ARGUED JANUARY 7, 2014 DECIDED APRIL 14, 2014

No. 13-5252

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

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and BUSINESS ROUNDTABLE,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

AMNESTY INTERNATIONAL USA and AMNESTY INTERNATIONAL LTD.,

Intervenors.

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

SUPPLEMENTAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

ANNE K. SMALL
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

TRACEY A. HARDIN
Assistant General Counsel

BENJAMIN L. SCHIFFRIN
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-5048 (Hardin)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Petition of the Securities and Exchange Commission for Rehearing or Rehearing En Banc:

Additional Amici for Appellee

Free Speech for People, Inc.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

This case was previously before this Court as *Nat'l Ass'n of Mfrs. v. SEC*, No. 12-1422, on a petition for review of Rule 13p-1 under the Securities Exchange Act of 1934. After the Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked jurisdiction over such petitions, the case was transferred to the district court pursuant to 28 U.S.C. 1631. Counsel is not aware of any other related cases currently pending in this, or any other, Court.

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Amicus Br.	Brief for the National Association of Manufacturers, Chamber of Commerce of the United States, and Business Roundtable as Amici Curiae Supporting Appellants, *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
Br.	Brief of the Securities and Exchange Commission, Appellee
DRC	Democratic Republic of the Congo
DRC Conflict Free	Products that do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country
Opening Br.	Opening Brief of Appellants the National Association of Manufacturers, Chamber of Commerce of the United States, and Business Roundtable
Response	Appellants' Joint Response to the Petitions for Rehearing En Banc

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STATEMENT

On April 14, 2014, this Court unanimously upheld many of the requirements under Securities Exchange Act Rule 13p-1, the Conflict Minerals rule. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014). But the panel majority found that requiring certain issuers to describe their products that they have not "found to be 'DRC conflict free'" compels speech in violation of the First Amendment.[1] This ruling was based in part on its view that the limited First Amendment scrutiny

[1] Section 13(p) of the Securities Exchange Act of 1934 defines "DRC conflict free" to mean "products that do not contain minerals that directly or indirectly finance or benefit armed groups in [the DRC] or an adjoining country." 15 U.S.C. 78m(p)(1)(A)(ii).

described in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), is reserved for disclosure requirements that "'are "reasonably related to the State's interest in preventing deception of consumers."''" *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371 (internal citations omitted). Because the description of products required by the Conflict Minerals rule is not "related to preventing consumer deception," *id.*, the majority did not apply *Zauderer*. The majority further held that the disclosure could not survive intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). *Id.* at 372-73.

On July 29, 2014, the *en banc* Court issued its decision in *American Meat Inst. v. U.S. Dep't of Agric.*, holding that "'government interests in addition to correcting deception can be invoked to sustain a disclosure mandate under *Zauderer*.'" 760 F.3d 18, 27 (D.C. Cir. 2014) (internal citation omitted). The Court also discussed the "criteria triggering the application of *Zauderer*," stating that for *Zauderer* review to apply, a commercial disclosure must "be of 'purely factual and uncontroversial information' about the good or service being offered." *Id*. (citing *Zauderer*, 471 U.S. at 651).

On November 18, 2014, the panel issued an order granting panel rehearing and directing the parties to file supplemental briefs addressing the following questions:

(1) What effect, if any, does this court's ruling in *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), have on

the First Amendment issue in this case regarding the conflict minerals disclosure requirement?

(2) What is the meaning of "purely factual and uncontroversial information" as used in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc)?

(3) Is determination of what is "uncontroversial information" a question of fact?

The second and third questions are addressed in part I of this brief. The first question is addressed in part II.

SUMMARY OF ARGUMENT

This Court's decision in *AMI* makes clear that the conflict minerals disclosure is consistent with the First Amendment under either *Zauderer* or *Central Hudson*. The *en banc* court held that *Zauderer* applies to commercial disclosures of "purely factual and uncontroversial information about the good or service being offered" so long as they are supported by *any* sufficient governmental interest. And *Zauderer* and its progeny make clear that information is "factual and uncontroversial" if it provides objectively determinable facts and the disclosure is not tantamount to a statement of viewpoint, belief, or ideology. The description of products that "have not been found" to meet the statutory definition of "DRC conflict free," made in the context of a detailed description of the issuer's efforts to trace the origin of the minerals in its products, meets these criteria. *Zauderer* therefore applies, and the conflict minerals disclosure survives such scrutiny.

Moreover, the decision in *AMI* also clarifies that the disclosure would survive scrutiny under the correct application of the *Central Hudson* standard.

ARGUMENT

I. A disclosure is factual and uncontroversial if it provides objectively determinable facts and is not tantamount to a statement of viewpoint, belief, or ideology; whether a disclosure meets this standard is a mixed question of law and fact.

The protection of commercial speech under the First Amendment is principally justified by the "value to consumers of the information such speech provides." *Zauderer*, 471 U.S. at 651. And the "free flow of information," commercial or otherwise, serves the First Amendment's interest in promoting informed decisionmaking. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Because the provision of factual, accurate commercial information furthers these First Amendment interests, *Zauderer* rejected the application of intermediate scrutiny to requirements to disclose such information as "unnecessary." *Zauderer*, 471 U.S. at 650. As the Court explained, the constitutionally protected interest in *not* providing factual information in advertising is "minimal," and lesser scrutiny is required to ensure that interest is protected. *Id*. at 651.

The Court contrasted this minimal interest in not providing "purely factual and uncontroversial information" (such as that at issue in *Zauderer*) with the significant First Amendment interests at stake where the government attempts "to

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977) (requiring "Live Free or Die" on license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (requiring newspaper to afford right to reply to candidates criticized in editorials); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (requiring recitation of pledge of allegiance). For this latter category, heightened scrutiny is appropriate because the First Amendment interests at stake are of a higher order.

Under *Zauderer*, then, the key question is whether the disclosure at issue is consistent with the First Amendment interest in facilitating the free flow of factual information or, rather, trenches upon First Amendment principles by requiring a speaker to convey or endorse an opinion. Courts following *Zauderer* have continued to distinguish between disclosures that provide "purely factual information" and those that require the expression of a viewpoint, belief, or opinion. *See*, *e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (*Zauderer* applies to compelled statements that are "necessarily accurate" and provide "interested observers with pertinent information"); *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509, 555 (6th Cir. 2012) ("*Zauderer* relied on the distinction between a fact and a personal or political opinion.").

As courts have explained, laws "requiring a commercial speaker to make purely factual disclosures related to its business affairs . . . have a 'purpose . . . consistent with the reasons for according constitutional protection to commercial speech[,]'" and review under *Zauderer* "is the proper standard[.]" *Beeman v. Anthem Prescription Mgmt. LLC*, 315 P.3d 71, 89 (Cal. 2013) (internal quotations omitted). Conversely, laws "that compel a commercial speaker to adopt, endorse, or subsidize a message or viewpoint with which it disagrees" remain "subject to heightened scrutiny." *Id.* at 94.

And in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001), for example, the Second Circuit applied *Zauderer* to disclosures that require certain manufacturers to "inform consumers that the[ir] products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." This disclosure "presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." *Id.* at 114; *see also N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 117, 132-33 (2d Cir. 2009) (*Zauderer* applied to requirement that restaurants post calorie content information on menus and menu boards); *Env. Def. Ctr. v. EPA*, 344 F.3d 832, 849-50 (9th Cir. 2003) ("Informing the public about safe toxin disposal is

non-ideological; it involves no 'compelled recitation of a message' and no 'affirmation of belief.'") (citation omitted).

In some instances, however, even a seemingly factual statement can convey a viewpoint and therefore trench on First Amendment rights. In those cases, where a disclosure is "controversial," a more stringent analysis may be necessary. This can occur when the accuracy or veracity of the factual information is subject to legitimate debate, such that stating the information is tantamount to endorsing one side of the debate, or when either the nature of the facts or the manner in which they are conveyed renders the statement otherwise tantamount to the expression of an opinion. *AMI*, 760 F.3d at 27.

For example, in *R.J. Reynolds Tobacco Co. v. FDA*, the Court found that the graphic cigarette warnings at issue did not involve "indisputably accurate statement[s] to which the *Zauderer* standard may be applied." 696 F.3d 1205, 1216 (D.C. Cir. 2012) (internal quotation marks and citation omitted). The required images were "not meant to be interpreted literally," but instead were intended to "symbolize" the textual warning statements and "provide additional context." *Id.* Such images, some of which "did not convey *any* warning information at all" and were therefore merely "inflammatory," could not "rationally be viewed as pure attempts to convey information." *Id.* at 1216-17 (emphasis in original).

Factual statements can also be tantamount to an opinion if they are so closely linked to an ideological point of view that they necessarily serve as a statement of that viewpoint. And the Court in *AMI* suggested that factual statements could be "so one-sided or incomplete that they would not qualify as 'factual and uncontroversial.'" 760 F.3d at 27.

But the mere fact that a speaker objects to making a factual disclosure cannot alone render it "controversial." *Zauderer* itself recognized that a disclosure is not controversial simply because it requires speakers "to provide somewhat more information than they might otherwise be inclined to present." 471 U.S. at 650. And it may be "assume[d] that the regulated entities would prefer not to make these disclosures, many of which run counter to their business interests." *Beeman*, 315 P.3d at 93. Such objection does not alter the nature of the First Amendment interests at stake. Accurate, factual information furthers rather than infringes on First Amendment interests regardless of whether commercial actors wish to provide it. *See Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 113; *N.Y. State Rest. Ass'n*, 556 F.3d at 133; *see also Milavetz*, 559 U.S. at 251.

Similarly, appellants have suggested that disclosed information can be considered "controversial" if the speaker disagrees with the implied representation (which, in their view, is inherent in all disclosures) that the information should be important to consumers. Amicus Br. at 10. But the argument that a factual

disclosure conveys information that the manufacturer considers irrelevant to the purchasing decision would be available for any factual disclosure. And disclosures that make available "what legislatures believe to be salient information for market participants to consider" are "commonplace," and "that the regulated entities would prefer not to make these disclosures" does not make them controversial. *Beeman*, 315 P.3d at 93. So long as the government has a sufficient interest in requiring a disclosure, and the disclosure required is reasonably related to that interest, any First Amendment objection to such an implied representation has been satisfied.

Nor is *Zauderer* inapplicable merely because the information disclosed relates to a matter of public debate. Such a test would impede the First Amendment's interest in promoting the robust and free flow of information to inform decisionmaking. It is precisely when the public's interest in a subject is high that the availability of accurate information is most important. Thus, the inquiry into the application of *Zauderer* properly focuses on whether the *information* disclosed, rather than the *topic* to which it relates, is "factual or uncontroversial."

* * *

In sum, "purely factual and uncontroversial information," as discussed in *Zauderer* and *AMI*, must be "factual" in that it is objectively determinable rather

than a statement of viewpoint or opinion, and "uncontroversial" in that its expression is not tantamount to the expression of a viewpoint or opinion, either because its veracity or accuracy is subject to debate or for other reasons. Because determining whether a factual statement is subject to debate or otherwise an expression of a viewpoint or opinion requires applying a legal standard to a set of facts, the determination of what is "uncontroversial information" is a mixed question of law and fact. *See United States v Klat*, 213 F.3d 697, 702 (D.C. Cir. 2000) (citing *Barbour v. Browner*, 181 F.3d 1342, 1345 (D.C. Cir. 1999) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). The determination is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard*, 456 U.S. at 289 n.19. As discussed below, the information conveyed in the conflict minerals disclosure meets the *Zauderer* standards.

II. In light of the *en banc* Court's decision in *AMI*, the conflict minerals disclosure should be upheld.

A. The disclosure should be upheld under *Zauderer*.

There is no dispute that the disclosure in this case relates to issuers' products. And although the panel suggested that the conflict minerals disclosure was not "factual and uncontroversial," it did not so hold. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 27. Thus, after *AMI*, whether *Zauderer* applies in this case is an open

question. And, because the disclosure is "purely factual and uncontroversial" as discussed above, application of *Zauderer* is appropriate.[2]

A conflict minerals report, if required, discloses the steps an issuer has taken to exercise due diligence on the source and chain of custody of minerals used in its products, as well as the results of that due diligence. The required description of products that "have not been found to be 'DRC conflict free'" is made in the context of those disclosures and merely measures the results of that due diligence against an objectively defined standard. It is therefore "factual and uncontroversial." And the disclosure otherwise survives *Zauderer* review.[3]

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[2] *Zauderer* applies to commercial speech. "In addition to information related to proposing a particular transaction . . . [commercial speech] can include material representations about the efficacy, safety, and quality of the advertiser's product[.]" *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009). The disclosure here is made by a commercial actor about its products and intended to inform decisions by consumers and investors. Moreover, because the disclosure is made in a single annual report rather than on product labels or in advertisements, it is less burdensome on issuers' speech rights than disclosures made in other commercial contexts. Accordingly, it should be evaluated, at most, under the rubric of commercial speech. *See*, *e.g.*, *SEC v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (although speech at issue not a "clear" fit with the traditional definition of commercial speech, given its nature, "at most" the level of protection afforded to commercial speech applied).

[3] The panel noted that the Commission's brief did not cite *Zauderer*. *Nat'l Ass'n of Mfrs*, 748 F.3d at 371 n.10. But, prior to *AMI*, there was uncertainty as to whether *Zauderer* review was limited to disclosures related to preventing deception. And the Commission nonetheless argued that the required disclosure was factual and uncontroversial and thus entitled to lesser scrutiny. Br. 59-60; 748 F.3d at 370.

1. The disclosure is factual.

The Conflict Minerals rule requires issuers to describe products that *have not been found to be* "DRC conflict free" as that term is defined in the rule and statute. Thus, contrary to appellants' argument (Response at 9), the disclosure is one of "literal fact" about whether an issuer has found its products to meet a defined standard. Appellants nonetheless argue that this case differs from *AMI*, in which the factual nature of the country-of-origin labelling at issue was undisputed, because the description required here "reflects a government viewpoint that the mineral trade bears responsibility for causing the DRC conflict." Response at 10.

But the factual information actually provided says nothing about the "cause" of the conflict in the DRC. Rather, it merely states whether a particular issuer's products have been found to meet the statutory standard. Moreover, appellants have never contested that trade in these minerals finances armed groups perpetrating violence in the DRC in some instances. Opening Br. at 1. Nor could they, as that connection is supported by longstanding international consensus. *See, e.g.*, U.S. Department of State, 2011 Human Rights Report for the DRC 15.

Appellants also argue (Response at 13-14) that the factual nature of the disclosure is undercut because the definition of "DRC conflict free" is "pregnant with political and ideological conclusions and connotations," such as "what it means to 'indirectly finance or benefit' a group" or which groups fall within the

definition of "armed group." But it is issuers—not the government—that apply the statutory standard to determine whether their necessary minerals "finance or benefit" armed groups. Thus, the requirement does not compel issuers to disseminate a governmental determination on this point with which they disagree.

And while appellants argue that the statutory definition of an "armed group" is subjective, it is not. An "armed group" is a group that is specifically identified in an annual State Department report. Section 1502(e)(3). The disclosure is therefore similar to many other regulatory programs that require disclosure about products meeting governmentally determined standards. For example, a federal statute requires disclosure of the manufacture, processing, or use of products that have been found to be "toxic" as identified in a specific Senate Committee report. 42 U.S.C. 11023. And the Second Circuit has pointed to this requirement as an example of the "innumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information" that should be reviewed under *Zauderer*.[4] *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 116.

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[4] Appellants also suggest that finding this disclosure to be "factual" could lead to requirements to disclose whether products "have not been found to be 'socially conscious' or to support 'family values,'" if those phrases were defined "in seemingly 'factual' terms." Response at 14. But the definition of "DRC conflict free" is not "seemingly" factual, it is factual—it provides the results of an issuer's due diligence rather than requiring them to characterize their products. And the permissibility of any disclosure requirement depends upon its context, the nature of the government interest, and the relationship of the required statement to that interest.

2. The disclosure is "uncontroversial."

There can be no real debate about the accuracy or veracity of the disclosure that certain products "have not been found to be 'DRC conflict free.'" The statutory definition of "DRC conflict free" encompasses products that "*do not contain* minerals that directly or indirectly finance or benefit armed groups" in the DRC or an adjoining country. 15 U.S.C. 78m(p)(1)(A)(ii) (emphasis added). Depending on the results of its due diligence, an issuer has either "found" that its products "do not contain" such minerals or it has not.

Appellants nonetheless assert that the disclosure is "highly misleading" because it "obscures" uncertainties about the origin of minerals. Response at 11. But this improperly divorces the disclosure from its context. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014) (citing *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988)). A required description of due diligence precedes any description of products. Thus, to the extent there are any "fundamental uncertainties" or "remote possibilities" involved (Response at 12), they are made clear in the disclosure itself. And the rule allows issuers to include any additional information they wish to provide to further clarify the level of certainty as to the origin of their minerals.[5] JA767.

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[5] Appellants also appear to renew their assertion that the substantive requirements of the rule are too broad. *See* Response at 11-12. But this Court unanimously upheld those provisions. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 365-70.

Nor is the disclosure tantamount to a statement of opinion in some other way. Unlike in *R.J. Reynolds*, the disclosure here does not seek to evoke an emotional response. 696 F.3d at 1216. And it does not convey a government message as to what consumers or investors should do with the information provided. *Id.* at 1216-17. Rather, just as the disclosures in *Nat'l Elec. Mfrs. Ass'n* (272 F.3d at 115) and *New York State Rest. Ass'n* (556 F.3d at 133) were designed to reduce mercury levels and obesity, respectively, by providing information in hopes that consumers would act on it, the disclosure here is designed to reduce funding to armed groups in the DRC by providing consumers and investors factual information with which to make their own decisions.

In appellants' view, the required statement "conveys moral responsibility for the Congo war" (Response at 9) because it "leaves consumers with the misleading impression that there is likely to be some substantial connection between the product and the DRC conflict" (Response at 12-13). But appellants fail to explain why this is the case, especially when the description is viewed in the context of the entire disclosure. Again, the precise nature of an issuer's known connection to the conflict is apparent from the entirety of the report. And a statement that, despite due diligence, an issuer has not been able to find that certain products meet the statutory definition of "DRC conflict free" does not inherently convey that those products are "ethically tainted" (Response at 9, 14). *See* http://www.sec.gov/cgi-

bin/srch-edgar?text=type%3Dsd&first=2014&last=2014 (conflict minerals disclosure forms filed for the 2013 reporting period; searched "type=sd" at http://www.sec.gov/cgi-bin/srch-edgar).

Appellants contend that the phrase "have not been found to be" does not alter the controversial nature of the disclosure because the term "DRC conflict free" itself carries the "unmistakable connotation" that the issuer is "immoral and has not done enough to avoid responsibility for the conflict." Response at 13. But again, the extent of the issuer's efforts is conveyed in the disclosure itself.

And the Supreme Court has made clear that the remedy for the hypothetical stigma appellants fear is not to suppress the information provided in the disclosure, but rather to allow more speech (as the rule does). In *Meese v. Keene*, the Supreme Court rejected a First Amendment challenge to compelled disclosures accompanying materials that met the statutory definition of "political propaganda" despite the potential "that the public will attach an 'unsavory connotation' to the term." 481 U.S. 465, 478-79 (1987) (internal citation omitted). The definition of "political propaganda" was not pejorative (*id.* at 484) and the district court erred by "assum[ing] that the reactions of the public to the label 'political propaganda' would be such that the label would interfere with freedom of speech," *id.* at 482. Instead, the Court held that a "zeal to protect the public from 'too much information' could not withstand First Amendment scrutiny." *Id.* Similarly, here,

the disclosure is intended to provide information regarding the known degree of connection between an issuer's products and the conflict in the DRC. Thus, rather than being pejorative, the use of the term "DRC conflict free" is necessarily descriptive of the facts conveyed.

Moreover, because the statutory scheme at issue in *Meese* allowed "[d]isseminators of propaganda" to "add any further information they think germane," they could combat any "unreasoning prejudice" the public may harbor against materials identified as political propaganda. *Id.* at 481. And Rule 13p-1 permits the disclosure of any additional information the issuer wishes to provide to dispel any perceived confusion about its connection to the conflict.

3. The disclosure survives *Zauderer* review.

The first step in applying *Zauderer* is to "assess the adequacy of the interest motivating the [statutory] scheme." *AMI*, 760 F.3d at 23. Because the governmental interest asserted in *AMI* was "substantial," the Court did not decide whether a lesser interest would suffice. So too here: appellants "do not contest that the government's interest in promoting peace and security in the DRC is substantial, even compelling." Opening Br. at 54.

"[W]hat remains," then, "is to assess the relationship between the government's identified means and its chosen ends." *AMI*, 760 F.3d at 25. And, by using a disclosure mandate to achieve the goal of informing consumers about a

product, the government "will almost always demonstrate a reasonable means-ends relationship, absent a showing that the disclosure is 'unduly burdensome' in a way that 'chill[s] protected commercial speech." *Id.* (quoting *Zauderer*, 471 U.S. at 651).

Here, the conflict minerals disclosure is "reasonably crafted" (*id.* at 26) to provide information about an issuer's products without chilling protected speech. The rule is not a labelling requirement. Nor does it require that the challenged statement be made in the context of an issuer's advertising. And issuers are not, as the district court noted (JA916-17), ever required to separately or conspicuously publish a list of products that have not been found to be "DRC conflict free."

Rather, the challenged statement is required once a year in the body of a conflict minerals report filed with the Commission and posted on an issuer's website, at a location of its choosing. The disclosure is thus not "temporally, tangibly, or otherwise linked to other fully protected speech." *Beeman*, 315 P.3d at 86; *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989). Nor is there any risk that issuers' own message will be overwhelmed (Amicus Br. at 10; *AMI*, 760 F.3d at 27) because of limited time or space in advertising or on labels. Moreover, Rule 13p-1 allows issuers to include additional statements and does not in any way restrict their ability to engage in speech either contemporaneously with the disclosure or elsewhere. This fully satisfies the "fit" requirement (*see AMI*,

760 F.3d at 27; *Envtl. Def. Ctr.*, 344 F.3d at 850), and the disclosure therefore survives *Zauderer* review.

B. Even if *Zauderer* did not apply, *AMI* makes clear that the disclosure survives *Central Hudson* scrutiny.

The Court's decision in *AMI* also makes clear that the conflict minerals disclosure meets the higher *Central Hudson* standard requiring that the disclosure be "narrowly tailored." 760 F.3d at 25. The panel stated that the Commission did not present sufficient evidence that a "less restrictive measure would fail." *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372-73 (quoting *Central Hudson*). But *AMI* reiterated that under *Central Hudson* the government is not required to show that its regulation is the least restrictive means to accomplish its purpose. Rather, all that must be shown is "a 'reasonable fit' or a 'reasonable proportion' between means and ends." *AMI*, 760 F.3d at 26 (internal citations omitted). Indeed, in *Fox*, the Supreme Court specifically disavowed any requirement for the government to show that a less restrictive measure would be less effective. 492 U.S. at 477-81.

Moreover, while the panel expressed concern that there was a lack of evidence that a government-compiled list of products that fail to meet the definition of DRC conflict free placed on the Commission's website would be less effective, the record supports the proposition that posting the disclosure on issuers' websites is more effective. JA617-18. Indeed, one of the appellants requested that the disclosures be made "exclusively" on issuers' websites because that would be

"the most appropriate location for conflict minerals disclosure." JA275-76. Thus, the disclosure meets this requirement of *Central Hudson* review, as well as the others. *See* Br. 61-66.

CONCLUSION

For the foregoing reasons, and those given in our response brief, the conflict minerals disclosure should be upheld.

Respectfully submitted,

ANNE K. SMALL
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

/s/ *Tracey A. Hardin*
TRACEY A. HARDIN
Assistant General Counsel

BENJAMIN L. SCHIFFRIN
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-9040
(202) 551-5048 (Hardin)

December 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I electronically filed the foregoing Supplemental Brief of the Securities and Exchange Commission with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also hereby certify that I caused eight paper copies of the brief to be delivered to the Clerk's Office. Service was accomplished on all parties using the CM/ECF system, including Peter Keisler at pkeisler@sidley.com and Scott Nelson at snelson@citizen.org.

Tracey A. Hardin
TRACEY A. HARDIN