non-targeted customers, the Department's test compares the average price paid by the targeted customer to the average price paid by all customers, both targeted and non-targeted. The Department's average is therefore a biased estimator because this average includes the low prices paid by the targeted customer. In statistical terms, bias is a "systematic tendency for an estimate to be too high or too low."[15] In this case, the calculated average mean price is too low because it includes the targeted prices. Moreover, the statistical bias inherent in the Department's methodology becomes more pronounced as the percent of targeted sales increases. For example, the targeted sales have a greater role in the determination of the overall mean price (and would exhibit a smaller deviation from the overall mean) when they account for 60 percent of a respondent's sales than when they account for 20 percent of the respondent's overall sales. The effect of this statistical bias is that the higher the percent of sales that are targeted the more closely the targeted sales will approximate the overall mean price, and the less likely the Department's method would reveal targeting. Again, as this demonstrates, the Department's method for calculating a standard deviation is particularly not "appropriate" in this context and therefore is not in accordance with the goal of the regulations.

In the Nails case, the Department recognized and corrected a similar flaw with respect to the pattern test methodology. Specifically, the Department noted that it revised the methodology to aggregate the pattern test results on the basis of volume, rather than value, across different

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[15] D. Kaye and D. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* (2000) at 160.

products. As the Department stated: "A volume-based aggregation method is free from being skewed by potentially dumped, or targeted dumped, sales value and, therefore, provides an appropriate measure. Nails Targeted Dumping Analysis, at 19 (Comment 5). In this case too, including the targeted sales in the standard deviation calculation skews the calculation and therefore is not a statistically valid measure.

To correct this obvious flaw in the Department's methodology, the Department should at a minimum be comparing the average price of non-targeted sales to the average prices of targeted sales to determine whether prices differ significantly. Yet, by including targeted sales within the average price comparison, the Department is distorting or biasing the comparison to a finding that targeting does not exist.

As explained earlier, the CFS Paper Test avoids this problem of bias and allows the Department to make a proper comparison of the prices. At a minimum, if the Department decides to continue to use this methodology, it should be modified so that the standard deviation is calculated using only non-targeted sales and then the targeted sales should then be examined to see if they are one standard deviation below the mean of non-targeted sales.

C. The Other Components of the Test, the 33% and 5% Tests within the Targeted Dumping Analysis, Also Rely on Unfounded Assumptions that Are at Odds with the Statute and the Regulations

The use of the standard deviation test alone is sufficient to reject the Department's new methodology. Until another starting point is found, it is difficult to comment meaningfully on

the other components of the test because, without a proper starting point, it is impossible to determine whether other components of the test can adequately measure targeting.

Regardless of whether another starting point is used, however, the other parts of the test are also flawed. In particular, the Department relies on unexplained assumptions and ratios (i.e., the 33 percent threshold and 5 percent threshold) to measure the pattern of sales and price differences, without providing any statutory or rational basis for these thresholds. As described below, these other two portions of the test should be modified.

1. The "33" Percent Test is Unexplained and Unreasonable

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

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

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

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

2. The Test for "Significant" Price Differences Should be Abandoned

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

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

As an example of the problematic nature of the price gap test, compare two hypothetical price patterns, both of which are reflective of targeted dumping. In both hypotheticals, the targeted customer pays a price of $1. In the first hypothetical, there are two non-targeted customers who pay prices of $7 and $11, respectively. Because the price gap between the targeted customer and the next higher non-targeted customer is $6, and the price gap between the non-targeted customers is $4, in this situation the price gap test would confirm the presence of targeting. In the very similar situation in which the non-targeted customers pay prices of $6 and $12, however, the price gap test would find targeting did not exist. As this example demonstrates, the Department's price gap test is unnecessary and rejects obvious examples of targeting. As with the standard deviation test, under the price-gap test, price differences among non-targeted sales thus affect a finding of whether targeting exists.

Another problem with the price gap test occurs if there is only one non-targeted price. In that case, since no "price gap" exists for non-targeted sales, the Department's test also rejects a

finding of targeting. Again, this arbitrary result further confirms that the Department's test is unusable and unlawful.

Additionally, the "price gap" test as conducted by the Department contains a significant clerical error. In the final determination of sales at less than fair value in Certain Steel Nails from the PRC, the Department defined the weighted average price gap for non-targeted sales ("WEIGHTED PRICE GAP (H=E x **G**)") as the product of the sales volume of the two observations generating the gap, by weight ("SALES VOLUME WEIGHT (E=B+D)") multiplied by the cumulative price gap ("CUMULATIVE PRICE GAP **G**=Sum[F]") (emphasis added on the variable in error, "G"). That error causes a double cumulation of the gap, since the program next cumulates that result ("WEIGHTED PRICE GAP (H=E x G)") in creating ("CUMULATIVE WEIGHTED PRICE GAP (I=Sum[H])"). As a result, the average price gap for each control number being tested expands sequentially, rather than being weight-averaged. The Department's formula also prevents gaps of zero width from reducing the average gap, since in the cumulative sum of gaps a zero gap is ignored. By definition an average should expand with the addition of larger values and reduce with the addition of smaller values. Due to all of these errors and inherent flaws, the Department's test cannot properly calculate the average price gap.

Apart from these problems, the most important flaw with this portion of the test is that it is redundant and unnecessary. In particular, if the Department decides to go forward with the use

[18] This comparison is only possible when a dataset has information on control number, customer code, and date for each purchase.

of a standard deviation test, this test (although flawed in numerous respects as discussed earlier) has already established to the Department's apparent satisfaction that significant price differences exist between the targeted and non-targeted sales. Thus, these sales have already satisfied the statutory criteria that significant price differences exist. The final 5% gap test is an extra-statutory test that appears to have been designed as simply one more method for limiting the number of sales that would be found to be targeted. Given that this portion of the test has no statutory basis, it should be abandoned.

D. The Targeted Dumping Analysis Is Complicated and Redundant

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

E. The Department Should Continue To Use the CFS Paper Test

In stark contrast to the statistically invalid and unsound methodology proposed by the Department, the CFS Paper Test is a simple, transparent, and effective test that measures whether a pattern exists and whether price differences are significant, and thereby satisfies the statutory objectives. Furthermore, rather than examining only a narrow portion of the data, the CFS Paper Test examines the entire range of pricing data and its results are based on an analysis of the complete population.

The CFS Paper Test is done in three stages. In the first stage, a simple unit-weighted average price is calculated across customers, time periods, or regions. Customers with an unit

weighted average price above the group average are identified as "potentially non-targeted." Similarly, customers (time periods or regions) with an average price below the group average are identified as "potentially targeted." In the second stage, the prices received by each potentially targeted customer are compared to the average prices received by the other customers, holding control number and time period constant.[18] Each transaction in which a potentially targeted customer (time periods or regions) receives significantly less, i.e., more than 2%, than the average price charged to the other customers (time periods or regions) is tallied. This stage establishes if targeting is significant. In the third stage, if more than 50% of these comparisons, involving a particular potentially targeted customer (time period or region) show that that customer (time period or region) paid significantly less than the average price paid by the other customers (time periods or regions),[19] that customer (time period or region) is labeled as targeted. This stage establishes if the significant targeting found in the second stage constitutes a pattern.

The CFS Paper Test does not exhibit the weaknesses that Commerce's test has been shown to suffer from. The CFS Paper Test is superior to Commerce's test for several reasons: (1) the CFS Paper Test is valid for any distribution, (2) the CFS Paper Test satisfies the criterion that it can detect obvious targeting, (3) the CFS Paper Test controls for time period in its comparisons, and (4) in contrast to Commerce's test, the CFS Paper Test is straightforward and transparent. These advantages argue for the use of the CFS Paper Test over Commerce's test in detecting targeted dumping.

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[19] After net price has been calculated.

F. If the Department Continues To Use its New Methodology, Significant Modifications Should Be Implemented

As indicated above, a standard deviation measure is not an appropriate tool for measuring whether targeting is occurring. If the Department nevertheless decides that it will continue to use its proposed methodology, at the very minimum, the test should be modified.

First, the calculation of a standard deviation should not include the targeted sales because this results in a bias to the test. Instead of using a standard deviation method (given that this is susceptible to outlier values, e.g., abnormally high or low values), the Department should accept and employ alternatives to standard deviations that are less susceptible to outliers, such as mean a median absolute deviation (MAD). As part of this calculation, the Department should base the calculation (whether on a standard deviation or other) only on non-targeted sales and then analyze the extent to which targeted sales fall below one standard deviation (or other measure) away from the mean of non-targeted sales.

Second, the Department should use a 20% test (rather than a 33% test) to determine whether there is a pattern of sales that fall below the standard deviation. In the first instance, the Department has failed to provide any rational basis for using 33% as the cut-off for determining whether a pattern exists. If the Department continues to use a standard deviation methodology, then a 20% test should be used because this is the same standard relied upon in a cost investigation.

Third, the Department should abandon the "price gap" test as redundant because the use of the standard deviation calculation already establishes that significant price differences exist between targeted and non-targeted sales. [20]

Fourth, the average-to-transaction dumping methodology should be applied to all sales within the targeted group (for example, to all targeted customers or to all sales within a targeted region), not just those sales that pass the test, because the purpose of the test is to establish whether targeting exists. Once it has been found to exist, then all sales within the targeted group should be included with the targeted dumping calculation methodology.

Finally, when 20 percent of the U.S. sales quantity is sold to a targeted customer, region, or time period, the targeting should be found to be "extensive," and the average-to transaction methodology should be applied to all sales.

III. THE DEPARTMENT SHOULD EXAMINE BOTH IDENTICAL AND SIMILAR MERCHANDISE IN ITS TARGETED DUMPING ANALYSIS

In its notice, the Department noted: "All price comparisons would be done on the basis of identical merchandise." Targeted Dumping Notice, 73 Fed. Reg. at 26,372.

Regardless of the targeted dumping methodology ultimately chosen by the Department, it should not limit its targeted dumping analysis to sales with identical CONNUMs only, but should also include similar merchandise. As the Department has long recognized, when identical products are not sold in the U.S. and exporting country, Commerce will compare the goods sold in the United States to the goods sold in the exporting country that are most similar in physical

[20] Thus use of the "price gap" test is also especially problematic and erroneous in light of the number of problems and errors involved with its application, as highlighted earlier.

characteristics. Where similar products are compared, a "difference in merchandise adjustment" (DIFMER) must be made to normal value to account for the differences in the physical characteristics of the merchandise. See Dept of Commerce, Antidumping Manual Chapter 8 at 50.

Comparatively, a respondent may not sell identical merchandise to every customer, to every region, or throughout the entire period of investigation in the United States, but that is not a valid reason for finding that targeting is not occurring. A respondent might be targeting a particular customer by selling it a low-priced product that it does not sell to any other customer. In that instance, the only way to determine whether targeting is occurring would be to compare these sales to merchandise that is similar but not identical. Commerce's proposal to limit its analysis to identical merchandise would prevent such a comparison. In fact, if targeting would only be found if sales of identical merchandise were involved, every respondent would have an obvious and easy method to avoid a finding of targeting.

Accordingly, the Department should conduct its targeted dumping analysis on the basis of both identical and similar product comparisons by employing a DIFMER adjustment that accounts for physical differences in merchandise.

If the Department intends, however, to limit its targeted dumping analysis to identical sales only, if these sales indicate that targeting is occurring, then all U.S. sales to that customer, or region, or during that time period (whether identical or not to other U.S. sales) should be considered to be targeted. Moreover, as noted earlier, when 20 percent of the U.S. sales quantity is sold to a targeted customer, region, or time period, the targeting should be found to be "extensive," and the average-to transaction methodology should be applied to all sales.

IV. APPROPRIATE CRITERIA AND STANDARDS FOR DEFINING REGIONS AND TIME PERIOD

The Department also requested comment on the extent to which the definitions for regions and time periods in a targeted dumping allegation should be reflective of the industry and commercial market in the United States. Targeted Dumping Notice, 73 Fed. Reg. 26,372.

The Department should not establish any requirement that allegations of targeted dumping reflect industry or commercial definitions of regions or time periods for several reasons. First, the language of the statute simply requires that there be a pattern of targeted prices and does not set standards on how the patterns must be defined or even that these patterns must conform to industry definitions.

Second, targeted dumping by region or by time period can take almost any form and is not limited to standard industry definitions. The regional definitions published by the U.S. Census Bureau (http://www.census.gov/geo/www/us_regdiv.pdf) divide the United States into four regions (Northeast, Midwest, South and West) and the Census Bureau further breaks these regions into nine divisions. As a general guideline only, these definitions could be used as a starting point for the Department's analysis. Again, however, no specific requirements should be established. In particular, these Census definitions may not reflect the targeting that is occurring in actual dumping investigations. For example, a respondent may simply be targeting customers that are located in close proximity to one U.S. port and this region may constitute only a portion of a Census region or division or only a portion of a region as commonly defined by the industry. Moreover, similar problems exist with respect to attempting to adopt commonly accepted standards or industry definitions for time periods. For example, it may be a common practice to

use calendar quarterly or monthly data for targeted dumping allegations by time period, but the actual targeting may occur as part of a seasonal period, cyclical period, or period of excess capacity that occurs over several calendar quarters.

In sum, the Department's practice should conform to the language of the statute, that is, that there should be a pattern of targeted dumping by region or by time period, and the Department should not adopt any definitions or standards for defining these terms.

V. MULTIPLE ALLEGATIONS OF TARGETED DUMPING BY ONE RESPONDENT

The Department also asked for comment on how it should conduct its analysis in cases that involve multiple allegations (such as targeting to a customer and also targeting to a region) with respect to one respondent. Specifically, the Department asked if it should exclude sales to an allegedly targeted region when calculating non-targeted customer weighted-average sales prices in the second stage (the gap test) of its analysis. Id.

In conducting its targeted dumping analysis the Department should recognize the fact that a respondent may be engaging in several forms of targeted dumping simultaneously, that is, the respondent may be targeting a certain customer in one region and may be targeting all or most of the customers in another region. Thus, in this situation, there is targeting by customer and by region and the targeting practices are cumulative. Given that the targeted dumping is cumulative, the second stage of the Department's analysis should also be cumulative and should include both types of targeting in its analysis. Thus, for example, the Department should exclude sales in an allegedly targeted region from any calculation of non-targeted customer weighted-average sales in the second stage of its analysis.

VI. THE DEPARTMENT SHOULD NOT ESTABLISH A MINIMUM THRESHOLD FOR ACCEPTING AN ALLEGATION OF TARGETED DUMPING

The Department asks if it should establish a type of *de minimis* threshold to the sales on which an allegation is based, either in terms of quantity of control numbers or share of sales covered. Id.

The Department should not establish minimum thresholds for accepting allegations of targeting dumping. The statute simply states that there must be a pattern of targeting dumping; it does not require the Department to establish standards for accepting allegations that targeted dumping may be occurring. The statute does not impose any burden on the petitioners to make such an allegation and in fact, none should be imposed.

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

If the Department is determined to set some form of minimum threshold, this threshold should be similar to its standard for initiation of a sales below cost investigation, that is, it should be sufficient for the petitioners merely to provide a reasonable indication that targeted dumping is occurring, and identification of even one targeted sale should satisfy that standard.

Further, the Department should recognize that an allegation of targeting dumping is just an allegation that should be investigated, and that the Department's analysis will determine whether this allegation passes the many and significant hurdles the Department has already established to sustain a finding of targeted dumping.

VII. THE DEPARTMENT SHOULD APPLY THE ALTERNATIVE CALCULATION METHODOLOGY TO ALL SALES TO THE TARGET

The Department requested comments on whether it should apply the alternative methodology (average-to-transaction comparisons) to all sales to the target even if some sales do not survive the targeted dumping test. Id.

The Department should apply the alternative methodology to all of the sales to the target. Once a customer or region has been identified as being targeted by a respondent and the Department's analysis confirms that this customer or region is subject to targeted dumping, the Department should consider that all of the sales to that target are subject to the same pricing practices and are, therefore, targeted sales.

The application of the alternative methodology to all sales to a target is especially warranted as a result of other limitations in the Department's analysis. For example, the Department states that it limits its targeted dumping price comparisons only to sales of identical merchandise. Thus, the Department automatically presumes that targeted dumping cannot occur on all sales where there are only similar product matches, even when those similar sales may constitute the overwhelming majority of sales to a target. Thus, in some cases the Department has already severely limited the sales that are subject to a targeted dumping analysis and application of the alternative methodology. Moreover, limitation of the targeted dumping

analysis only to identical product comparisons has provided a roadmap to potential respondents, that is, minor changes or differences to the products sold to targeted customers or regions prevents an allegation or examination of targeted dumping.

As a general principle, the Department should not endeavor to limit application of the average-to-transaction methodology as much as it possibly can. The statue does not contemplate any such limitations; it envisions the application of the average-to-transaction methodology to all sales whenever there is a pattern of significant price differences. 19 U.S.C. § 1677f-1(d)(1)(B). Indeed, any limitation on application of the average-to-transaction methodology only serves to frustrate the purpose of the statute, which is to avoid the problem of masked dumping margins. [21]

Finally, the current limitation on application of the average-to-transaction methodology on a product-specific basis (i.e., as applied only to specific CONNUMUs) is fundamentally in violation of the principles governing the analysis of targeted dumping. Rather than providing relief from targeting on the basis of the pattern examined, i.e., targeting by purchaser, region or period of time,[22] the partial relief applied by the Department provides relief only on specific

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[21] See also Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Doc. 103-316, Vol. 1 (1994) at 842-843.

[22] The regulations define the basis of targeting . . .

> As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly **among purchasers, regions, or periods of time**;

See 19 C.F.R. §351.414(f)(1)(i), emphasis added.

products. It violates the spirit and letter of the law to provide relief on a basis not provided for in the statutory and regulatory definition of targeting itself.

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

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VIII. CONCLUSION

For the foregoing reasons, we respectfully request that the Department decide not to implement its proposed targeted dumping methodology. We urge the Department to continue to use the CFS Paper Test. At a minimum, if the Department decides to rely on its proposed methodology, significant modifications must be implemented.

Respectfully submitted,

DAVID A. HARTQUIST
KELLEY DRYE & WARREN LLP

ATTACHMENTS

Chart 1
The Department's Standard Deviation Test Eliminates Obviously Targeted Sales from Consideration

- A few low prices can prevent a finding of targeting

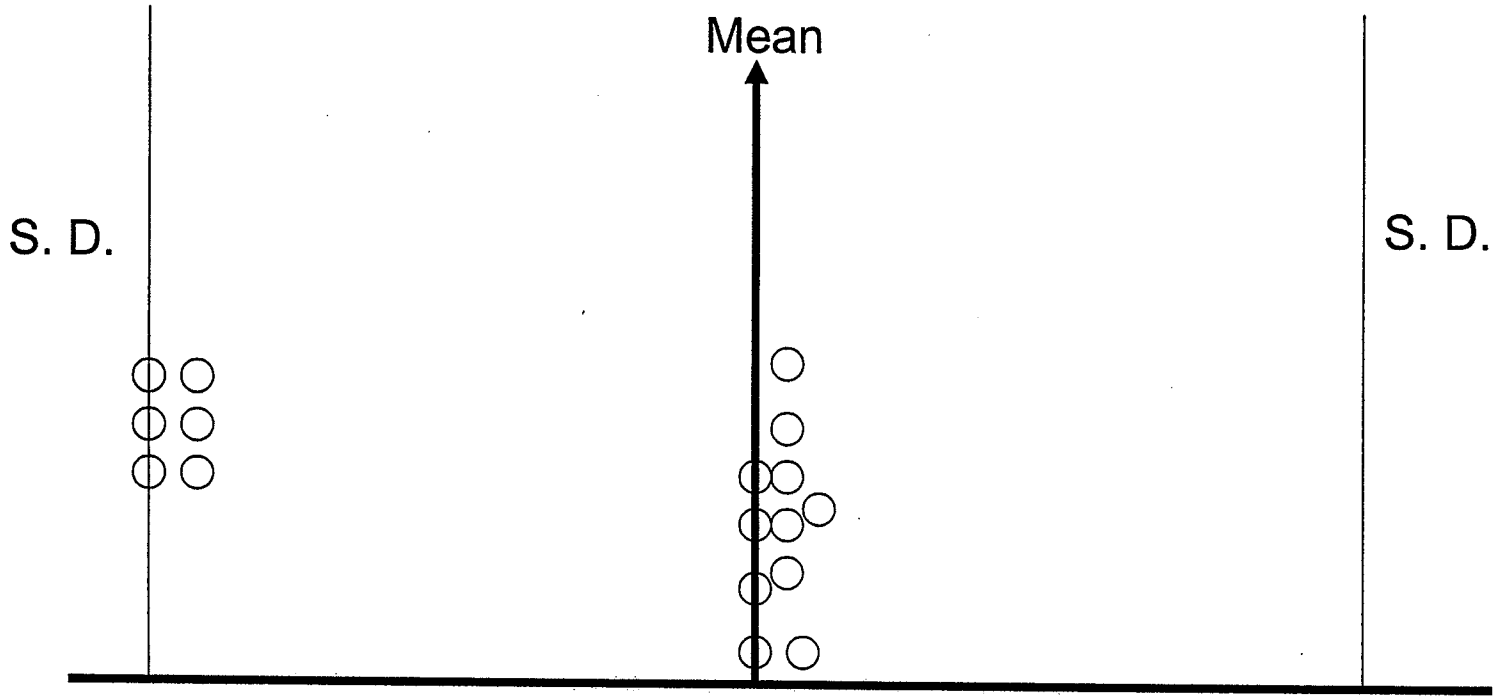


Chart 2
The Department's Standard Deviation Test Allows Even A Few High Priced Sales To Distort The Results

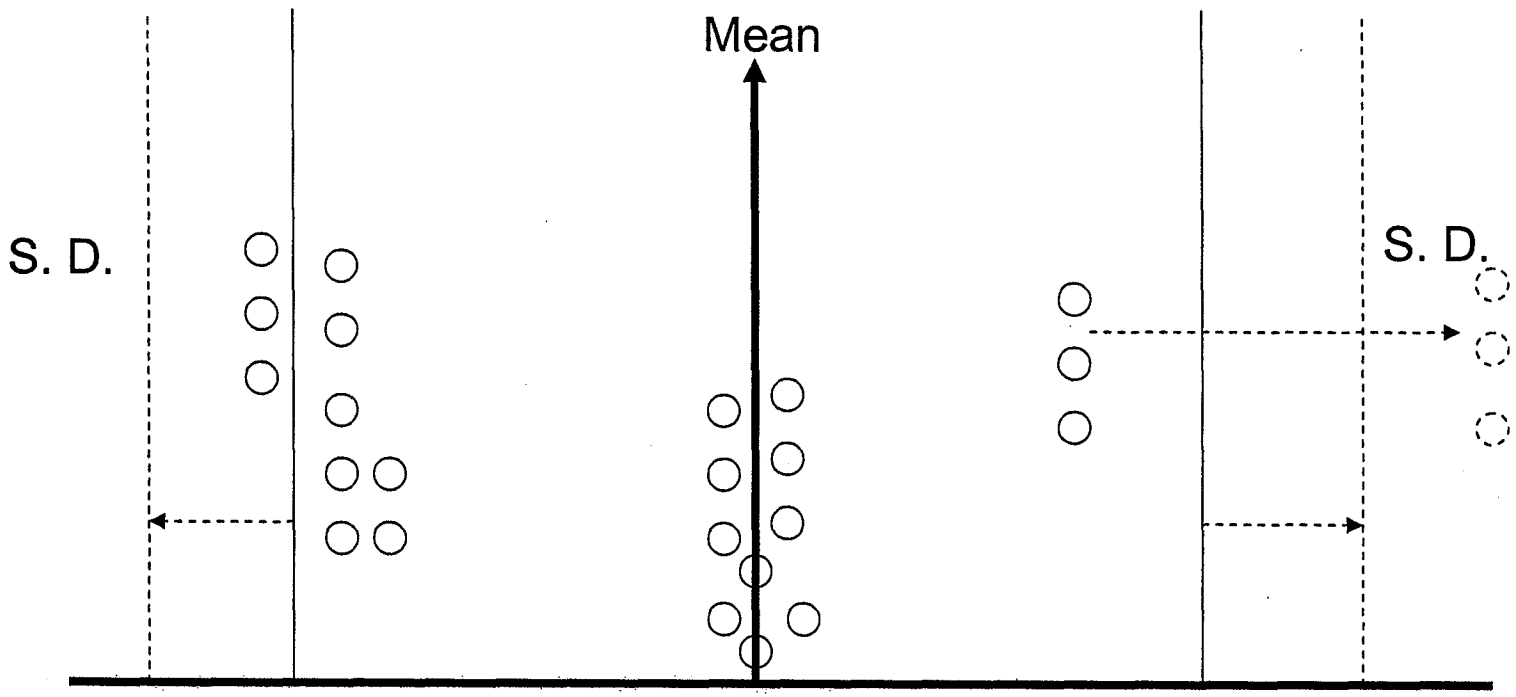
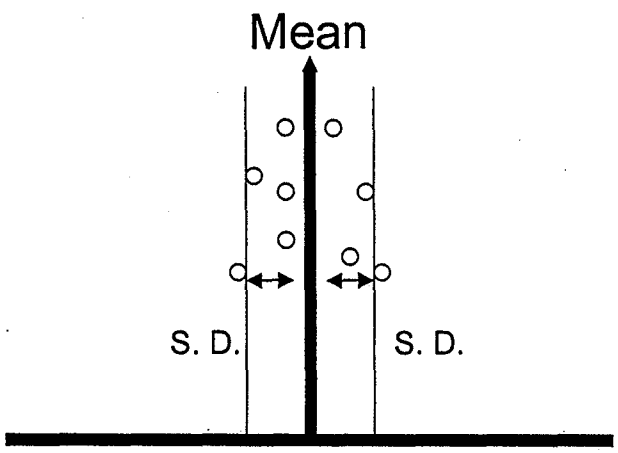
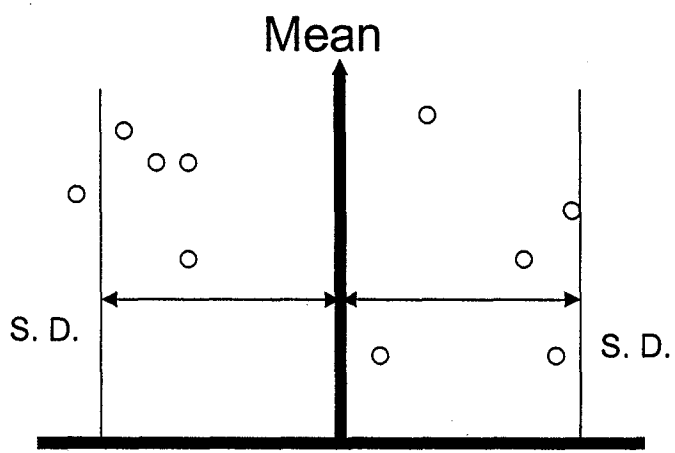


Chart 3
The Department's Test Is Not An "Appropriate" Statistical Technique for Measuring Targeting

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



Prices close to the mean =
Small standard deviation



Prices far from the mean =
Large standard deviation