MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations


I. SUMMARY

We have analyzed the case and rebuttal briefs submitted by interested parties. After careful analysis, we have not made changes to the Preliminary Results,1 as discussed below. We recommend that you approve the positions described in the “Discussion of Interested Party Comments” section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

Comment 1: Whether “Bona Fides” Testing is Applicable Only to New Shipper Reviews, and Not Administrative Reviews
Comment 2: Whether Record Evidence Confirms that NLMK’s Sale Was Not a Bona Fide Sale
Comment 3: Whether Rescinding this Administrative Review is Appropriate

II. BACKGROUND

On February 19, 2019, the Department of Commerce (Commerce) published the preliminary results of the administrative review of the antidumping duty (AD) order on certain hot-rolled flat-rolled carbon-quality steel products (hot-rolled steel) from the Russian Federation (Russia) for the period December 1, 2016 through November 30, 2017. The review covers one producer/exporter of the subject merchandise: Novolipetsk Steel (NLMK).

On March 25, 2019, NLMK and the Ministry of Economic Development of the Russian Federation (the MEDRF) timely submitted case briefs commenting on the Preliminary Results. Nucor Corporation (i.e., Nucor) timely filed its rebuttal brief on April 1, 2019. On June 27, 2019, we held a public hearing at the request of NLMK.

Based upon our analysis of the comments received, we continue to find that NLMK had no bona fide U.S. sales during the POR. If our recommendation is approved, consistent with our finding that NLMK had no bona fide U.S. sales during the POR, we will rescind the administrative review.

Commerce has conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

III. SCOPE OF THE ORDER

For the purposes of this antidumping duty order, “hot-rolled steel” means certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness.

Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this antidumping duty order.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor

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lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products subject to the scope of this order, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: 1) iron predominates, by weight, over each of the other contained elements; 2) the carbon content is 2 percent or less, by weight; and 3) none of the elements listed below exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.012 percent of boron, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including e.g., ASTM specifications A543, A387, A514, A517, and A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silica-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

<table>
<thead>
<tr>
<th>C</th>
<th>Mn</th>
<th>P</th>
<th>S</th>
<th>Si</th>
<th>Cr</th>
<th>Cu</th>
<th>Ni</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.10 - 0.14% Max</td>
<td>0.90% Max</td>
<td>0.025% Max</td>
<td>0.005% Max</td>
<td>0.30 - 0.50% Max</td>
<td>0.50 - 0.70% Max</td>
<td>0.20 - 0.40% Max</td>
<td>0.20% Max</td>
</tr>
</tbody>
</table>

Width = 44.80 inches maximum; Thickness = 0.063 - 0.198 inches;

Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000- 88,000 psi.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:
<table>
<thead>
<tr>
<th>C</th>
<th>Mn</th>
<th>P</th>
<th>S</th>
<th>Si</th>
<th>Cr</th>
<th>Cu</th>
<th>Ni</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.10 - 0.16%</td>
<td>0.70% - 0.90%</td>
<td>0.025% Max</td>
<td>0.006% Max</td>
<td>0.30 - 0.50%</td>
<td>0.50 - 0.70%</td>
<td>0.25% Max</td>
<td>0.20% Max</td>
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<tr>
<td>Mo</td>
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<td>0.21% Max</td>
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Width = 44.80 inches maximum; Thickness = 0.350 inches maximum;
Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

<table>
<thead>
<tr>
<th>C</th>
<th>Mn</th>
<th>P</th>
<th>S</th>
<th>Si</th>
<th>Cr</th>
<th>Cu</th>
<th>Ni</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.10 - 0.14%</td>
<td>1.30 - 1.80%</td>
<td>0.025% Max</td>
<td>0.005% Max</td>
<td>0.30 - 0.50%</td>
<td>0.50 - 0.70%</td>
<td>0.20 - 0.70%</td>
<td>0.20% Max</td>
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<tr>
<td>V(wt.)</td>
<td>Cb</td>
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<tr>
<td>0.10% Max</td>
<td>0.08% Max</td>
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</table>

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum;
Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

<table>
<thead>
<tr>
<th>C</th>
<th>Mn</th>
<th>P</th>
<th>S</th>
<th>Si</th>
<th>Cr</th>
<th>Cu</th>
<th>Ni</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.15% Max</td>
<td>1.40% Max</td>
<td>0.025% Max</td>
<td>0.010% Max</td>
<td>0.50% Max</td>
<td>1.00% Max</td>
<td>0.50% Max</td>
<td>.20% Max</td>
</tr>
<tr>
<td>Nb</td>
<td>Ca</td>
<td>Al</td>
<td></td>
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</tr>
<tr>
<td>0.005% Max</td>
<td>Treated</td>
<td>0.01 - 0.07%</td>
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Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm² and 640 N/mm² and an elongation percentage ≥ 26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm² and 690 N/mm² and an elongation percentage ≥ 25 percent for thicknesses of 2mm and above.
Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium.

Grade ASTM A570-50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inches nominal), mill edge and skin passed, with a minimum copper content of 0.20 percent.

The covered merchandise is classified in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00. Certain hot-rolled flat-rolled carbon-quality steel covered include: vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.01.80. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the covered merchandise is dispositive.

IV. DISCUSSION OF THE ISSUES

Comment 1: Whether “Bona Fides” Testing is Applicable Only to New Shipper Reviews, and Not Administrative Reviews

NLMK’s Comments:

• In 2015, Congress amended section 751(a)(2) of the Act to clarify when and where Commerce should conduct a bona fide sale analysis, namely in new shipper reviews, not administrative reviews.6

• The purpose of the bona fide sale analysis is to identify situations where a new participant enters into a scheme to make a few sales showing little/no dumping, which is not at issue because (1) NLMK has a long-history of selling hot-rolled steel in the United States, 350 F. Supp. 2d 1148, 1152 (CIT 2004) (Globe Metallurgical)).

6 See NLMK’s Case Brief at 4-7 (citing the Trade Facilitation and Trade Enforcement Act of 2015, sections 751(a), (a)(1), (a)(2), and (a)(2)(b) of the Act (2016) (TFTEA); TFTEA, H.R. Rep. No. 114-114, pt. 1, at 89; Antidumping Duties; Countervailing Duties: Final Rule, 63 FR 27295 (May 19, 2017), at 27320; and Globe Metallurgical, Inc. v. United States, 350 F. Supp. 2d 1148, 1152 (CIT 2004) (Globe Metallurgical)).
States, (2) the importer of record to the U.S. is an affiliated trading company, and (3) a single sale is not a sufficient basis to conduct a *bona fide* sale analysis in an AR.7

**MEDRF’s Case Brief:**
- MEDRF did not comment on this issue.

**Nucor’s Rebuttal Brief:**
- Although *bona fide* sales are typically an issue in new shipper reviews, Commerce uses the same standards in administrative reviews to determine whether the sales under review are atypical or otherwise unrepresentative of normal business practices.8
- In the TFTEA, Congress intended to remedy abuses in new shipper reviews. Nowhere did Congress state that it aimed to change the *bona fide* sales methodology applied in administrative reviews. Further, Commerce has a long-standing history of conducting *bona fides* analyses in administrative reviews prior to 2015.9
- Every company examined in an administrative review was a “pre-existing” producer/exporter. As a result, NLMK’s case is the same as all other administrative reviews where Commerce conducts *bona fide* sale analyses. Further, contrary to its


claim, NLMK has a long history of dumping in the U.S., which justifies Commerce’s concerns about its sole U.S. sale.10

- NLMK’s other arguments concerning the applicability of the *bona fides* analysis in administrative reviews have been examined in past cases and approved by courts.11

**Commerce’s Position:**

We disagree with NLMK that the *bona fides* sales analysis is only applicable to new shipper reviews. Commerce has a long-standing practice of conducting *bona fides* analyses in administrative reviews if the circumstances warrant such an analysis.12 Further, the Court of International Trade (CIT) has held that Commerce has the authority to conduct *bona fides* analyses in the context of an administrative review.13

It is true, as NLMK notes, that Congress amended the law in 2016 and added section 751(a)(2)(B)(iv) of the Act. This section requires Commerce to base dumping margins in new shipper reviews on *bona fide* sales. Prior to this statutory amendment, the new shipper *bona fides* analysis was a matter of Commerce practice. There is no analogous statutory provision requiring Commerce to base dumping margins in administrative reviews on *bona fide* sales. This means that the *bona fide* analysis in administrative reviews remains a matter of Commerce practice. Therefore, contrary to NLMK’s argument, we find that Congress’s silence regarding *bona fide* sales in administrative reviews does not mean that Commerce is not permitted to examine this issue in administrative reviews. Rather, it simply means that Commerce is not required to conduct a *bona fides* analysis in every administrative review, like it is in new shipper reviews. We further find that the factors listed in section 751(a)(2)(B)(iv) of the Act can be used for guidance in conducting a *bona fides* analysis in an administrative review.

NLMK’s claim that the purpose of the *bona fide* sale analysis is to identify situations where a new participant enters into a scheme to make a few sales showing little/no dumping is misplaced.14 Rather, this practice was developed so that a producer or exporter could not benefit

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10 See Petitioner’s Rebuttal Brief at 8-10 (citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled FlatRolled Carbon Quality Steel Products From the Russian Federation, 65 FR 5510 (February 4, 2000), and accompanying IDM; Grain-Oriented Electrical Steel From the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 79 FR 59223 (October 1, 2014), and accompanying IDM; Certain Carbon and Alloy Steel Cut-to-Length Plate From Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 82 FR 16345 (April 4, 2017), and accompanying IDM; Certain Carbon and Alloy Steel Cut-toLength Plate From Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part, 82 FR 16378, 16379 (April 4, 2017), and accompanying IDM; Certain Carbon and Alloy Steel Wire Rod From Belarus, the Russian Federation, and the United Arab Emirates: Affirmative Final Determinations of Sales at Less Than Fair Value and Partial Affirmative Finding of Critical Circumstances, 82 FR 56214 (November 28, 2017), and accompanying IDM).


12 See, e.g., 2013-2014 AR of Siliconmanganese from India IDM at Comment 1; see also Hebei New Donghua, 374 F. Supp. 2d at 1342; and Tianjin Tiancheng, 366 F. Supp. 2d at 1263.


14 See NLMK’s Case Brief at 7-12.
unfairly from an atypical sale to obtain a low dumping margin.\textsuperscript{15} The CIT affirmed that an administrative review should not be based on a sale that is unrepresentative or distortive.\textsuperscript{16}

While \textit{bona fide} sales analyses always arise in the context of new shipper reviews, if a producer’s or exporter’s transactions involve prices, quantities, or overall circumstances that are questionable, Commerce will evaluate the \textit{bona fides} of the sale in the context of an administrative review.\textsuperscript{17} Commerce analyzes such transactions in detail because “a U.S. sale must be a \textit{bona fide} commercial transaction to be a basis for a dumping margin, and, therefore, we apply the same test in administrative reviews and new shipper reviews.”\textsuperscript{18} Regarding single sale reviews, it is also well-established that Commerce heavily scrutinizes single sales, because there is only one transaction with which to calculate a margin and establish a cash deposit rate.\textsuperscript{19} As such, a non-\textit{bona fide} finding must necessarily end a single sale review.\textsuperscript{20} Thus, we disagree with NLMK’s assertion that Commerce does not have the statutory authority to conduct \textit{bona fides} analysis on a single sale in an administrative review.

Finally, Commerce disagrees with NLMK’s claim that Commerce has substantial information regarding its selling practices and past business practices.\textsuperscript{21} As a threshold matter, Commerce conducts each administrative proceeding on a case-by-case basis. Second, insofar as NLMK asserts that Commerce may find that some normative pattern exists with respect to NLMK’s selling and past business practices, Commerce also disagrees. To the extent that Commerce has previously examined NLMK’s selling and business practices, Commerce has found NLMK uncooperative or failing to act to the best of its ability in other cases in which NLMK was a respondent.\textsuperscript{22} Additionally, NLMK asserts that its importer of record is affiliated, meaning there is no risk of cash deposit avoidance, and that might be reduced risk of circumvention in administrative reviews, as compared to new shipper reviews.\textsuperscript{23} However, these assertions are both unfounded and do not eliminate the concerns identified in Commerce’s \textit{bona fides} analysis.

\textsuperscript{15} See Hebei New Donghua, 374 F. Supp. 2d at 1342 (citing Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002)).


\textsuperscript{17} See Tissue Paper from China IDM at Comment 4a.

\textsuperscript{18} See 2013-2014 AR of Silicomanganese from India IDM at Comment 1.

\textsuperscript{19} See Silicomanganese from India IDM at Comment 1; and Preliminary Bona Fides Memo at 13-14.

\textsuperscript{20} See Tianjin Tiancheng, 366 F. Supp 2d at 1249.

\textsuperscript{21} See Petitioner’s Rebuttal Brief at 9-10.

\textsuperscript{22} See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From the Russian Federation, 65 FR 5510 (February 4, 2000), and accompanying IDM; Grain-Oriented Electrical Steel From the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 79 FR 59223 (October 1, 2014), and accompanying IDM; Certain Carbon and Alloy Steel Cut-to-Length Plate From Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 82 FR 16345 (April 4, 2017), and accompanying IDM; Certain Carbon and Alloy Steel Cut-to-Length Plate From Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part, 82 FR 16378, 16379 (April 4, 2017), and accompanying IDM; Certain Carbon and Alloy Steel Wire Rod From Belarus, the Russian Federation, and the United Arab Emirates: Affirmative Final Determinations of Sales at Less Than Fair Value and Partial Affirmative Finding of Critical Circumstances, 82 FR 56214 (November 28, 2017), and accompanying IDM.

\textsuperscript{23} See NLMK’s Case Brief at 11.
In sum, Commerce has a long-standing practice of making *bona fides* determinations in single sale administrative reviews and the courts have repeatedly upheld Commerce’s authority to make such determinations. Accordingly, we find that it is within our authority to examine whether NLMK’s single sale in this administrative review was *bona fide*.

**Comment 2:** Whether Record Evidence Confirms that NLMK's Sale Was Not a *Bona Fide* Sale

**NLMK’s Comments:**

- In the *Preliminary Determination*, Commerce ignored record evidence indicating NLMK’s sole U.S. sale was made at a reasonable price.\(^{24}\)
  - Specifically, average unit values (AUVs) placed on the record by NLMK were rejected, because these figures did not represent quantity and value on a transaction-specific basis.\(^{25}\)
  - CBP data placed on the record was also not considered.\(^{26}\)
  - Commerce’s decision that the price of NLMK’s sole U.S. sale is higher than its other third country export sales made during the POR is incorrect.\(^{27}\)
- Commerce’s assertion that the quantity of NLMK’s sole U.S. is atypical or unrepresentative when compared to NLMK’s other third market sales is incorrect.\(^{28}\)
  - Pursuant to section 751(a)(2)(B)(iv) of the Act, Commerce shall consider whether sales were made in commercial quantities – not whether such sales are indicative of future transaction-specific commercial quantities.\(^{29}\)

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\(^{26}\) *Id.* at 16-18 (citing *Turkey OCTG IDM* at 14).


\(^{28}\) *Id.* at 20-23.

\(^{29}\) *Id.* at 21-22 (citing Preliminary *Bona Fides* Memo at 7; Memorandum, “*Bona Fide* Nature of the Sales in the Antidumping Duty New Shipper Review of Fresh Garlic from the People’s Republic of China: Zhengzhou Yudi Shengjin Agricultural Trade Co., Ltd.,” dated November 30, 2017, at 5; Memorandum from Commerce, “New Shipper Review of Certain Frozen Fillets from the Socialist Republic of Vietnam: Final Results *Bona Fide* Nature of Than Hung Co., Ltd.’s Sale,” dated December 1, 2014; and *CTL Plate from Romania*).
• Other aspects of the *bona fide* sale analysis do not support Commerce’s conclusion that NLMK’s sole sale was not commercially viable.30
  o In terms of the timing on NLMK’s sale, the sale was made in September – two months prior to the end of the POR. In contrast, in *Windmill Int’l*, the merchandise entered on the last day of the POR.31
• Regarding the arm’s length nature of the transaction, Commerce recognizes that NLMK’s sale was made to an unaffiliated customer and should thus find the sale *bona fide*.32
  o Customer correspondence indicates that NLMK’s sale was *bona fide*.33
  o Commerce’s statements regarding the late payment for this sale are speculative.34
  o The affiliation between NLMK, NOVEX, and the U.S. sales agent has no relevance as to whether NLMK’s sale to an unaffiliated customer subject to this review is indicative of NLMK’s future sales.35
  o Heightened scrutiny of a single sale is necessary in new shipper reviews; however, as NLMK is a known exporter, scrutiny of its sole sale is not a concern here.36

*MEDRF’s Case Brief:*
• MEDRF did not comment on this issue.

*Nucor’s Rebuttal Comments:*
• NLMK’s emails concerning the transaction demonstrate the non-*bona fide* nature of the sale because it was not made at arm’s length, the timing of the sale was a key consideration, and other circumstances of the sale were made outside of normal business considerations.37
  o Nucor disagrees with NLMK that the sale is “ipso facto” an arm’s length transaction because of the customer correspondence.38
  o Commerce was correct to request information from NLMK’s exclusive selling agent and the final customer, and NLMK’s failure to provide this information precluded Commerce from reviewing the role of the selling agent and the commercial reasonableness of the sale.39
• The price and quantity of the U.S. sale indicate that the NLMK’s sale is non-*bona fide*.40

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30 See NLMK’s Case Brief at 23 (citing Turkey OCTG *Bona Fides* Memo at 10).
31 Id. at 23-25 (citing Preliminary *Bona Fides* Memo at 7; and *Windmill Int’l*, 193 F. Supp. 2d at 1312).
32 Id. at 25-27 (citing Preliminary *Bona Fides* Memo at 8; and *AK Steel Corp. v. United States*, 226 F. 3d 1361 (Fed. Cir. 2003)).
33 Id. at 27-28.
34 Id. at 28.
35 Id. at 28-30 (citing *Nan Ya Plastics Corp. v. United States*, 810 F. 3d 1333, 1338 (Fed. Cir. 2016) (Nan Ya Plastics Corp.); *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990) (Rhone Poulenc, Inc.); *Haixing Jingmei Chemical Prod. Sales Co., Ltd. v. United States*, 277 F. Supp. 3d 1375, 1383 (CIT 2017); Sections 776(a)-(b) of the Act; and 19 CFR 351.410(e)).
36 Id. at 30-31.
37 See Petitioner’s Rebuttal Brief at 11-19.
38 Id. (citing NLMK Brief at 26; and Preliminary *Bona-Fides* Memo at 8).
39 Id. at 19 (citing *Fresh Garlic from the People’s Republic of China: Preliminary Intent To Rescind New Shipper Reviews*, 76 FR 24857, 24859 (May 3, 2011)).
40 Petitioner’s Rebuttal Brief at 19.
Waiting until the end of the POR allowed NLMK to have import data covering the POR to make a sale within the range of available data.\textsuperscript{41} NLMK twice failed to provide requested information regarding other customer purchases, which is critical to the analysis of \textit{bona-fide} sales.\textsuperscript{42} The record demonstrates the price and quantity of the single U.S. sale is not representative or normal in comparison with its other sales during the POR.\textsuperscript{43} There is no indication by NLMK that the purchaser used or resold the goods at profit.\textsuperscript{44} NLMK did not provide information after customer acceptance, so Commerce should adversely find that it is unlikely that the coils were consumed in a product that was later sold.\textsuperscript{45}

\textit{Commerce’s Position:}

We disagree with NLMK that its U.S. sale was \textit{bona fide}, and we continue to find that in examining the totality of the circumstances, the weight of evidence on the record supports Commerce’s determination that NLMK’s sale was not \textit{bona fide}.

We explained our practice with respect to \textit{bona fides} determinations in administrative reviews in the \textit{Wind Towers from Vietnam Final}:

\textit{We consider the following factors when determining if a sale is \textit{bona fide}:} (1) timing of the sale; (2) price and quantity; (3) expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made at arm’s length. Thus, we consider a number of factors in our \textit{bona fide} analysis, “all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.” In \textit{Tianjin Tiancheng v. United States}, the court affirmed \{Commerce’s\} practice of considering “any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,” and that “the weight given to each factor investigated will depend on the circumstances surrounding the sale.” In \textit{Hebei New Donghua v. United States}, the court stated that \{Commerce’s\} practice makes clear that \{Commerce\} “is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an AD Order.”\textsuperscript{46}

Regarding price, we continue to find that the price of NLMK’s sole POR U.S. sale weighs against finding the transaction \textit{bona fide}. As we explained in the Preliminary \textit{Bona Fides}

\begin{itemize}
  \item Id. at 20.
  \item Id. at 21.
  \item Id. at 23.
  \item Id.
  \item Id.
  \item See \textit{Wind Towers from Vietnam Final} IDM at Comment 1 (citations omitted).
\end{itemize}
Analysis Memorandum, NLMK: (1) did not provide information needed for Commerce’s *bona fide* sale analysis, and (2) based on NLMK’s/NOVEX’s third country sales, which per Commerce’s practice represent the best information available in this proceeding with which to compare the price and quantity of NLMK’s sole U.S. sale, the per unit price of NLMK’s sole POR U.S. sale is significantly higher than NLMK’s/NOVEX’s other export sales made during the same period. Thus, we find the price of NLMK’s POR sale is not representative of its normal business practice, and does not indicate that the sale is *bona fide*.

First, we are not persuaded by NLMK’s claim that relying on broad price trends in the United States market as a comparison benchmark is of more probative value than an analysis of the respondent’s own sales to third country markets. As indicated in the Preliminary *Bona Fides* Analysis Memorandum, Commerce twice requested that NLMK provide certain information necessary for the *bona fide* analysis concerning the price of the single POR U.S. sale. Rather than providing this information, NLMK instead provided United States International Trade Commission (ITC) Dataweb data containing broad monthly average prices of all entries of hot-rolled steel into the United States using one HTSUS code from the scope of the order. Further, these figures do not represent price or quantity on a transaction-specific basis – meaning we cannot analyze the full range of shipments entering the United States. As such, this data was not suitable to serve as a comparison benchmark, nor is it Commerce’s preference to rely on such data in a *bona fides* analysis.

Second, as evidence that Commerce should rely on the ITC Dataweb data, NLMK cites to Commerce’s statement regarding comparison benchmarks in *OCTG from Turkey*. In *OCTG from Turkey*, Commerce explained:

> Typically, for these comparisons, Commerce relies on the POR data for entries made under the Harmonized Tariff Schedule of the United States (HTSUS) categories, covered by the scope of the order, under which the shipment of the U.S. sale under examination was entered, as obtained from the U.S. Customs and Border Protection (CBP). In the course of a *bona fide* analysis, either as an alternative or in addition to the CBP data examination, Commerce may also compare a respondent’s selling price and quantity of the reported U.S. transaction to the POR sales made by other producers/exporters under review, or to a respondent’s own sales, whether these were made to third country markets or to the United States before or after the POR.

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47 See Preliminary *Bona Fides* Memo at 5-6.
48 Id.
50 Id.
This statement, however, concerns the use of CBP data as a comparison benchmark, not ITC Dataweb data. As a result, NLMK’s argument is misplaced. Further, contrary to NLMK’s claim, we note that in this proceeding, as in OCTG from Turkey, we adhered to Commerce’s preferred practice, i.e., utilizing CBP data, and/or sales by other producers under review or a respondents’ own sales (e.g., third country sales) as a comparison benchmark.51

Third, we made an exhaustive effort to find a suitable comparison benchmark with which to compare NLMK’s sole POR sale to the United States. Specifically, as discussed above, we requested information from NLMK and its final customer in our bona fides questionnaire that was necessary to compare price and quantity, but did not receive a response with the information requested.52 Next, we requested CBP data, but found that this data was not suitable as a comparison benchmark.53 Additionally, at the time this data was released, no parties commented on it.54 Therefore, we then requested that NLMK/NOVEX submit third country sales of hot-rolled steel made during the POR to serve as a benchmark. Here, even if we utilized NLMK’s self-reported ITC Dataweb data during the POR as a comparison benchmark, which NLMK claims better represents commercial realities in the United States, the per unit value of NLMK’s sole U.S. sale is higher than the AUV covering the entire time period for which NLMK provided data, and the steel market price forecast covering the same period in which NLMK made its sole U.S. sale under review. Thus, the data NLMK provided is outside the average of the aforementioned AUVs and the monthly U.S. market steel price forecast. As a result, this information would also weigh in favor of finding NLMK’s reported price non-bona fide because it is unlikely to represent future selling practices.55

Fourth, NLMK raises the issue of sampling to support its claim that we should analyze price and quantity using its self-reported ITC Dataweb data.56 As stated above, it is Commerce’s practice to use a respondent’s third country sales either in place of or in addition to transaction-specific CBP data. It is also important to clarify that “transaction-specific” here refers to the format of the raw data, which provides us with the ranges of the entries. In other words, this data may be averaged, as we have done here with NLMK’s third country sales data. Finally, we find that the volume of NLMK’s/NOVEX’s third country sales made during the POR is substantial enough to avoid the sample size concerns listed by NLMK.57 Specifically, because the sample size is large and NLMK’s U.S. and third country sales are all export sales made through the same channel, we find this information to serve as the most reliable benchmark, which in this case indicates the U.S. transaction is not bona-fide.

51 Id.
52 See Preliminary Bona Fides Memo at 5-6.
53 Id. at 6. As we suspect that Severstal Export Miami Corp. made certain entry errors on shipments manufactured by JSC Severstal during the POR, we referred Severstal Export Miami Corp. to CBP for audit.
55 See, e.g., Certain Pasta from Turkey: Preliminary Rescission of Antidumping Duty New Shipper Review, 81 FR 46050 (July 15, 2016), and accompanying PDM (explaining that of shipments made during the POR, if the sale in question is among those with the highest unit prices, this is an indication that the sale is non-bona fide. We note that the preliminary decision was unchanged in the final results).
56 See NLMK’s Case Brief at 16.
57 See Preliminary Bona Fides Memo at 6.
With respect to our analysis of the quantity of the sale, we used NLMK’s/NOVEX’s third country sales for the reasons discussed above. In the Preliminary *Bona Fides* Analysis Memorandum, we stated in the “price of the sale” section that the third country sales were the most suitable comparison benchmark, because these sales were “(1) export sales and (2) made through the same sales channel (i.e., from NLMK to NOVEX).”58 As such, after considering all information on the record, we continue to find NLMK’s third country sales to be the best information with which to compare price and quantity. Further, we continue to find that the quantity of NLMK’s sole U.S. sale, as compared to other third country shipment quantities during the POR, and the high unit price of NLMK’s sole U.S. sale, does raise concerns with respect to the *bona fides* of the sale, which we stated in the Preliminary *Bona Fides* Analysis Memorandum.59 Contrary to NLMK’s claim, Commerce may also consider whether sales from the respondent made to the U.S. customer are typical or atypical of normal business practices and the respondent’s future selling practices in the United States.60 Here, given the comparison to NLMK’s/NOVEX’s third country sales and the high unit value and low quantity of NLMK’s sole U.S. sale under review, we find that the evidence on this record weighs in favor of finding the sale non-*bona fide*.

With respect to the timing of the sale, we disagree with NLMK. Although the sole U.S. sale occurred in the latter part of the POR, this does not itself indicate that NLMK’s sale was not made on a *bona fide* basis. Here, however, record evidence (i.e., customer correspondence in the form of certain emails) leads us to question the timing of this sale. Specifically, the correspondence regarding the sale negotiations indicates that for NLMK and its importer the direction and timing of this sale were critical elements in ensuring it was placed and entered into CBP territory prior to the end of the POR.61 These considerations regarding the timing are not typical business considerations, and thus, weigh in favor of finding the sale non-*bona fide*.

Regarding the arm’s length basis of the transaction, we similarly find that email correspondence concerning the sale negotiations indicates that this sale was not made on an arm’s length basis. Record evidence demonstrates that the U.S. sale was made to an unaffiliated customer, however the email correspondence shows that the sale was directed by the producer, not the customer, and the motivations surrounding the nature of this sale are not reflective of normal business considerations.62 We note that the CIT has recognized that Commerce’s *bona fide* analysis may consider whether a sale was an arm’s length transaction by examining whether parties to that sale had negotiated based on independent interests.63 Because there is a lack of evidence demonstrating that NLMK/NOVEX officials and the final customer negotiated based on independent business interests, we find that this information weighs in favor of finding the sale non-*bona fide*.

58 Id.
59 Id. at 6-7.
60 See *Hebei New Donghua*, 374 F. Supp. 2d at 1339 (citing *Windmill Int’l*, 193 F. Supp. 2d at 1313; and *Tianjin Tiancheng*, 366 F. Supp. 2d at 1260); see also *Wind Towers from Vietnam Final IDM* at Comment 1 (citing *Tianjin Tiancheng*, 366 F. Supp. 2d. at 1250 (stating “any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant.”)).
61 See Preliminary *Bona Fides* Memo at 7, and 8-11.
62 Id. at 8-13.
Regarding whether the hot-rolled coils were resold at a profit, we continue to find that this factor does not weigh against finding the sale *bona-fide*. There is no information on the record indicating that NLMK’s final customer resold this subject merchandise. As such, we continue to determine that this factor does not support finding NLMK’s sole sale non-*bona-fide*.64

With respect to “other relevant factors,” *i.e.*, circumstances of the sale and customer correspondence, late payment, the sales agent agreement between NOVEX and a certain selling agent, affiliation issues, and the fact that NLMK made a single sale during the POR, we continue to find that the record evidence indicates these factors weigh in favor of finding the sole U.S. sale under review non-*bona fide*. First, the circumstances of the sale and customer correspondence indicate that NLMK/NOVEX dictated the terms of the sale, *i.e.*, the unit value, volume, sale terms, purchase order, and delivery location, with the sole purpose of eliminating NLMK’s AD liability by placing the shipment in question in the United States.65 Further, a thorough review of the record indicates that NLMK/NOVEX made a number of contradictory statements by urging the final customer to purchase merchandise found in inventory produced to the final customer’s previous specifications, even though record evidence proves this merchandise was produced just prior to shipment.66 As a result, although NLMK/NOVEX had previously conducted business with this customer, the totality of these circumstances demonstrates that this transaction was not made at an arm’s length basis – or based on normal business considerations between two parties with distinct business interests.

Second, the final U.S. customer did not adhere to the payment terms established in the sales contract with NLMK/NOVEX. We note that in previous cases Commerce has analyzed payments from the customer when other characteristics of the sale indicate that the transaction was atypical.67 Consequently, Commerce evaluated payment from the customer and finds that this factor also indicates this sale may have been atypical, because clauses in the contract were not followed. As such, this information weighs in favor of finding the sole U.S. sale non-*bona fide*.

Third, we disagree with NLMK regarding the nature of the sales contract between NOVEX and its selling agent and NOVEX and its final customer. As stated in the Preliminary *Bona Fides* Analysis Memorandum, because certain portions of the sales agreement between NOVEX and its selling agent were adhered to, while other clauses were disregarded, we find that this factor weighs in favor of finding the sale non-*bona fide*.68 Specifically, although NLMK/NOVEX were provided with multiple opportunities to explain why this agreement was only partially enforced, NLMK simply replied that certain aspects were “not applicable.”69 Additionally, there are no other U.S. sales to use as a comparison to indicate that such irregularities somehow typify NOVEX’s business transactions. Given these discrepancies, we find that this sale was not

64 See Preliminary *Bona Fides* Memo at 8.
65 Id. at 9-10.
66 Id. at 9-11.
67 See *Tianjin Tiancheng*, 366 F. Supp 2d. at 1260-1261; see also, *e.g.*, 2013-2014 *AR of Silicomanganese from India; and Certain Pasta from Turkey: Final Results of Rescission of Antidumping of Antidumping Duty Administrative Review: 2015-2016*, 83 FR 6516 (February 14, 2018).
69 Id. at 13.
conducted pursuant to the selling agent agreement, which further contributes to our finding that this single transaction was not *bona fide*.

Fourth, after analyzing the nature of the selling agreement between NOVEX and its sales agent, we requested information that was necessary to develop a clear understanding of the nature of affiliation between the selling agent and NLMK/NOVEX. We note that the selling agent cooperated by providing most information requested by Commerce throughout this proceeding, but it twice refused to provide its financial statements. By failing to provide this information, the selling agent precluded Commerce from examining information critical to its *bona fides* sale analysis. Such examination is especially necessary in light of the questions regarding customer correspondence, selling agreements, and affiliations involving the selling agent. Because this information is absent from the record, we find this factor indicates the sale to be non-*bona fide*.

Finally, regarding the fact that a single sale was made during the POR, we find that while this fact alone would not by itself indicate a sale to be commercially unreasonable, the CIT has, however, agreed that a single sale must be “carefully scrutinized.” In this instance, because this is a single sale administrative review and Commerce has few transactions from which to draw inferences, and given the other information on the record, we conclude that the fact that NLMK made only a single sale during the POR further weighs against finding the sale *bona fide*. As such, based on the totality of the evidence concerning NLMK’s U.S. sale, we continue to determine that this transaction was not *bona fide*.

**Comment 3:** Whether Rescinding this Administrative Review is Appropriate

**NLMK’s Comments:**

- According to the statute, Commerce is required to conduct an administrative review if an entry is made and if a review is requested.
- The law requires that Commerce calculate dumping margins as accurately as possible and that dumping margins be current.
- As Commerce made no finding that NLMK failed to cooperate in this review, the application of an AFA cash deposit rate, and the assessment of duties at this rate, is not justified.

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70 Id.
71 Id.
72 Id. at 13-14 (citing *Tianjin Tinacheng v. United States* at 1263; and *Windmill Int’l* at 1313).
73 Id. at 31-32 (citing sections 752(a), (a)(1), (a)(1)(B), and (a)(2)(A) of the Act; *Hubbell Power Systems, Inc. v. United States*, 884 F. Supp. 2d 1283, 1289, and 1290-1293 (CIT 2012) (citing *Allegheny Ludlum Corp. v. United States*, 346 F. 3d 1368, 1371 (Fed. Cir. 2003) (*Allegheny Ludlum Corp.*)).
74 Id. at 33-34 (citing *Yangzhou Bestpak Gifts & Crafts Co., Ltd., v. United States*, 716 F. 3d 1370, 1379 (Fed. Cir. 2013); *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F. 3d 1319, 1323 (Fed Cir. 2010); *SNR Roulements v. United States*, 402 F. 3d 1358, 1363 (Fed. Cir. 2005); *Rhone Poulenc, Inc.*, 899 F. 2d at 1191; *Nam Ya Plastics Corp.*, 810 F. 3d at 1344-1345; *Albemarle Corp., v. United States*, 821 F. 3d 1345 (Fed. Cir. 2016); *Union Steel v. United States*, 713 F. 3d 1101, 1103, 1108 (Fed. Cir. 2013); *Allegheny Ludlum Corp.*, 346 F. 3d at 1373; and sections 752(a)(1) and (a)(2)(B)(ii) of the Act).
75 Id. at 34-36 (citing *Rhone Poulenc, Inc.*, 899 F. 2d at 1191; sections 751 and 776(b) of the Act; and *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1275-1277 (CIT 2009)).
**MEDRF’s Comments:**
- By rescinding the review of NLMK, Commerce has ignored Russia’s status as a market economy and imposed an AFA rate on NLMK established in the 1999 AD investigation. Commerce has since graduated Russia to market economy status.\(^{76}\) NLMK fully cooperated in this administrative review, so Commerce has no legal basis under section 776 of the Act to apply AFA. Further, assigning a non-market economy (NME) AFA rate to NLMK is inconsistent with the World Trade Organization (WTO) obligations of the United States.\(^{77}\)

**Nucor’s Rebuttal Comments:**
- Subject merchandise from Russia has been evaluated under the ME methodology since the end of the suspension agreement in 2014, and in a previous review Commerce determined that assigning the AFA rate was appropriate.\(^{78}\)
- Since there are no other entries with which to calculate a margin, and NLMK’s only U.S. entry was deemed to be non-bona fide, Commerce lawfully rescinded the administrative review and assigned NLMK a margin based on AFA.\(^{79}\)

**Commerce’s Position:**
We disagree with NLMK’s assertion that Commerce must calculate a dumping margin for it in the current review. As Commerce has explained, when a “respondent under review makes only one sale and {Commerce} finds the transaction atypical, ‘exclusion of that sale as non-bona fide necessarily must end the review as no data will remain on the export price side of {Commerce’s} antidumping duty calculation.’”\(^{80}\) Calculating a rate based on a non-bona fide sale would create an inaccurate margin. NLMK cites Hubbell v. United States to support the proposition that Commerce must calculate a dumping margin for each entry made during the review period.\(^{81}\) We agree with this principle; however, that case concerns a non-market economy separate rate issue and does not speak to Commerce’s practice and authority to rescind a review when there is no bona fide sale, which makes it inapposite to this review. In sum, it is well-established that Commerce will conduct reviews when both an entry and a request for a review are made, but when there is no bona-fide sale made during the POR and therefore no basis to calculate an accurate margin, it is within Commerce’s authority to rescind the review.\(^{82}\)

Rescission of an administrative review because there is no bona-fide sale to calculate a margin does not constitute an application of AFA to the respondent. Commerce applies AFA when a

\(^{76}\) See MEDRF’s Case Brief at 1-2.

\(^{77}\) Id. at 3.

\(^{78}\) Id. at 25 (citing Termination of Suspension Agreement; and Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation: Final Results of Antidumping Duty Administrative Review; 2014-2015, 82 FR 31559 (July 7, 2017)).

\(^{79}\) Id.


\(^{81}\) See NLMK Case Brief at 32 (citing Hubbell Power Systems, Inc., 884 F. Supp. 2d at 1289, and 1290-1293).

\(^{82}\) See, e.g., Evonik Rexim, 253 F. Supp. 3d at 1370; and 1995-1996 AR of Titanium Sponge from Russia IDM at Comment 3.
respondent has not cooperated or has not acted to the best of its ability to ensure that it does not “obtain a more favorable result by failing to cooperate than if it had cooperated fully.” In the instant case, we are rescinding the administrative review because there is not a bona fide sale to calculate a margin. We are not determining a new rate for NLMK or “imposing AFA.” More precisely, because of the rescission, NLMK’s rate will continue to be the rate to which it was subject prior to the administrative review and at which its merchandise entered the U.S. customs territory, i.e., 184.56 percent.

Further, while Commerce has conducted a review of subject merchandise from Russia since the end of the suspension agreement in 2014, Commerce determined again the rate to be 184.56 percent in that administrative review. We are not ignoring Russia’s market economy status and imposing the NME AFA rate, as the MEDRF suggests, but instead the rescission leaves in place NLMK’s lawfully-assigned current rate. Thus, Commerce is justified in rescinding the review, and NLMK’s sole entry must be liquidated at the rate under which it entered.

V. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If this recommendation is accepted, we will publish the final results of the administrative review in the Federal Register.

☐ Agree    ☐ Disagree

8/2/2019

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

83 See Aluminum Extrusions from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016, 82 FR 52265 (November 13, 2017), and accompanying IDM.
85 See MEDRF’s Case Brief at 1-2.