

[ORAL ARGUMENT NOT SCHEDULED]**No. 22-1052**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMAZON SERVICES LLC,

Petitioner,

v.

U.S. DEPARTMENT OF AGRICULTURE,

Respondent.

**On Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties to the agency proceeding were Amazon Services LLC and the Administrator of the Animal and Plant Health Inspection Service. The parties to this proceeding are Amazon Services LLC and the U.S. Department of Agriculture. No amici have appeared in either the administrative proceedings or this petition for review proceeding.

B. Rulings Under Review

The ruling under review is the February 2, 2022 order of the Department of Agriculture's Judicial Officer, reproduced at JA __-__. That order is unpublished, but is available on Westlaw at 2022 WL 722724. The Judicial Officer's order affirmed the decision of the administrative law judge, which is reproduced at JA __-__. That decision is likewise unpublished.

C. Related Cases

This petition for review has not previously been before this Court or any other court. Government counsel is not aware of any related cases.

/s/ Brad Hinshelwood
Brad Hinshelwood

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STATEMENT OF JURISDICTION

The Secretary of Agriculture issued his final decision in this civil penalty proceeding under the Animal Health Protection Act and Plant Protection Act on February 2, 2022. JA __ (Doc. 32 at 38). Petitioner Amazon Services LLC filed this petition for review on April 1, 2022. *See* 28 U.S.C. § 2344 (60-day time limit). This court has jurisdiction under 7 U.S.C. §§ 7734(b)(4) and 8313(b)(4)(A), as well as 28 U.S.C. § 2342, and venue is proper under 28 U.S.C. § 2343.

STATEMENT OF THE ISSUES

The Animal Health Protection Act and the Plant Protection Act each provide that parties may be subject to civil penalties if they “aid, abet, cause, or induce” the importation of certain plant or animal products into the United States without complying with regulations prescribed by the Secretary of Agriculture. 7 U.S.C. §§ 7702(9)(B), 8302(12)(B). The questions presented are:

1. Whether the Secretary properly concluded that Amazon could be subject to civil penalties for aiding, abetting, causing, or inducing the shipment of plant and animal products into the United States from Asia without compliance with applicable regulations where Amazon invited

the shipment of those products to Amazon facilities in the United States.

2. Whether the Secretary abused his discretion in assessing the maximum penalty of \$1 million against Amazon.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Animal Health Protection Act and Plant Protection Act

Congress enacted the Animal Health Protection Act and the Plant Protection Act as part of an effort to consolidate, modernize, and streamline various statutes designed to prevent the introduction or spread of pests and diseases in American agriculture. *See, e.g.*, JA ___ (Doc. 21 at 17-18); H.R. Rep. No. 107-424, at 664 (2002) (Conf. Rep.) (noting that the Animal Health Protection Act “provides for the consolidation and updating” of animal health statutes); 145 Cong. Rec. E723 (daily ed. Apr. 21, 1999) (statement of Rep. Canady) (remarking, while introducing the Plant Protection Act, that the statute would modernize “outdated, fragmented, and confusing quarantine statutes

that govern interdiction of prohibited plant[s] and plant pests” and “consolidate[] eleven existing statutes into one comprehensive law”).

As relevant here, the operative sections of the two statutes are functionally identical. The Animal Health Protection Act addresses the “prevention, detection, control, and eradication of diseases and pests of animals” to protect the health of people, animals, the environment, and the economy. 7 U.S.C. § 8301(1). The statute covers not only animals themselves, but also any “article,” defined to include “any pest or disease or any material or tangible object that could harbor a pest or disease.” *Id.* § 8302(2). The statute empowers the Secretary of Agriculture to “prohibit or restrict . . . the importation or entry of any animal[or] article . . . if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock.” *Id.* § 8303(a)(1). The Secretary is authorized to “issue such orders and promulgate such regulations as are necessary” to effectuate his determinations. *Id.* § 8303(b)(1).

The Animal Health Protection Act defines the term “import” as “to move from a place outside the territorial limits of the United States to a

place within the territorial limits of the United States.” 7 U.S.C.

§ 8302(7). The Act also defines the term “move” to include “to carry, enter, import, mail, ship, or transport.” *Id.* § 8302(12)(A). As particularly relevant here, the definition of “move” also includes “to aid, abet, cause, or induce” any of those actions, as well as “to offer to” perform those actions, “to receive in order” to perform those actions, “to release into the environment,” and “to allow any of” the enumerated activities. *Id.* § 8302(12)(B)-(F).

Failure to comply with the certification requirements or other determinations by the Secretary may carry both civil and criminal penalties. “A person that knowingly violates” the statute may be subject to prosecution for a misdemeanor, while “[a] person that knowingly imports[] . . . any animal or article, for distribution or sale” may be subject to prosecution for a felony. 7 U.S.C. § 8313(a)(1)(A), (B).

Civil penalties, by contrast, are authorized for “any person that violates” the statute. 7 U.S.C. § 8313(b)(1). The statute provides a mix of mandatory and discretionary factors to guide the Secretary’s determination of the penalty. *Id.* § 8313(b)(2). The Secretary is required to consider “the nature, circumstance, extent, and gravity of

the violation or violations,” and the Secretary may consider the violator’s “ability to pay,” “history of prior violations,” “degree of culpability,” the “effect on [the violator’s] ability to continue to do business,” and “such other factors as the Secretary considers to be appropriate.” *Id.* The penalty is also subject to various statutory caps, including a \$500,000 cap on “all violations adjudicated in a single proceeding . . . if the violations do not include a willful violation.” *Id.* § 8313(b)(1)(A)(iii).

The Plant Protection Act functions identically in all respects relevant here. It has similar purposes, 7 U.S.C. § 7701(1), and grants the Secretary similar authorities to restrict importation and issue regulations, *id.* § 7712(a), (c). The Plant Protection Act also contains substantively identical definitions of the terms “import” and “move.” *Id.* § 7702(5), (9). Like the Animal Health Protection Act, it provides that to “move” includes “to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting” of plants or plant products. *Id.* § 7702(9)(B). The Plant Protection Act includes substantively identical criminal and civil penalties: criminal penalties for persons who “knowingly” violate the statute, *id.* § 7734(a)(1)(A), (B),

and civil penalties for “[a]ny person that violates” the statute, *id.*

§ 7734(b)(1), subject to the same maximum penalties and with the same mix of required and discretionary factors for consideration in setting the penalty, *id.* § 7734(b)(1)(A), (b)(2).

B. Factual Background

The facts in this proceeding are essentially undisputed, and are described here with citations to the Secretary’s decision and the underlying record materials.

1. The “Selling On Amazon” and “Fulfillment By Amazon” Services

Amazon operates an online store in which it sells its own products to the public. JA __ (Doc. 32 at 4). Amazon also offers a program called “Selling On Amazon” through which other sellers may, for a fee, offer their products through Amazon’s store. *Id.* These sellers source their own products and set their own prices, with Amazon processing the payments and distributing sales proceeds. *Id.*

Participants in the Selling on Amazon program can also pay an additional fee to participate in the “Fulfillment By Amazon” program. JA __ (Doc. 32 at 5). In that program, third-party sellers ship their products to an Amazon warehouse—known as a “fulfillment center”—in

the United States. *Id.* Amazon then stores the products in inventory until they are sold, and handles picking, packing, and shipping each product to the end customer. *Id.* Amazon also provides other benefits to third-party sellers, including serving as an initial point of contact for returns, handling customer service requests, and providing free shipping to customers. *Id.*; JA __ (Doc. 21 at 25).

Third-party sellers who participate in the Fulfillment By Amazon service are required to register each product they want to include, and Amazon reserves the right to decline to permit particular products to use the service. JA __ (Doc. 32 at 5). Amazon is thus aware of which products third-party sellers will ship to its warehouses for later fulfillment.

Taken together, these programs represent a substantial share of Amazon's business. In the fourth quarter of 2019, for example, approximately 53% of all units sold through Amazon's online store were from third-party sellers. JA __ (Doc. 32 at 5). Many of those sales lead to or derive from imports. For example, an estimated 200,000 third-party sellers in the Selling On Amazon program are located in China,

and in 2018, the Fulfillment By Amazon program generated nearly \$43 billion in revenue for Amazon. JA __ (Doc. 32 at 6).

Third-party sellers who participate in the Fulfillment By Amazon program agree to Amazon's "Business Solutions Agreement." The agreement contains various provisions that seek to minimize Amazon's responsibility for products shipped to Amazon from abroad. The agreement requires that the seller must list itself "as the importer/consignee and nominate a customs broker," and Amazon "reserves the right to refuse to accept" products "[i]f Amazon is listed on any import documentation." JA __ (Doc. 12, Ex. 1, at 33); *accord* JA __ (Doc. 12, Ex. 5, at 1) (program policy emphasizing that "Amazon, including our fulfillment centers, **will not** act as an [importer of record] for **any** shipment of [Fulfillment By Amazon] inventory"). The agreement thus places responsibility for complying with "applicable laws" on third-party sellers. JA __ (Doc. 32 at 6); JA __ (Doc. 12, Ex. 1, at 3). Program policies that Amazon makes available to sellers also generally advise that third-party sellers "are responsible for complying with all import and export obligations and for payment of all applicable duties and customs fees," JA __ (Doc. 12, Ex. 6, at 1), and that they

“may not import prohibited or restricted products without all required permits and authorizations. For example, the import of certain agricultural, food products, alcohol, plants and seeds, fish and wildlife products, or medication into certain countries may be prohibited or restricted.” JA __ (Doc. 12, Ex. 7, at 1-2).

2. The Department of Agriculture Seizes Plant and Animal Products Shipped From Asia to Amazon Warehouses

The civil penalty proceeding here concerned instances where Asia-based third-party sellers participating in the Fulfillment By Amazon program shipped animal or plant products to Amazon warehouses without complying with import restrictions imposed by the Secretary.

First, in March 2015, federal agents in San Francisco seized 13 shipments of beef, pork, and poultry products from China addressed to an Amazon warehouse in California. To prevent the introduction or spread of foot-and-mouth disease, Highly Pathogenic Avian Influenza, classical swine fever, and swine vesicular disease, the Secretary has provided that importation of these products requires a certification that the products were prepared in conformity with requirements designed to prevent disease transmission. 9 C.F.R. §§ 94.4, 94.6, 94.9, 94.12.

The seized products lacked these certificates. JA __ (Doc. 32 at 7). In addition, the sender—Yummy House Hong Kong, which had signed its agreement with Amazon in December 2014—had provided false information on the shipping labels, declaring the contents to be items such as “rubber tube” or “personal belongings.” JA __ (Doc. 32 at 7-8).

On April 2, 2015, the Department asked Amazon to identify other Yummy House products that remained at Amazon warehouses and requested that Amazon place a hold on those products. JA __, __ (Doc. 32 at 8; Doc. 21 at 36). Amazon agreed to both requests. *Id.* Amazon identified 74 additional units of Yummy House products that had been shipped to Amazon fulfillment centers between December 2014 and May 2015, 53 of which Amazon had already shipped to customers in the United States. *Id.* On May 7 and 13, Amazon told the Department that the remaining 21 products were still held in Amazon warehouses. JA __, __, __ (Doc. 32 at 8; Doc. 21 at 36, 43). However, Amazon’s internal “hold” on those products had ended on May 2, and Yummy House subsequently asked Amazon to send the remaining products to a non-Amazon warehouse in New Jersey. JA __-__, __ (Doc. 21 at 36-47, 43). Amazon complied with that request, but did not inform the Department

until June 5, explaining that one of the 21 products had been sent to an Amazon fulfillment center in Tennessee, while the others were released to the New Jersey warehouse.¹ JA __ (Doc. 32 at 9). Although the Department located and destroyed the product in Tennessee, it found only one of the remaining 20 products at the New Jersey warehouse. JA __, __ (Doc. 32 at 9-10; Doc. 21 at 43-44). The Department did, however, locate 16 previously unknown Yummy House products at the New Jersey warehouse, which bore shipping labels from Amazon warehouses in Kentucky, Maryland, California, and Pennsylvania. JA __ (Doc. 32 at 9-10).

Second, in July 2015, federal agents in Los Angeles seized three boxes shipped from Hong Kong and addressed to an Amazon fulfillment center in California. JA __ (Doc. 32 at 10-11). The sender had declared the contents of the boxes as “gift box” and “plastic strip,” but the boxes in fact contained 85 packages of poultry products without the certificates required for entry into the United States. JA __ (Doc. 32 at

¹ Amazon’s legal department, which had made the representations about the items still being in Amazon’s possession, was apparently unaware of the release request from Yummy House and did not discover that the items had been released until June 4. JA __ (Doc. 19 at 1-2); JA __ (Doc. 32 at 9 n.36).

11). Amazon identified the sender as Deng Dan. *Id.* Deng Dan had signed the agreement with Amazon in June of 2013, over two years before the shipments were intercepted. *Id.*

Third, in March 2016, federal agents in San Francisco discovered and destroyed three boxes containing dried citrus leaves shipped from Thailand to an Amazon warehouse in Illinois. JA __ (Doc. 32 at 11). At that time, the Secretary's regulations largely barred the importation of certain plants and plant parts (including citrus leaves) to prevent the introduction of citrus canker disease and other citrus diseases. 7 C.F.R. § 319.19 (2016).² Amazon identified the shipper as X-Sampa Co., and located additional X-Sampa products at Amazon warehouses in 10 other states, which the Department picked up and destroyed. JA __ (Doc. 32 at 12); see JA __-__ (Doc. 11, Ex. 21). X-Sampa had signed its agreement with Amazon in July 2012, nearly four years before the Department located and destroyed these products.

² That provision was removed in April 2018, after all of the events at issue in this proceeding. *Restructuring of Regulations on the Importation of Plants for Planting*, 83 Fed. Reg. 11,845, 11,855 (Mar. 19, 2018).

C. Prior Proceedings

1. In September 2019, the Administrator of the Animal and Plant Health Inspection Service filed an administrative complaint against Amazon. JA __-__ (Doc. 1). As relevant here, the Administrator alleged that Amazon had “imported” the animal and plant products described above, specifically by aiding, abetting, causing, or inducing the shipment of those products into the United States. The administrative law judge granted summary judgment to the Administrator. Under both statutes, the judge observed that “Amazon takes a significant primary role in the importation of” these products by “choosing to enter into agreements with foreign sellers to market, sell, and distribute” their products and that Amazon had “previously profited from the sale of similar foreign animal products sold by the third-party sellers through its platform.” JA __ (Doc. 21 at 26-27); *accord* JA __-__ (Doc. 21 at 34-35). Amazon thus “knew or should have known of the types of restricted animal foreign products sold by these sellers and of the incoming shipments.” JA __ (Doc. 21 at 27); *accord* JA __ (Doc. 21 at 35).

The administrative law judge rejected Amazon’s argument that it could not be responsible because it did not know that the third-party sellers were engaged in wrongdoing. JA __ (Doc. 21 at 28). The judge explained that “actual knowledge of the third-party sellers’ ‘wrongdoing’ is not necessary” for a violation. *Id.* He noted that the statutes “differentiate[] between ‘knowingly’ violating the statute and [r]egulations” by imposing “criminal penalties,” while “for civil penalties ‘knowledge’ is not a required element for [a] violation.” *Id.*; accord JA __ (Doc. 21 at 34-35).

The judge emphasized that “Amazon’s contractual relationship with its third-party sellers does not insulate it from” the statutory requirements. JA __ (Doc. 21 at 29-30). The opinion explained that “Amazon’s contentions [that] it did not know that the foreign third-party sellers were not adhering” to federal law “illustrates[] . . . Amazon’s failure to prevent violations of federal regulations intended to protect the public to whom it markets, sells, and delivers potentially harmful products.” JA __ (Doc. 21 at 27); see JA __ (Doc. 21. at 35) (noting that Amazon “failed to place stop guards that would prevent

violations of the [Plant Protection Act] and cannot be absolved of liability by contracting”).

After review of the mandatory penalty factors and several discretionary factors, the administrative law judge imposed the maximum permissible penalty of \$500,000 under each statute, for a total of \$1 million. JA __ (Doc. 21 at 38-41).

2. Amazon appealed the administrative law judge’s decision to the Judicial Officer, who exercises by delegation the Secretary’s authority to hear administrative appeals. 7 C.F.R. §§ 1.415, 2.35(a)(2). The Judicial Officer affirmed. The Judicial Officer concluded that Amazon had aided, abetted, caused, or induced the importation of the products at issue, noting that Amazon “exercised some control over the movement of the restricted products into the United States,” and that it is “inconceivable that the many benefits” Amazon promised to provide third-party sellers who sent their products into the United States “would not influence the decision to import the restricted products into the United States.” JA __ (Doc. 32 at 28).

The Judicial Officer rejected Amazon’s contention that the terms “aid, abet, cause, or induce” in these statutes require a showing that

Amazon “had ‘knowledge of wrongdoing and provid[ed] substantial assistance to the wrongdoer’” based on a “well-settled” common law meaning for those statutory terms. JA __, __-__ (Doc. 32 at 15, 16-17) (alteration in original). As the Judicial Officer explained, “[c]ourts have not uniformly accepted or applied the elements of aiding and abetting that [Amazon] urges, particularly outside the criminal context.” JA __ (Doc. 32 at 17). In particular, the Supreme Court has emphasized that aiding and abetting doctrine in the civil context “has been at best uncertain in application,” and other cases addressing the question “acknowledge the uncertainty” around the doctrine. JA __ (Doc. 32 at 18) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994)).

The Judicial Officer further held that even aside from the lack of a settled common-law meaning for aiding and abetting, Amazon’s argument “is inconsistent with the structure” of the statutes. JA __ (Doc. 32 at 21). In particular, the Judicial Officer noted that both statutes provide that criminal penalties may be imposed only if the violator acted “knowingly,” with no corresponding knowledge requirement for civil penalties. JA __-__ (Doc. 32 at 21-22). Given that

distinction, the Department had long held that knowledge is not a requirement for civil liability under those statutes (or predecessor statutes with similar language), JA __ (Doc. 32 at 22), and had likewise imposed similar liability by regulation in other contexts, JA __-__ (Doc. 32 at 25-26). The Judicial Officer also noted that Amazon’s position was “against the respective manifest purpose” of the statutes, “allowing parties with a role in importing prohibited items into the United States to avoid responsibility to comply” and making it “more difficult . . . to prevent the introduction of dangerous animal and plant products into the United States and increas[ing] the risk of spreading associated diseases and pests.” JA __-__ (Doc. 32 at 24-25).

The Judicial Officer also briefly noted that Amazon had knowledge of the specific products that were shipped into the United States, given that Amazon required registration of each product and reserved the right to refuse to permit each product to use the Fulfillment By Amazon service. JA __ (Doc. 32 at 30). In addition, Amazon was “aware of federal regulations that restrict animal and plant products,” having provided information to third-party sellers advising that such regulations existed. *Id.* And Amazon’s actions had

provided substantial assistance to the third-party sellers, including storage of the products in the United States, picking and domestic shipping, payment processing, and customer service. JA __ (Doc. 32 at 28, 29).

Finally, the Judicial Officer affirmed the imposition of the \$1 million penalty. The Judicial Officer noted the “serious” nature of Amazon’s violations, given the destructive consequences that could result from an outbreak of the animal and plant diseases at issue here. JA __-__ (Doc. 32 at 32-33). Amazon’s violations were also “numerous,” including “multiple shipments and three different foreign sellers from two foreign countries,” and “occurred over a span of time that underscores their repeated nature.” JA __ (Doc. 32 at 34). A \$1 million penalty would not hinder Amazon’s ability to operate or be beyond Amazon’s ability to pay, while “the penalty amount supports the deterrence of future violations by Amazon and other potential violators.” JA __ (Doc. 32 at 35, 36). The Judicial Officer considered Amazon’s assistance with the Department’s investigation and its lack of prior violations, but concluded that Amazon’s assistance and previous record did not warrant reducing the penalty when weighed against

Amazon's actions and the gravity of the violations. JA __-__, __, __
(Doc. 32 at 33-34, 35, 36).

SUMMARY OF ARGUMENT

1. The Animal Health Protection Act and the Plant Protection Act provide civil penalties for those who “aid, abet, cause, or induce” the importation of animal and plant products into the United States without compliance with regulations issued by the Secretary to protect the health of American agriculture and consumers. 7 U.S.C. §§ 7702(9)(B); 7734(b); 8302(12)(B); 8313(b). The Secretary properly assessed civil penalties against Amazon under these provisions.

Amazon contracts with third-party sellers who offer their goods to the American public through Amazon's website—including, as relevant here, third-party sellers based overseas. For third-party sellers who pay to participate in Amazon's “Fulfillment By Amazon” program, Amazon promises to handle virtually all aspects of the transaction in the United States—storing the products in inventory until they are sold; picking, packing, and shipping each product to the end customer; serving as an initial point of contact for returns; handling customer service requests; and in some circumstances providing free shipping to

end customers. To receive these benefits, sellers must register with Amazon the products they want included and are instructed to ship their products to an Amazon warehouse in the United States. As the Secretary explained, Amazon “exercised some control over the movement of the restricted products into the United States,” and “[i]t is inconceivable that the many benefits provided [to] third-party sellers by Amazon” under its contracts “would not influence the decision to import the restricted products into the United States,” JA __ (Doc. 32 at 28), rendering Amazon liable for aiding, abetting, causing, or inducing the importation.

The text, structure, and history of these statutes also make clear that civil penalties may be imposed on a strict liability basis for aiding, abetting, causing, or inducing a violation. The statutes provide that criminal sanctions can be imposed for violations committed “knowingly,” while omitting any reference to a mens rea requirement for civil penalties. 7 U.S.C. §§ 7734(a)(1), (b)(1); 8313(a)(1), (b)(1). In addition, Congress provided that the Secretary may consider a violator’s “degree of culpability” in the course of setting the penalty, underscoring that the underlying violation carries no mens rea requirement. *Id.*

§§ 7734(b)(2), 8313(b)(2). The Secretary has long understood this statutory structure to authorize imposition of civil penalties on a strict liability basis to address the potentially devastating consequences that the spread of an animal or plant pest or disease could have for American agriculture and public health. The decision accords with decisions of this Court concluding that statutes with similar text and structure authorize civil penalties regardless of knowledge, including civil penalties for secondary liability. *Iran Air v. Kugelman*, 996 F.2d 1253, 1259 (D.C. Cir. 1993); *accord Federal Express Corp. v. U.S. Dep't of Commerce*, 39 F.4th 756, 767-68 (D.C. Cir. 2022).

Amazon's contrary argument rests on the premise that aiding and abetting has a settled common-law meaning that incorporates requirements of "knowledge and substantial assistance." *E.g.*, Br. 19. This Court recently rejected a near-identical argument in addressing an enforcement action under the Export Control Act, which likewise provides that civil penalties may be imposed without a showing of knowledge for aiding, abetting, or causing a violation. *Federal Express*, 39 F.4th at 770-72. Amazon's argument fails for the same reasons. First, as in *Federal Express*, the text and structure of these statutes

demonstrate “that the common-law meaning” Amazon posits “is out of place.” *Id.* at 771. Second, Amazon fails to demonstrate that any such settled meaning exists in the civil context. The Second Restatement of Torts, for example, expressly “takes no position” on whether knowledge and “substantial assistance or encouragement” are required elements of secondary liability when the primary conduct “involves strict liability for the resulting harm,” Restatement (Second) of Torts § 876 (Am. Law Inst. 1979), and Amazon acknowledges (Br. 34) that at least some of the primary conduct here is subject to strict liability. That uncertainty around secondary liability for strict liability offenses merely “amplifie[s]” the “variation in tort law’s *mens rea* requirement” for secondary liability more generally. *Federal Express*, 39 F.4th at 771.

2. The Secretary did not abuse his discretion in penalizing Amazon \$1 million (\$500,000 under each statute). The Secretary considered all of the mandatory factors under the statutes, as well as some discretionary factors, and determined that Amazon’s violations warranted imposition of the maximum statutory penalty notwithstanding Amazon’s lack of prior violations and its assistance with the Department’s investigation. Amazon’s attacks on the

Secretary's penalty determination chiefly repeat the company's view that it did nothing wrong or reiterate arguments the Secretary considered but concluded did not warrant reducing the penalty in light of all the relevant considerations.

STANDARD OF REVIEW

The Court examines “the text, structure, purpose, and history of an agency’s authorizing statute’ to determine whether a provision reveals congressional intent about the precise question at issue.”

Adirondack Med. Ctr. v. Sebelius, 740 F.3d 692, 696 (D.C. Cir. 2014)

(quoting *Hearth, Patio & Barbecue Ass’n v. U.S. Dep’t of Energy*, 706

F.3d 499, 503 (D.C. Cir. 2013)). If the Court “cannot readily divine

Congress’ clear intent,” it “defer[s] to the agency’s interpretation of the

statute so long as it is ‘based on a permissible construction of the

statute.” *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 843 (1984)).

The Secretary’s determination of the amount of the penalty is reviewed for abuse of discretion. *Affum v. United States*, 566 F.3d 1150, 1161 (D.C. Cir. 2009).

ARGUMENT

I. Amazon Is Liable For Importing Animal And Plant Products Into The United States Without Compliance With The Secretary's Regulations

A. Amazon Aided, Abetted, Caused, or Induced the Importation of Animal and Plant Products

The Animal Health Protection Act and the Plant Protection Act were enacted to protect the American public and American agriculture from the dangers posed by animal and plant pests and diseases. 7 U.S.C. §§ 7701, 8301. To that end, Congress has given the Secretary of Agriculture broad authority to restrict the importation of animal and plant products. Each statute defines the term “import” broadly as “to move” an animal or plant product into the United States. *Id.* §§ 7702(5), 8302(7). Each statute then defines the term “move” extremely broadly, encompassing not only “to carry, enter, import, mail, ship, or transport,” but also “to offer to” perform those actions, “to receive in order” to perform those actions, “to release into the environment,” and “to allow any of” the enumerated activities. *Id.* § 8302(12)(A), (C)-(F); *accord id.* § 7702(9)(A), (C)-(F). And both statutes likewise provide that a party has engaged in “mov[ing]” an animal or plant product where they “aid, abet, cause, or induce” the

“carrying, entering, importing, mailing, shipping, or transporting” of those products. *Id.* §§ § 7702(9)(B), 8302(12)(B). These provisions evince Congress’s intent to ensure that all parties with a role in the importation of potentially hazardous animal and plant products take responsibility for preventing potentially devastating outbreaks by ensuring compliance with the Secretary’s regulations.

Amazon is one such responsible party. Amazon operates an online store in which it sells its own products to the public but also, for a fee, allows third-party sellers to sell their own wares to customers in the United States. JA __ (Doc. 32 at 4). Amazon also offers third-party sellers a host of additional services (again for a fee) through its “Fulfillment By Amazon” program. JA __ (Doc. 32 at 5). Under that program, Amazon handles virtually all aspects of the transaction when a customer purchases a third-party seller’s product. Pursuant to Amazon’s contracts with the third-party sellers, those sellers first register with Amazon the products they want included in the program—here, beef, pork, and poultry products, as well as plant products. *Id.* Amazon has the option to reject any product that a third-party seller seeks to include. *Id.* The third-party sellers are then required to ship

their products to an Amazon warehouse in the United States. *Id.* Amazon stores the products in inventory until they are sold and handles picking, packing, and shipping each product to the end customer. *Id.* Amazon also agrees to serve as a point of contact for returns, handles customer service requests, and in some circumstances provides free shipping to end customers. *Id.*; JA __ (Doc. 21 at 25).

Many of Amazon's third-party sellers are located abroad. *See* JA __ (Doc. 32 at 6) (noting that an estimated 200,000 third-party sellers in the Selling On Amazon program are located in China). And Amazon is aware that many items that sellers wish to import are subject to the restrictions at issue here. For example, the documentation Amazon provides to third-party sellers notes that "the import of certain agricultural, food products, alcohol, plants and seeds, fish and wildlife products, or medication into certain countries may be prohibited or restricted." JA __-__ (Doc. 12, Ex. 7, at 1-2); *see* JA __-__ (Doc. 12, Exs. 9, 10) (noting restrictions on the importation of animal and plant products).

At the same time, however, Amazon attempts to place the entire burden of compliance with those "applicable laws" on third-party

sellers. JA __ (Doc. 32 at 6); JA __ (Doc. 12, Ex. 1, at 3). Amazon requires that the third-party seller list itself “as the importer/consignee and nominate a customs broker,” and Amazon “reserves the right to refuse to accept” products “[i]f Amazon is listed on any import documentation.” JA __ (Doc. 12, Ex. 1, at 33); *accord, e.g.*, JA __ (Doc. 12, Ex. 5, at 1) (program policy emphasizing that “Amazon, including our fulfillment centers, **will not** act as an [importer of record] for **any** shipment of [Fulfillment By Amazon] inventory”); JA __ (Doc. 12, Ex. 6, at 1) (stating that third-party sellers “are responsible for complying with all import and export obligations”). Thus, although Amazon is aware of what products third-party sellers will be sending to its warehouses, Amazon does not determine whether those products can be lawfully imported, whether importation is subject to conditions imposed by the Secretary (such as certification requirements), or whether third-party sellers actually comply with any such conditions.

Notwithstanding Amazon’s efforts to escape responsibility for its role, Amazon plainly played an essential role in the importation of the animal and plant products at issue here. Amazon contracted to receive those products into inventory for further sale; accepted those products

into its program when they were registered; instructed third-party sellers to ship those products to Amazon warehouses in the United States; and promised that if they did so, Amazon would handle virtually all aspects of the domestic transaction. JA __ (Doc. 32 at 21, 28).

Amazon thus “exercised some control over the movement of the restricted products into the United States,” and it is “inconceivable that the many benefits” Amazon promised to provide third-party sellers who sent their products into the United States “would not influence the decision to import the restricted products into the United States.” JA __ (Doc. 32 at 28).

Amazon’s efforts to insulate itself from legal responsibility do not alter the analysis. Amazon “cannot be allowed under the law to circumvent its statutory duties and obligations to the U.S. public through asserted private agreements.” JA __ (Doc. 21 at 25); *see* JA __-__ (Doc. 32 at 24-25) (noting that “allowing parties with a role in importing prohibited items into the United States to avoid responsibility to comply” would undermine the statutes). Thus, “Amazon’s conduct squarely falls within the ‘aid, abet, cause, or induce’ definition of the term ‘move.’” JA __ (Doc. 32 at 29).

B. Civil Penalties for Aiding, Abetting, Causing, or Inducing a Violation May Be Assessed on a Strict Liability Basis

Amazon urges that it bears no responsibility under the statutes unless it acted with knowledge of the violation. That argument finds no support in the text, structure, history, and purposes of the Animal Health Protection Act and the Plant Protection Act, and is at odds with this Court's analysis in decisions construing comparable statutes.

As discussed, both statutes define the term "import" as to "move" something into the United States. 7 U.S.C. §§ 7702(5), 8302(7). Both statutes then separately define "move," in relevant part, as "to aid, abet, cause, or induce" the "carrying, entering, importing, mailing, shipping, or transporting" of an animal, plant, or covered product. 7 U.S.C. §§ 7702(9)(B), 8302(12)(B). Neither of these definitional provisions address whether a party that aids, abets, causes, or induces the importation of a product must know that the product is imported without compliance with the Secretary's regulations. Instead, Congress addressed the relevant knowledge requirements in outlining the enforcement provisions for each statute. Under those provisions, civil penalties may be assessed against "any person that violates" each

statute, without any knowledge requirement. *Id.* §§ 7734(b)(1), 8313(b)(1). Criminal penalties, by contrast, are available against “a person that knowingly violates” each statute or “knowingly imports, enters, exports, or moves . . . for distribution or sale” in violation of each statute. *Id.* §§ 7734(a)(1)(A), (B); 8313(a)(1)(A), (B).

This Court and others have long recognized that where a statute expressly provides for state of mind requirements for criminal punishment but is silent as to civil penalties, civil penalties may be assessed on a strict liability basis. Indeed, “[i]t is not unusual for Congress to provide for both criminal and administrative penalties in the same statute and to permit the imposition of civil sanctions without proof of the violator’s knowledge.” *Iran Air v. Kugelman*, 996 F.2d 1253, 1258 (D.C. Cir. 1993). Congress commonly accomplishes this result by simply omitting any scienter requirement from the civil penalty provision, while providing such a requirement for criminal punishment. *See, e.g., id.* at 1258-59 (addressing statute providing for civil penalties with no express mens rea and criminal penalties for knowing or willful violations); *United States v. Jones*, 735 F.2d 785, 788 (4th Cir. 1984) (noting that a statute providing civil penalties for a violation and

criminal penalties for willful violations “established a strict liability standard to assess civil liability and a willful standard to fix criminal liability”).

In many of the predecessor statutes to the Animal Health Protection Act and Plant Protection Act Congress adopted this structure, providing for strict liability for civil violations of animal and plant health regulations by providing for criminal penalties for “knowingly” violating the relevant statute or implementing regulation and civil penalties for “[a]ny person who violate[d]” the relevant statute or implementing regulation. *See, e.g.*, 7 U.S.C. § 163 (1994) (Plant Quarantine Act); 7 U.S.C. § 150gg (1994) (Federal Plant Pest Act); 21 U.S.C. § 122 (2000) (Act of Feb. 2, 1903, also known as the Contagious Cattle Disease Act). The Secretary has long understood that statutory structure to impose strict liability for civil violations. *See, e.g., Richard Duran Lopez*, 44 Agric. Dec. 2201, 2209 (U.S.D.A. 1985) (“The use of the word ‘knowingly’ as to criminal violations and the omission of the word ‘knowingly’ as to civil violations indicates quite clearly the Congressional intent as to this matter.”); *Norea Ivelisse Abreu*, P.Q. Docket No. 99-0045, 2002 WL 113758, at *4 & n.2 (U.S.D.A. Jan. 24,

2002) (collecting cases). The Secretary thus consistently assessed civil penalties even in the absence of knowledge by the violator under those statutes. *See, e.g., Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (U.S.D.A. 1986) (assessing civil penalty where items were placed in the violator's luggage "without [her] knowledge"); *Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (U.S.D.A. 1986) (same); *Shulamis Kaplinsky*, 47 Agric. Dec. 613, 636 (U.S.D.A. 1988) (same); *Mr. Francisco Escobar, Jr.*, 54 Agric. Dec. 392, 418-19 (U.S.D.A. 1995) (assessing civil penalty where violator did not know that potatoes were still in his truck); *see also Reed v. U.S. Dep't of Agric.*, 39 F.3d 1192, 1994 WL 596616, at *2 (10th Cir. 1994) (table) (affirming imposition of penalty where agency did not show knowledge in a Contagious Cattle Disease Act proceeding because "[t]he text of the statute clearly requires a 'knowing' violation for the imposition of criminal penalties, but omits such a requirement from the civil penalty provisions"); *Valkering, U.S.A., Inc. v. U.S. Dep't of Agric.*, 48 F.3d 305, 307 (8th Cir. 1995) (rejecting argument that a party could escape liability for allowing the movement of trees where "it played no role in the actual shipment of the trees, had delegated all responsibility for compliance with state and federal inspection requirements to [other

parties], and was a wholesaler rather than a broker in the transactions”).

When Congress enacted the Plant Protection Act in 2000 and the Animal Health Protection Act in 2002, it did so against the backdrop of this longstanding understanding. And in both statutes, Congress added or expanded the definition of “move” to include aiding, abetting, inducing, or causing, without deviating from the structure of the penalties provision that the Department had long understood to impose strict liability for civil penalties. *Compare* 7 U.S.C. §§ 7702(9), 8302(12), *with* 7 U.S.C. § 150aa(g) (1994) (definition of “move” in the Federal Plant Pest Act). And to the extent the legislative history addresses the question, it indicates that Congress intended to carry forward the longstanding differentiation between criminal and civil penalties. *See* H.R. Rep. No. 106-639, at 157 (2000) (Conf. Rep.) (explaining that the Plant Protection Act “[a]llows for criminal penalties . . . for knowing violations of the Act” and “also provides for civil penalties for violations of the Act”); *see also Iran Air*, 996 F.2d at 1258 n.5.

The strict liability nature of these statutes is further underscored by Congress's decision to make the violator's "degree of culpability" a factor the Secretary is permitted to consider in setting the amount of the penalty under each statute. 7 U.S.C. §§ 7734(b)(2), 8313(b)(2). This Court and others have observed that the presence of a factor considering "the culpability of the violator" in determining the amount of a penalty underscores that the statute "allow[s] . . . the imposition of strict liability" for the underlying violation. *Iran Air*, 996 F.2d at 1259; *see, e.g., International Union, United Mine Workers of Am. v. Federal Mine Safety & Health Review Comm'n*, 840 F.2d 77, 84 n.13 (D.C. Cir. 1988) (explaining that penalty-setting provision requiring consideration of whether the violator was "negligent" "only serves to underscore" the absence of a mens rea requirement for the underlying violation); *Asarco, Inc.-Nw. Min. Dep't v. Federal Mine Safety & Health Rev. Comm'n*, 868 F.2d 1195, 1197 (10th Cir. 1989) (noting that inclusion of a negligence factor in setting the penalty "suggests, and strongly so, that an operator may be assessed a civil penalty" without negligence "and that the lack of negligence is merely a factor to be considered in setting the *amount* of the civil penalty"). That inference is particularly strong where, as here,

the violator's "degree of culpability" is a discretionary factor which the Secretary may choose to disregard altogether in setting the penalty. 7 U.S.C. §§ 7734(b)(2), 8313(b)(2). Congress's grant of authority to impose a penalty without regard to culpability further confirms that the penalized violations are not linked to a particular state of mind.

These basic principles apply with equal force where Congress has provided civil penalties for secondary liability, such as aiding, abetting, causing, or inducing a violation. In *Iran Air*, this Court affirmed the Department of Commerce's imposition of civil penalties for "caus[ing]" a prohibited act, emphasizing the statute's omission of any mens rea requirement for civil penalties and Congress's grant of authority to consider a party's culpability in setting the penalty. 996 F.2d at 1256 n.3, 1257-59.

This Court recently and comprehensively reaffirmed these principles in *Federal Express Corp. v. U.S. Department of Commerce*, 39 F.4th 756 (D.C. Cir. 2022). There, a provision of the Export Control Act entitled "Penalties" provides that "[n]o person may cause or aid, abet, counsel, command, induce, procure, permit, or approve the doing of any act prohibited, or the omission of any act required by" export control

laws, without prescribing any mens rea requirement. 50 U.S.C.

§ 4819(a)(2)(B). The following subsections address penalties. Criminal penalties are prescribed for “[a] person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids and abets in the commission of, an unlawful act.” *Id.* § 4819(b). Civil penalties, by contrast, are available for any “violation . . . of this subchapter or any regulation, order, or license issued under this subchapter.” *Id.*

§ 4819(c)(1). The Department of Commerce’s implementing regulations likewise contain no mens rea requirement. 15 C.F.R. § 764.2(b). The Department of Commerce assessed civil penalties against Federal Express on a strict liability basis for causing, aiding, or abetting the export of items without the licenses required by the statute. *Federal Express*, 39 F.4th at 761-62.

This Court rejected Federal Express’s ultra vires challenge to the Department of Commerce’s action. In doing so, the Court emphasized that neither the general statutory proscription of aiding and abetting nor the specific civil penalty provision contains a mens rea requirement, which “stands in sharp contrast” to the statute’s provision of a willfulness requirement for criminal penalties. *Federal Express*, 39

F.4th at 767. Indeed, “[t]he Act’s repeated omission of any state of mind requirement for civil liability and penalties weighs mightily against FedEx’s argument that the statute’s civil aiding and abetting prohibition plainly requires a culpable mind.” *Id.* This Court reiterated that where Congress has left it to an agency “to determine the role of ‘culpability’ in the assessment of civil penalties,” there is “no room for [a party’s] insistence that Congress required a specific knowledge *mens rea*” for the underlying violation. *Id.* at 768.

Imposition of strict liability also implements the goals of both acts: to protect the American public and American agriculture from the dangers posed by plant and animal pests and diseases. 7 U.S.C. §§ 7701(1), 8301(1). The specific regulations violated here aim to prevent outbreaks of diseases which could result, or have previously resulted, in devastating economic losses. That is why Congress has made it incumbent on all those who play a role in the importation of plant and animal products to ensure that they actively work to prevent potentially devastating outbreaks by ensuring compliance with the Secretary’s regulations.

C. Aiding, Abetting, Causing, or Inducing a Violation Does Not Incorporate Knowledge or Substantial Assistance Requirements in These Statutes

Amazon's primary contention is that the terms "aiding and abetting" have a settled common-law meaning as incorporating requirements of "knowledge and substantial assistance," and that those requirements carry over to "inducing" or "causing" a violation. Br. 19, 22, 27-28. Thus, even though Amazon acknowledges that other violations of the statutes—such as "carrying" products in violation of the Secretary's regulations—may be penalized on a strict liability basis, Br. 34, it contends that additional requirements attach to aiding, abetting, causing, or inducing a violation.

Amazon's argument fails in all respects. As this Court has explained, "we only presume that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate." *Federal Express*, 39 F.4th at 770-71 (quotation marks omitted) (quoting *United States v. Wells*, 519 U.S. 482, 491 (1997)). Neither element is met here: the statutory text and structure

do not require the meaning Amazon proffers, and this Court has already rejected Amazon's claim that such a "settled meaning" exists.

1. Amazon fails to come to grips with the textual analysis this Court employed in *Federal Express*, *Iran Air*, and other cases involving comparable statutes. Those textual and structural features, particularly Congress's "selective inclusion and omission of a *mens rea*" and its provision that the Secretary may consider "the culpability of the violator" in determining the amount of a penalty, illustrate "that the common-law meaning is out of place." *Federal Express*, 39 F.4th at 768, 771 (quoting 50 U.S.C. § 4819(c)(3)); see JA __ (Doc. 32 at 21).

Amazon nevertheless urges that the statutes' omission of a knowledge requirement for civil penalties "simply establishes that even a violation that has no *mens rea* requirement can be subject to civil penalties," but "does not establish the *mens rea* requirement for the underlying violation." Br. 34.

Amazon makes little effort to reconcile this assertion with the decisions of this Court and other courts concluding that the omission of a *mens rea* requirement from a civil penalty provision establishes that no knowledge is required for such penalties. Nor does it address the

enactment of the current statutes against the background of the Secretary's longstanding interpretation of the same structure in predecessor statutes. *See supra* pp. 31-33. Had Congress sought to depart from that understanding, it could easily have done so, such as by separately providing for secondary liability in the penalties section of each statute and attaching an express knowledge requirement. Indeed, as the Secretary pointed out, Congress has expressly applied a knowledge requirement to secondary liability in other statutory contexts. *See* JA __-__, __ n.103 (Doc. 32 at 23-24, 24 n.103).

Amazon's assertion is also difficult to comprehend on its own terms. Amazon generally acknowledges that the definitional provisions of each statute set out the relevant conduct, such as "carrying" or "importing" a product. Amazon also acknowledges that the penalties provisions spell out the state of mind required before a person can be penalized for engaging in that conduct—knowledge in the case of criminal penalties, and no mens rea for civil penalties. To borrow Amazon's phrasing, the penalties provisions thus dictate that knowledge is an "element[]" of the criminal offense of (for example) "carrying" a restricted product, as well as that "carrying" has no such

“element[]” for civil penalties. Br. 34. So even on Amazon’s account, the penalties provisions “establish the mens rea requirement for the underlying violation.” *Id.* Amazon’s attempt to treat aiding, abetting, causing, or inducing a violation as the sole exception to that rule is not only textually groundless, but also introduces needless redundancy: the requirement that a criminal violation must occur “knowingly,” 7 U.S.C. §§ 7734(a), 8313(a), would be entirely unnecessary as to aiding, abetting, causing, or inducing a violation on Amazon’s account. The Secretary’s reading, by contrast, avoids redundancy by tracking the structure of the statutes: all of the regulated conduct (including aiding, abetting, causing, or inducing) is subject to civil penalties without regard to knowledge, while that same conduct is subject to criminal penalties where knowledge is present.

2. Amazon’s contention that the concepts of aiding, abetting, causing, or inducing a violation have a settled common-law meaning in the civil context is likewise difficult to reconcile with its acknowledgement that “[s]ome underlying violations can be established without any mens rea, such as unwittingly ‘carry[ing]’ a restricted product across the border.” Br. 34 (second alteration in original). No

such settled meaning exists, particularly where the primary conduct does not require any mens rea.

The Second Restatement of Torts—which Amazon cites in passing, Br. 25 n.2—notes that secondary liability can attach where a party “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” But the Restatement also expressly “takes no position” as to whether this rule applies “when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability for the resulting harm.” Restatement (Second) of Torts § 876. As this Court explained in *Federal Express*, “[i]n those scenarios, strict liability is imposed ‘not on the ground that the conduct upon which it is based is wrongful,’ but because ‘the conduct, although lawful because of the importance of the enterprise to the community, creates such great risk of harm to third persons that it is fair that the one conducting the enterprise should be required to compensate for the harm caused by it.’” 39 F.4th at 772 (quoting Restatement (Second) of Torts § 876 cmt. f).

That uncertainty with respect to strict liability offenses “amplifie[s]” the more general “variation in tort law’s *mens rea*

requirement” for secondary liability. *Federal Express*, 39 F.4th at 771. “[T]he common law of tort does not so clearly or uniformly require a knowledge *mens rea*,” as jurisdictions disagree over whether actual knowledge, a “general awareness of the primary tortfeasor’s wrongdoing,” or recklessness or constructive knowledge are sufficient. *Id.* “This variation takes the air out of [Amazon]’s insistence that there was a ‘settled meaning under the common law’ for aiding and abetting liability.” *Id.* (quoting *Wells*, 519 U.S. at 491); see *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (noting that aiding and abetting liability in the civil context “has been at best uncertain in application”); *Halberstam v. Welch*, 705 F.2d 472, 485 n.14, 489 (D.C. Cir. 1983) (observing that “[p]recedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society” and cataloguing different approaches to mens rea in the securities context).

Amazon relies extensively on cases addressing “federal criminal law.” Br. 22; see, e.g., Br. 22-25 (citing *Rosemond v. United States*, 572 U.S. 65 (2014); *United States v. Raper*, 676 F.2d 841 (D.C. Cir. 1982); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938)); Br. 27-28

(collecting criminal cases addressing the terms “cause” and “induce”). These cases provide no support for Amazon’s contention that those elements are well settled in civil cases of the type presented here. And the civil cases on which Amazon relies chiefly address circumstances in which the primary conduct is not subject to strict liability. *See, e.g., Halberstam*, 705 F.2d at 474, 485 (addressing a tort claim for aiding and abetting a murder committed in the course of a robbery, and observing that aiding and abetting in the securities context has arisen “principally in the area of fraud”); *Pittman ex rel. Pittman v. Grayson*, 149 F.3d 111, 121, 123-24 (2d Cir. 1998) (addressing a claim for aiding and abetting the tort of intentional interference with parental custody).

Amazon mistakenly seeks to discount the relevance of *Federal Express* on the ground that the case involved an ultra vires challenge to the challenged agency action. Br. 41-42. But the Court’s explication of the relevant statutory and common law principles did not turn on the applicable standard of review. And the Court’s textual analysis in *Federal Express* embraced the Court’s conclusions in cases subject to Administrative Procedure Act review, such as *Iran Air*, 996 F.2d at 1258-59, which Amazon disregards altogether.

Amazon is on no firmer ground in suggesting that *Federal Express* turned on “Congress’s acquiescence in Commerce’s longstanding omission of a mens rea requirement” and that “no such acquiescence” is present in the Animal Health Protection Act or Plant Protection Act.

Br. 42. The Court’s analysis in *Federal Express* rested on several considerations. In any event, as discussed, the predecessor statutes to the Animal Health Protection Act and Plant Protection Act had long been interpreted to impose strict liability, and there is no indication that Congress meant to alter that understanding in enacting the new statutes.

Amazon discusses at length (Br. 19-21) the Tenth Circuit’s decision in *Culbertson v. U.S. Department of Agriculture*, 69 F.3d 465 (10th Cir. 1995), which has no bearing on the questions here.

Culbertson did not address the Animal Health Protection Act or Plant Protection Act. It instead concerned an enforcement action under the Contagious Cattle Disease Act (also known as the Act of February 2, 1903), which was repealed simultaneously with the adoption of the Animal Health Protection Act. Pub. L. No. 107-171, § 10418(a)(7), 116 Stat. 134, 507, (2002). Unlike the statutes at issue here, the Contagious

Cattle Disease Act did not expressly provide for aiding and abetting liability. The Department had instead promulgated a regulation defining the term “moved” under that Act as including “aided, induced, or caused to be moved.” *Id.* at 467 (quoting 9 C.F.R. § 78.1 (1995)). In interpreting this regulation, the Tenth Circuit’s opinion conducted no analysis of the common-law standard for aiding and abetting liability and did not analyze the relevant statutory structure. It instead read the regulatory terms “aided, induced, or caused” to “require[] an element of culpability together with direct involvement in the movement of cattle” based on the Department’s own rulemaking, which had identified scenarios meeting that description as covered by the regulatory text. *Id.* at 467-68; *see* 51 Fed. Reg. 32,574, 32,577 (Sept. 12, 1986) (identifying “a veterinarian who prepares false documents or a seller who promises to have animals tested but does not” as the subjects of that component of the regulation). Even assuming that *Culbertson* was correctly decided, it sheds no light on the appropriate analysis here.³

³ As the Secretary explained, the facts of that case also bear no resemblance to the Amazon’s activities here. Amazon required each

Continued on next page.

3. Amazon urges that unless the Court reads these requirements into the statutes, the result will be to “ensnare many other innocent actors” and “expose innocent providers of . . . products or services to liability.” Br. 30. This appeal to policy encapsulates Amazon’s fundamental misunderstanding of its responsibilities under the governing statutes. A central purpose of a strict liability regulatory scheme like the statutes at issue here is to ensure that parties “standing in responsible relation to a public danger” take steps to ensure compliance with the regulations designed to prevent that danger, particularly where legislation “touch[es] phases of the lives and health of people which[] . . . are largely beyond self-protection.” *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943). Amazon does not dispute that the fundamental purpose of the statutes at issue is to protect American agriculture and public health by preventing the

third-party shipper to register their products with Amazon and then to ship those products to Amazon warehouses in the United States, promising that if those shippers did so, Amazon would store the products and handle virtually all aspects of further sales. JA ___-___ (Doc. 32 at 27-28); *see supra* pp. 25-27. In contrast, the penalized individual in *Culbertson* did not “own or control the cattle or influence the decisions prerequisite to their interstate movement.” 69 F.3d at 468.

introduction or spread of destructive animal and plant pests and diseases. Nor does Amazon dispute that the destructiveness of such pests and diseases does not depend on Amazon's state of mind. These statutes, like similarly structured schemes, reflect Congress's judgment "that the public interest is better served by placing the risk of harm 'upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of [others].'" *Federal Express*, 39 F.4th at 770 n.5 (quoting *Dotterweich*, 320 U.S. at 285); see JA ___-___ (Doc. 32 at 24-25) (noting that Amazon's reading would undermine the statutes "by allowing parties with a role in importing prohibited items into the United States to avoid responsibility to comply").

Amazon urges, and the agency noted in its decision, that Congress has made a different judgment when balancing, for example, competing considerations of "extending copyright protection to promote creativity and limiting copyright protection to support innovation." JA ___ (Doc. 32 at 19). Here, however, Congress addressed the very different concerns raised by the risks to public health and the economy resulting from outbreaks of agricultural pests and diseases. It should be evident that a

company that specialized in contracting with foreign companies to store, sell, pack, ship, and provide post-sale support for imported animal and plant products could not avoid liability under these statutes by attempting to contract away all compliance and then pleading ignorance. That Amazon offers other, non-restricted products in addition to the regulated products at issue and operates on a mammoth scale does not alter the application of the statutes.

Amazon has all the tools it needs to avoid violations of the statutes. As the Department noted, Amazon can take steps such as “requiring third-party sellers to provide the contents of, and documentation for, expected shipments,” so that Amazon can confirm that the products may be lawfully imported, as well as that any applicable requirements for that importation are being met. JA __ n.87 (Doc. 21 at 27 n.87). If Amazon or third-party sellers believe that such steps are too burdensome, Amazon’s contracts allow it to reject products third-party sellers wish to include in the Fulfillment By Amazon program. JA __ (Doc. 32 at 5). What Amazon may not do is participate in—and directly profit from—the importation of animal and plant

products while taking no steps to comply with regulations ensuring the safety of American agriculture and consumers.

Amazon's appeal to policy also fails to recognize that Congress has addressed concerns about the fairness and effects of strict liability civil penalties. It has done so not by relieving sellers of their obligations, but by calibrating the penalty provisions. Both statutes require the Secretary to consider "the nature, circumstance, extent, and gravity of the violation or violations" in setting the amount of the penalty, and the Secretary may also consider the violator's "degree of culpability," "ability to pay" or to continue doing business, and history of prior violations, along with any other relevant factors. 7 U.S.C. §§ 7734(b)(2), 8313(b)(2). Congress also established a range of caps on penalties that take account of particular circumstances: at the low end, individual first-time violators not engaged in commercial activity can be assessed no more than \$1,000, while up to \$1 million can be assessed for a group of violations including at least one willful violation. *Id.* §§ 7734(b)(1), 8313(b)(1).

4. As discussed, Amazon's arguments are at odds with the text, structure, and purpose of these statutes, as well as this Court's

decisions. But even if the Court were to conclude that ambiguities remained after applying tools of statutory construction, it should hesitate to set aside an agency interpretation that is at a minimum reasonable and wholly consistent with the governing statutes. “When reviewing an interpretation of a statute by an agency charged with the administration of that statute,” this Court applies “the two-step *Chevron* framework.” *Coosemans Specialties, Inc. v. Department of Agriculture*, 482 F.3d 560, 564 (D.C. Cir. 2007) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). “If the meaning of the statute is unambiguous, we must give effect to the clear congressional intent,” but where ambiguity exists the Court will uphold the agency’s interpretation as long as it is not “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* (quoting *Chevron*, 467 U.S. at 844); *see also JSG Trading Corp. v. Department of Agriculture*, 235 F.3d 608, 614 & n.8 (D.C. Cir. 2001) (deferring to the Secretary’s interpretation of governing statute). As in *Coosemans Specialties*, the Secretary “is charged with the administration” of the statutes at issue. 482 F.3d at 564. Congress has tasked the Secretary with deciding when and subject to what conditions animal and plant products may be

prohibited or restricted from entry, import, export, or movement, 7 U.S.C. §§ 7712(a), 8303(a); has authorized the Secretary to promulgate regulations necessary to carry out each statute, *id.* §§ 7712(c), 8303(b)(1); and has empowered the Secretary to adjudicate civil penalties “after notice and opportunity for a hearing on the record,” *id.* §§ 7734(b)(1), 8313(b)(1). *See United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229-30 (2001) (noting that these are hallmarks of statutes for which deference to an agency’s interpretation is appropriate); *Perfectly Fresh Farms, Inc. v. U.S. Dep’t of Agric.*, 692 F.3d 960, 966-67 (9th Cir. 2012) (same).⁴

5. Finally, Amazon also discusses (Br. 44-48) the question whether its conduct met the standard of knowledge and substantial assistance that it posits under the common law. The primary focus of

⁴ Amazon does not discuss these relevant principles of statutory construction, but cites this Court’s decision in *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144 (D.C. Cir. 2001), to suggest that de novo review would be appropriate. Br. 18, 42. Deference was inappropriate in that case “[b]ecause [the National Environmental Policy Act’s] mandate is addressed to all federal agencies,” and therefore an agency’s “determination that [the Act] is inapplicable” to a particular statute “is not entitled to the deference that courts must accord to an agency’s interpretation of its governing statute.” *Id.* at 1150. These statutes, by contrast, are administered by the Secretary.

the agency proceedings and opinions was whether the statutes incorporate those elements as a prerequisite to civil penalties, and it concluded that the statutes do not. If the Court were to disagree with the agency's conclusion, a remand would be appropriate to allow the agency to consider in light of this Court's guidance the question of knowledge and what form of knowledge is required. As this Court has observed, even where courts have treated knowledge and substantial assistance as elements of secondary liability in the civil context, they have offered differing accounts of how those elements actually apply. For example, although Amazon insists that it must have actual knowledge of the third-party sellers' unlawful conduct, Br. 45-46, courts have disagreed on the precise quantum of knowledge required, whether actual knowledge, general knowledge, or even recklessness.

Halberstam, 705 F.2d at 485 n.14; *Federal Express*, 39 F.4th at 771.

Courts have also struggled to determine the precise conduct that qualifies as "substantial assistance." Amazon's discussion of that element, for example, does not address the fact that the Second Restatement and many states likewise consider "encouragement" to satisfy that requirement, much less address how that might apply

where Amazon told third-party sellers to ship their products to the United States. *See* Restatement (Second) of Torts § 876 (phrasing the element as “substantial assistance or encouragement”); *Halberstam*, 705 F.2d at 481-82 (same, and reviewing cases involving encouragement); *id.* at 485 n.14 (discussing difficulties in defining “substantial assistance”).

Assuming that the statutes incorporated a knowledge requirement, the nature of such knowledge might vary among the specific violations at issue here. Amazon suggests that all of the products at issue here “can be lawfully imported with proper documentation,” Br. 45, but that generalization disregards a variety of significant qualifications. The Plant Protection Act violations, for example, involve a product that could only be imported “for experimental, therapeutic, or developmental purposes.” 7 C.F.R. § 319.19(b) (2016). Importation for sale to the general public was thus wholly forbidden. Amazon was aware both that the product was being shipped and, at a minimum, that the Secretary had issued regulations restricting the import of plant and animal products. JA __ (Doc. 32 at 29-30). If this Court were to disagree with the agency’s understanding

of the statutes, the Court's analysis would provide necessary guidance in the application of a knowledge requirement.

II. The Secretary Properly Imposed A \$1 Million Penalty On Amazon

Amazon challenges the Secretary's decision to impose a civil penalty of \$500,000 under each statute—the maximum penalty permissible in this proceeding. 7 U.S.C. §§ 7734(b)(1)(A), 8313(b)(1)(A). The Secretary's determination of the penalty amount is reviewed for abuse of discretion, *Affum v. United States*, 566 F.3d 1150, 1161 (D.C. Cir. 2009), and an abuse of discretion occurs only if the penalty “is ‘unwarranted in law’ or ‘without justification in fact,’” *Coosemans Specialties*, 482 F.3d at 566 (quoting *Norinsberg Corp. v. Department of Agriculture*, 47 F.3d 1224, 1227-28 (D.C. Cir. 1995)). Under this standard, the Court “will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement.” *Id.* (quoting *JSG Trading*, 235 F.3d at 617).

Both statutes here contain the same mix of required and discretionary factors for the Secretary's consideration in setting the penalty. The Secretary is required to consider “the nature, circumstance, extent, and gravity of the violation or violations.” 7

U.S.C. §§ 7734(b)(2); 8313(b)(2). The Secretary is also permitted to consider (1) the violator's ability to pay; (2) the effect of a penalty on the violator's ability to continue to do business; (3) any history of prior violations; (4) the degree of culpability; and (5) any other factors the Secretary considers appropriate. *Id.* §§ 7734(b)(1)(A); 8313(b)(1)(A).

A. The Secretary reviewed the mandatory factors, concluding that those factors supported the penalty issued because of the severe consequences for American agriculture and the general public that could flow from an outbreak of the diseases at issue here, Amazon's "active involvement in the importation of prohibited products," and the fact that the violations involved "multiple shipments and three different foreign sellers from two foreign countries," "occurred over a span of time that underscores their repeated nature," and "involved shipments of numerous restricted products that posed the risk of spreading disease" that Amazon intended to ship "to customers anywhere in the United States." JA __-__ (Doc. 32 at 32-34). The Secretary also concluded that Amazon's cooperation with the Department's investigation did not outweigh the serious concerns created by Amazon's conduct, particularly given that Amazon had released certain Yummy House

products from its warehouses even after the Department had notified Amazon of its concerns with those products. JA __-__ (Doc. 32 at 33-34).

The Secretary also considered several discretionary factors. The Secretary observed that Amazon would be able to pay a \$1 million penalty and that the penalty would not affect its ability to do business. JA __ (Doc. 32 at 35). The Secretary also considered the fact that Amazon did not have a history of violations under either statute, but concluded that “the gravity of the violations” continued to “merit the maximum civil penalty.” *Id.* The Secretary also emphasized Amazon’s culpability, given that Amazon was aware “of the kind of products offered by the third-party sellers, which by contract had to be registered with Amazon before inclusion in [Fulfillment By Amazon],” and was also aware of “federal regulations that restrict animal and plant products,” and also “intended to profit or otherwise benefit from its engagement with the third-party sellers.” JA __ (Doc. 32 at 36). And the Secretary concluded that the penalty amount “supports the deterrence of future violations by Amazon and other potential violators.” *Id.*

B. Amazon offers two challenges to the Secretary’s penalty determination. First, Amazon contends that the Secretary “did not address the nature and gravity of the alleged violations in the circumstances of this case,” Br. 49, providing a list of facts that the Secretary purportedly overlooked in setting the penalty, Br. 50. Those “facts,” however, generally restate Amazon’s belief that its conduct was not a violation of the statutes. For example, Amazon notes that the products “belonged to third-party sellers” who “violated their contracts with Amazon” by shipping those products to the United States without compliance with the Secretary’s regulations, and contends that it “had no knowledge of the third parties’ unlawful importation.” *Id.* But at the core of Amazon’s violations is its failure to take steps to ensure compliance with the Secretary’s regulations, regardless of its specific knowledge of the third-party shippers’ misconduct; as the Secretary repeatedly explained, Amazon knew that shipments of animal and plant products were coming to it from overseas, knew that such shipments could be subject to the Secretary’s regulations, but took no steps to actively ensure compliance. JA __, __ (Doc. 32 at 33, 36).

The Secretary also addressed Amazon’s contention that it should be credited for its cooperation “with the underlying investigation,” “suspending the[] accounts” of the third-party sellers, and no longer offering their wares on Amazon’s website. Br. 50. The Secretary explained that the penalty was appropriate because “Amazon was responsible for not participating in the importation and introduction of those products into interstate commerce in the first place.” JA __ (Doc. 32 at 33) (quoting JA __ n.87 (Doc. 21 at 27 n.87)). And the Secretary observed that in any event, “Amazon’s assistance was not as extensive as purported,” given that it released products the Department had asked Amazon to hold, which evinced “disregard for the safety of United States agriculture.” JA __ (Doc. 32 at 33-34).

Amazon similarly contends that the Secretary “failed to consider any specific facts on the gravity of the alleged violations” because the Secretary considered “the statutes’ remedial purpose and the hypothetical harm of an outbreak” in concluding that the violations were serious, and those principles would “support imposing the maximum penalty in *every* case.” Br. 51. That description bears no resemblance to the Secretary’s decision, which identified several other

facts that made these violations particularly serious, including the fact that they occurred over an extended period of time, involved “numerous restricted products” shipped from multiple countries to multiple states, and that Amazon intended to further ship those products “to customers anywhere in the United States.” JA __ (Doc. 32 at 34). Nor can Amazon seriously dispute that the Secretary is entitled to consider the effects that an outbreak of the specific plant and animal diseases implicated by Amazon’s violations could have on American consumers and American agriculture.

Second, Amazon argues that the Secretary improperly relied on its size and ability to pay to increase the amount of the penalty. Br. 52. As Amazon correctly notes, those factors are generally mitigating factors that reduce a penalty to avoid putting a violator out of business or imposing a penalty that the violator cannot hope to pay. But Amazon cannot seek mitigation on that basis; it “did not raise an inability to pay the civil penalty or the effect of such penalty on [its] ability to do business” in the administrative proceeding, JA __ (Doc. 32 at 35), and any such assertion would be implausible. The fact that the Department

considered whether to mitigate the penalty on either of those bases, and decided not to do so, cannot be an abuse of discretion.

Amazon instead asserts that the Secretary must have used these factors to increase the amount of the penalty because otherwise the Secretary could not “have reached the maximum penalty amount where the other two discretionary factors—degree of culpability and history of prior violations—weighed in Amazon’s favor.” Br. 53. That argument disregards the Secretary’s assessment of the *mandatory* factors—which supported imposition of the maximum penalty—and the Secretary’s specific explanation that taken as a whole, the statutory factors he considered supported the maximum penalty “notwithstanding . . . the absence of previous violations.” JA __ (Doc. 32 at 35). Amazon’s contention that its degree of culpability was “zero,” Br. 54, simply misunderstands the Secretary’s conclusion on that factor, which was that Amazon’s conduct was troubling given its knowledge of and involvement in the importation of animal and plant products. JA __, __ (Doc. 32 at 33, 36). Amazon has thus provided no basis for concluding that the Secretary abused his discretion in setting the penalty.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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October 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,905 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Brad Hinshelwood

Brad Hinshelwood

ADDENDUM

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7 U.S.C. § 7702(5), (9)**§ 7702. Definitions**

In this chapter:

...

(5) Import and Importation

The terms “import” and “importation” mean to move into, or the act of movement into, the territorial limits of the United States.

...

(9) Move and related terms

The terms “move”, “moving”, and “movement” mean—

(A) to carry, enter, import, mail, ship, or transport;

(B) to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting;

(C) to offer to carry, enter, import, mail, ship, or transport;

(D) to receive to carry, enter, import, mail, ship, or transport;

(E) to release into the environment; or

(F) to allow any of the activities described in a preceding subparagraph.

...

7 U.S.C. § 7734

§ 7734. Penalties for violation

(a) Criminal penalties

(1) Offenses

(A) In general

A person that knowingly violates this chapter, or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter shall be fined under title 18, imprisoned not more than 1 year, or both.

(B) Movement

A person that knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or sale, in violation of this chapter, shall be fined under title 18, imprisoned not more than 5 years, or both.

(2) Multiple violations

On the second and any subsequent conviction of a person of a violation of this chapter under paragraph (1), the person shall be fined under title 18, imprisoned not more than 10 years, or both.

(b) Civil penalties

(1) In general

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) \$50,000 in the case of any individual (except that the civil penalty may not exceed \$1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for

monetary gain), \$250,000 in the case of any other person for each violation, \$500,000 for all violations adjudicated in a single proceeding if the violations do not include a willful violation, and \$1,000,000 for all violations adjudicated in a single proceeding if the violations include a willful violation; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator—

(A) ability to pay;

(B) effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) any other factors the Secretary considers appropriate.

(3) Settlement of civil penalties

The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty that may be assessed under this subsection.

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

(c) Liability for acts of an agent

When construing and enforcing this chapter, the act, omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of his or her employment or office, shall be deemed also to be the act, omission, or failure of the other person.

(d) Guidelines for civil penalties

The Secretary shall coordinate with the Attorney General to establish guidelines to determine under what circumstances the Secretary may issue a civil penalty or suitable notice of warning in lieu of prosecution by the Attorney General of a violation of this chapter.

7 U.S.C. § 8302(7), (12)**§ 8302. Definitions**

In this chapter:

...

(7) Import

The term “import” means to move from a place outside the territorial limits of the United States to a place within the territorial limits of the United States.

...

(12) Move

The term “move” means—

- (A) to carry, enter, import, mail, ship, or transport;
- (B) to aid, abet, cause, or induce carrying, entering, importing, mailing, shipping, or transporting;
- (C) to offer to carry, enter, import, mail, ship, or transport;
- (D) to receive in order to carry, enter, import, mail, ship, or transport;
- (E) to release into the environment; or
- (F) to allow any of the activities described in this paragraph.

...

7 U.S.C. § 8313

§ 8313. Penalties for violation

(a) Criminal penalties

(1) Offenses

(A) In general

A person that knowingly violates this chapter, or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter shall be fined under title 18, imprisoned not more than 1 year, or both.

(B) Distribution or sale

A person that knowingly imports, enters, exports, or moves any animal or article, for distribution or sale, in violation of this chapter, shall be fined under title 18, imprisoned not more than 5 years, or both.

(2) Multiple violations

On the second and any subsequent conviction of a person of a violation of this chapter under paragraph (1), the person shall be fined under title 18, imprisoned not more than 10 years, or both.

(b) Civil penalties

(1) In general

Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A)

(i) \$50,000 in the case of any individual, except that the civil penalty may not exceed \$1,000 in the case of an initial

violation of this chapter by an individual moving regulated articles not for monetary gain;

(ii) \$250,000 in the case of any other person for each violation; and

(iii) for all violations adjudicated in a single proceeding—

(I) \$500,000 if the violations do not include a willful violation; or

(II) \$1,000,000 if the violations include 1 or more willful violations.

(B) twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under this chapter that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator—

(A) the ability to pay;

(B) the effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) such other factors as the Secretary considers to be appropriate.

(3) Settlement of civil penalties

The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty that may be assessed under this subsection.

(4) Finality of orders

(A) Final order

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28.

(B) Review

The validity of the order of the Secretary may not be reviewed in an action to collect the civil penalty.

(C) Interest

Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

(c) Liability for acts of agents

In the construction and enforcement of this chapter, the act, omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of the employment or office of the officer, agent, or person, shall be deemed also to be the act, omission, or failure of the other person.

(d) Guidelines for civil penalties

Subject to the approval of the Attorney General, the Secretary shall establish guidelines to determine under what circumstances the Secretary may issue a civil penalty or suitable notice of warning in lieu of prosecution by the Attorney General of a violation of this chapter.