PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Philip Serpe, Docket No. D09441.

APPELLANT'S REPLY

Pursuant to 16 CFR 1.146(c)(4)(i)(C), Appellant Philip Serpe states as follows:

I. HISA's wrong standard of review.

HISA contends that the ALJ should affirm the Arbitrator because the Final Decision "is rationally connected to the facts and the record does not otherwise reveal a clear error of judgment."[1] The Authority relies on the wrong standard of review. The ALJ's review standard for Serpe's appeal is "de novo." 15 U.S.C. 3058(b)(1). Under this review, the ALJ determines whether "the final civil sanction of HISA was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 3058(b)(2)(iii).

While an appeal of a decision as "arbitrary, capricious, [and] an abuse of discretion" usually engenders a reasonableness-review standard,[2] and an appeal as "not in accordance with law" usually evokes a *de-novo* one,[3] those two standards effectively *merge* where the challenge is to the agency's failure to follow its own regulations. *E.g.*, *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 728 (W.D. Tex. 2019) ("Many courts have concluded that an agency's failure to comply with its own regulations is arbitrary and capricious. Other courts have concluded that an agency's failure to comply with its own regulations is 'not in accordance with law.'" (collecting cases)); *see generally United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (failure to follow regulations invalidates agency action). Serpe's appeal requires the ALJ to resolve a de-

[1] The Authority's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Legal Brief ("HISA's Resp.") at 17.
[2] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020).
[3] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 n.4 (2024).

novo question of regulatory interpretation for the FTC, not the reasonableness of the Arbitrator's Final Decision.

II. The Act does not foreclose Serpe's Challenge to the Absence of a Fine.

First, HISA overreads the term, "civil sanction" as only permitting appeals of individual punishments actually imposed.[4] The Act characterizes the *entire* arbitration decision in the singular: "the final civil sanction" that HISA enforces, which is then subject to administrative review through the FTC's "decision." 15 U.S.C. § 3058(b), (c). The use of "final civil sanction" and "decision" simply connotes the different enforcement tracks established under the Act: a private self-regulatory track that imposes a ***sanction*** on industry participants and a public track that issues a ***decision*** subject to judicial review. *See* 15 U.S.C. § 3058(3)(B) ("A decision under this paragraph shall constitute the decision of the Commission without further proceedings . . . ."); 5 U.S.C. § 704 (granting judicial review to "final agency action[s]"). Regardless, Serpe, in fact, appeals ***all*** his "sanctions" because he is seeking vacatur of the Final Decision. While his *argument* concerns the lack of a fine, Serpe is clearly appealing HISA's "impos[ition] [of] a final civil sanction for a violation committed by a covered person." 15 U.S.C. § 3058(a).

Second, and more importantly, Serpe falls within the "zone of interests" protected by Section 3058. To appeal, Serpe must only "belong to the class of persons to whom the statute grants a right to sue." *F.D.A. v. R. J. Reynolds Vapor Co.*, 145 S. Ct. 1984, 1991 (2025). Under the Act, "a person aggrieved by the civil sanction" may seek administrative review. 15 U.S.C. § 3058(a). The term "aggrieved" is "a term of art with a 'long history in federal administrative law.'" *F.D.A.*, 145 S. Ct. at 1991 (citation omitted). Courts interpret it "broadly, as covering anyone even '*arguably* within the zone of interests to be protected or regulated by the statute . . . in question.'"

[4] HISA Resp. at 20.

Id. (citation omitted) (emphasis in original). A party is "aggrieved" by an administrative action "unless h[is] 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* "The inquiry is 'not especially demanding.'" *Id.* (citation omitted).

Serpe easily falls within Section 3058's zone of interests because he is the "covered person" against whom the "Authority impose[d] a final civil sanction for a violation." 15 U.S.C. § 3058(a). Serpe was "aggrieved" by the final civil sanction because the Final Decision "result[ed] in an adverse effect in fact," *i.e.*, suspension, disgorgement, and public notice. *Chicago Bd. Options Exch., Inc. v. Sec. & Exch. Comm'n*, 889 F.3d 837, 840 (7th Cir. 2018) (citation omitted). Serpe's appeal seeks to remediate those effects by requesting vacatur of the Final Decision. Irrespective of whether he is successful, Serpe's appeal is "arguably" within the zone of interests protected by the Act.

The Authority invokes the canon of constitutional avoidance, but the canon "has no application in the absence of . . . ambiguity." *Warger v. Shauers*, 574 U.S. 40, 50 (2014) (citation omitted). And section 3058 unambiguously adopts the "aggrieved" party "term of art." *See F.D.A.*, 145 S. Ct. at 1991 ("[W]hen we have interpreted variations of the phrase 'adversely affected or aggrieved' outside the context of the APA, we have borrowed from our APA cases, including their broad formulation of the zone-of-interests test."). Serpe's appeal must only "arguably" fall within the Act's zone of interest, which it does.

III. Serpe preserved his appeal.

To preserve an "assignment of error," Serpe must "present[]" a "question of fact or law" to the "Authority." 16 C.F.R. § 1.146. During the Arbitration hearing, Serpe argued that the

Arbitrator must assess a fine based on certain factual findings, and thus he preserved this appeal.[5] Serpe only clarified that he was "not asking [the Arbitrator] to impose a fine" because he maintained his innocence,[6] and the Arbitrator acknowledged, "All right. I understand your argument[.]"[7] *Cf. In re: Shell*, 2025 WL 1784696, at *39 ("HIWU should have presented this changed position promptly to the Arbitrator ***before*** her decision issued." (emphasis added)).[8]

IV. HIWU lacks prosecutorial discretion, and the Arbitrator must independently assess a fine.

HISA Rule 3223(b) states that the "financial penalties specified" for a "first offense" "shall" include a "[f]ine of up to $25,000 or 25% of the total purse (whichever is greater)[.]" In addition to the reasons identified in Serpe's brief in support, HISA's argument that this Rule permits a discretionary fine, including none at all, fails for four additional reasons.[9]

First, HISA Rule 3223(b) does not provide a ceiling without a floor. The phrase "up to" is a limit-setting modifier that applies only to the phrase proceeding it, *i.e.*, "$25,000"—not to the

[5] AB2 Tab 45, 3107:9-3117:18. *Cf. In re: Wong*, 2024 WL 3052985, at *9 ("[T]he record does not reflect that Appellant made this argument in the arbitration and thus he cannot properly raise it for the first time on appeal, absent a showing of good cause."); *In re: Lynch*, 2024 WL 2045674, at *3 ("Appellant . . . has provided no explanation at all as to why she did not seek or present this evidence at the arbitration."); *In re: Lewis*, 2024 WL 5078296, at *13 n.2 ("Appellant's request to present evidence regarding metabolization rates of synthetic Clenbuterol was impermissible because Appellant had not presented this issue in the arbitration.").

[6] *Compare* AB2 Tab 45, 3108:5-6 *with id.* at 3114:2-13 ("THE ARBITRATOR: Do you want me to find that the fine is now active? MR. BEILLY: I want you to follow the law, whatever the law is in connection with the arbitrator's obligations under the HISA regulations. It is not for HIWU to determine that a mandatory fine can be withdrawn from consideration by the arbitrator simply by asking.").

[7] *Id.* at 3117:19-20.

[8] Serpe also only raised the issue in closing because ***HIWU*** earlier stated that it would "address the reason for [withholding a fine] in our closing submission." *Id.* at 2862:22-23. But the Arbitrator was already familiar with the issue. *See* AB2 Tab 45, 3111:22-24.

[9] When Serpe stated in his federal court filing that "HIWU could have easily chosen to make this decision when it issued its charging letter," (*See* HISA's Resp. at 23), Serpe was obviously referencing HIWU's decision to try to ***moot*** the lawsuit, *i.e.*, HIWU had not made a deliberative decision to forgo the fine based on discretion that it believed it always possessed but rather on the district court's then-recent comments during oral argument. *See* ECF No. 42, 2–3.

phrase separated by the conjunction, "or," *i.e.*, "25% of the total purse." *See* THE CHICAGO MANUAL OF STYLE § 5.179 (17th ed. 2017). So while the amount of a fine may be "discretionary,"[10] HISA Rule 3223(b) cabins that discretion by permitting any amount "up to" $25,00 ***if*** it is "greater" than twenty-five percent of the purse. This is meant to ensure proportional fines for races with larger purses.[11]

Second, HISA points to HISA Rules imposing a "minimum" or "automatic" punishment as evidence that the ADMC Program does not include a mandatory minimum fine. But HISA Rule 3223's imposition of a "minimum" four-year suspension for trafficking does not *also* include an alternative suspension, so including "minimum" was necessary to clarify that four years was the lowest amount of time. And unlike the "automatic" sanctions of disqualification, forfeiture, and redistribution that apply to all violations, (HISA Rule 3221), the amount of a fine varies according to the number of violations, so the amount is not "automatic." Rather, HISA Rule 3223(b) imposes a mandatory minimum fine for a first-time violation because the punishment "shall apply" and because the amount is calculated as the "greater" of either a fine of up to $25,000 or twenty-five percent of the purse.

Third, HIWU's discretion to forgo attorneys' fees and costs—and the Arbitrator's corresponding authority to withhold them—is distinct from a fine. Initially, unlike the "accepted application of the discretion" granted to seek these costs,[12] HISA cites no similar arbitration where HIWU arbitrarily withheld a fine, nor where the Arbitrator found that applying HISA Rule 3223(b) and HISA Rule 3224(a)'s no-fault-or-negligence determination was not, at least, required.

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[10] HISA's Resp. at 24 (citing *In re: Shell*, Docket No. 9439, 61 (March 6, 2025), which like *Poole,* did not involve a racing purse, and thus the Arbitrator would not apply the "whichever is greater" provision and instead had discretion to impose any fine "up to $25,000.").

[11] The Authority's interpretation would have been phrased either as a "[f]ine of up to the greater of $25,000 or 25% of the total purse" or a "[f]ine of up to $25,000 or up to 25% of the total purse."

[12] HISA's Resp. at 25.

More importantly, HISA Rule 3223(b) provides for the "payment of *some* or *all* of the adjudication costs." *Id.* (emphasis added). The term "some" means an "indeterminate . . . number," which connotes ***discretion*** in the amount. *See* "some." Merriam-Webster.com. 2025. https://www.merriam-webster.com/dictionary/some (accessed Aug. 21, 2025). In this context, "some" specifically means any amount less than "all of the adjudication costs," which could include *none*. The phrase, "shall apply" in HISA Rule 3223(b) requires the Arbitrator to apply the category of the punishment, *i.e.*, a fine or assessment of legal costs. But the actual amount of the punishment is defined by further terms, and unlike the amount of legal costs, which is calculated by an *indeterminate* amount, a fine is calculated as the "greater" of either a fine of up to $25,000 or twenty-five percent of the purse.[13]

Fourth, the canon of constitutional avoidance again does not apply. HISA has not explained why HISA Rule 3223 is ambiguous, and it "cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). Serpe's interpretation does not raise a constitutional question anyways. A constitutional question only arises if Serpe asked the ALJ to decide whether the Act prevents HISA from bringing a jury trial on remand. That question is (at most) for the district court and not implicated by Serpe's interpretation of HISA Rule 3223(b) as imposing a mandatory fine (which HISA can always amend to include discretion).[14] Simply "[s]potting a constitutional issue does not give a court the authority to rewrite a [regulation] as it pleases." *Jennings v. Rodriguez*, 583 U.S. 281, 298 (2018).

[13] To require the mandatory imposition of legal costs, the provision would have provided "at least" a certain amount or "not less than" a certain amount.

[14] Presumably, the ADMC Program currently envisions a Covered Person's ability to avoid a mandatory fine to be proving no fault or negligence under HISA Rule 3224(a), not spooking HIWU into exercising "discretion" to drop the fine by filing a lawsuit.

V. Vacatur.

Ironically, HISA's contention that Section 3508 "does not provide a basis for the ALJ to direct commencement of a federal civil action"[15] violates the canon of constitutional avoidance by presuming that "remand for further proceedings" does not permit the ALJ to comply with the Seventh Amendment if and when it applies. If the ALJ concludes that a fine is mandatory, the ALJ has no authority to withhold a fine nor modify the Final Decision to impose one. The ALJ therefore must either vacate and remand for a jury trial or simply vacate and set aside the Final Decision.

APPELLANT'S REPLY FINDINGS OF FACT

Serpe does not disagree with the HISA's Proposed Findings of Fact but sets forth the following:

1. During the Arbitration hearing, Serpe argued that the Arbitrator must assess a fine based on certain factual findings.[16]

APPELLANT'S PROPOSED CONCLUSIONS OF LAW

1. The ALJ's standard of review for Serpe's appeal is "de novo." 15 U.S.C. 3058(b)(1).

2. Serpe's appeal requires the ALJ to resolve a de-novo question of regulatory interpretation for the FTC, not the reasonableness of the Arbitrator's Final Decision.

3. Serpe falls within the "zone of interests" protected by 15 U.S.C. § 3058. Under the Act, "a person aggrieved by the civil sanction" may seek administrative review. 15 U.S.C. § 3058(a). Courts interpret "aggrieved" "broadly, as covering anyone even '*arguably* within the zone of interests to be protected or regulated by the statute . . . in question.'" *F.D.A. v. R. J. Reynolds*

[15] HISA's Resp. at 27.
[16] AB2 Tab 45, 3107:9-3117:20.

Vapor Co., 145 S. Ct. 1984, 1991 (2025) (citation omitted) (emphasis in original). Serpe was "aggrieved" by the final civil sanction because the Final Decision's sanctions "result[ed] in an adverse effect in fact," *i.e.*, suspension, disgorgement, and public notice. *Chicago Bd. Options Exch., Inc. v. Sec. & Exch. Comm'n*, 889 F.3d 837, 840 (7th Cir. 2018) (citation omitted). Serpe's appeal seeks to remediate those effects by requesting vacatur. Irrespective of whether he is successful, Serpe's appeal is "arguably" within the zone of interests protected by the Act.

4. Serpe preserved his appeal.

5. HISA Rule 3223(b) unambiguously imposes a mandatory minimum fine of either twenty-five percent of the purse or a fine of up to $25,000, whichever is greater.

6. The ALJ will vacate and remand.

7. HIWU shall not initiate an arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 16 CFR § 1.146(a) and 16 CFR § 4.4(b), a copy of the foregoing is being served this 21st day of August, 2025, via first-class mail and/or electronic mail upon the following:

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