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April 1, 2014

U.S. Court of Appeals for the D.C. Circuit
Mark Langer, Clerk
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *National Association of Manufacturers v. SEC*, No. 13-5252

Dear Mr. Langer:

On March 31, 2014, the SEC submitted a letter drawing the Court's attention to *American Meat Institute v. USDA*, No. 13-5281 (D.C. Cir. Mar. 28, 2014), which holds that the *Zauderer* standard of review is not limited to disclosure laws intended to prevent consumer deception. Slip Op. 13-14. The SEC contends that *Zauderer* therefore applies here. *American Meat Institute*, however, reaffirms that *Zauderer* "applies only to requirements ... [to] disclose factual and non-controversial information," *id.* at 10, not "to messages biased against or expressly contrary to the views of the entity." *Id.* at 13 (internal alterations omitted).

The compelled disclosures at issue here are *not* "purely factual and non-controversial." *Id.* at 10; *see* Opening Br. 52-53; Reply Br. 24-26. Far from being a "pure attempt[] to convey information to consumers," Slip Op. 12, the SEC's rule forces companies to carry a scarlet letter, publicly denouncing their products and applying an ideological label with which they disagree. Consumers are likely to infer from the disclosure that products are tainted by association with human rights abuses in a foreign



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country, hardly a “benign” conclusion. SEC Ltr. at 1. Furthermore, in part because the SEC construed the statute’s “did originate” language to mean “may have originated,” the compelled disclosure will frequently be false or misleading: companies will be forced to state that their products have not been found to be “DRC conflict free” even when, as the SEC puts it, they have “gone to great lengths to trace the origin of [the] minerals, but ha[ve] simply been unable to confirm” that origin. *Id.*

The compelled disclosure here is therefore nothing like the “purely factual and non-controversial” disclosure at issue in *Zauderer*, a simple statement that a client in a contingent fee case would be liable for litigation costs. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985). It is also far different from the disclosure in *American Meat Institute*, where the companies had no “objection to the content of the message conveyed by the mandated speech.” Slip Op. 10. For these and other reasons discussed in Appellants’ briefs, *Zauderer* is inapplicable.

Respectfully submitted,

/s/ Peter D. Keisler

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2014, I electronically filed the foregoing letter with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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