



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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March 31, 2014

VIA ECF FILING

Mark Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252

Dear Mr. Langer:

Pursuant to Federal Rule of Civil Procedure 28(j), I write regarding the recent decision in *Am. Meat Inst. v. U.S. Dep't of Agric.*, __ F.3d __, No. 13-5281 (D.C. Cir. March 28, 2014) (“*AMI*”). In that decision, the Court held that the standard set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), is the appropriate test for First Amendment challenges to compelled disclosures of factual, non-controversial information. Op. at 10-13. Because the Court held that application of *Zauderer* is not limited to mandates aimed at curing deception, Op. at 13, its holding refutes Appellants’ argument in this case (Appellants’ Br.53-54 n.5) that *Zauderer*’s rational basis standard does not apply because “the compelled disclosures are not aimed at preventing consumer deception.”

AMI also supports the Commission’s argument (Commission Br.59) that rational basis review is the appropriate test under which to evaluate Appellants’ First Amendment challenge. Viewed in its entirety, the disclosure required here is factual and non-controversial. It requires a detailed description of manufacturers’ efforts to trace the origin of certain minerals in their products and a list of any products that “have not been found” to meet the statutory definition of “DRC conflict free.” In this context, contrary to Appellants’ argument (Appellants’ Br. 52-53), it is unlikely consumers would draw an incorrect negative inference about a product’s connection to the conflict in the DRC. And, like in *AMI* (Op. at 10-11), the disclosure is subject to “benign” inferences, including that the manufacturer has gone to great lengths to trace the origin of its minerals but has simply been unable to confirm that its products meet the statutory definition.

Finally, *AMI* is not distinguishable on the ground that the disclosure here is not commercial speech (Appellants’ Br.53). Commercial actors are required to disclosure information about their



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products and thus the disclosure has the same “information-producing function” as commercial speech. Op. at 11. Moreover, unlike in *AMI*, the disclosure here is *not* a labeling requirement and therefore does not interfere with any contemporaneous commercial message by the manufacturer.

Sincerely,

/s/ Tracey A. Hardin

Tracey A. Hardin

cc via ECF: Peter Keisler