



## Board Report

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**EXECUTIVE MANAGEMENT COMMITTEE  
APRIL 20, 2023**

**SUBJECT: SYSTEM ADVERTISING POLICY**

**ACTION: ADOPT REVISED POLICY**

### **RECOMMENDATION**

ADOPT the System Advertising Policy 2023 (Attachment A) that includes revisions made in response to a recent ruling by the U.S District Court in First Amendment litigation brought by People for the Ethical Treatment of Animals (PETA) against Metro.

### **ISSUE**

Pursuant to Metro's current advertising policy, Metro accepts only advertising of commercial content, subject to two exceptions: ads by government agencies (Exception 1 in Attachment B) and ads from non-profits containing non-commercial content that are co-sponsored by a government agency (Exception 2 in Attachment B). In 2021, PETA filed a lawsuit against Metro, alleging that Metro's prohibition against non-commercial advertising and its exception for ads co-sponsored by a government agency violate the First Amendment. The U.S. District Court granted summary judgment in favor of PETA, and entered its final judgment and permanent injunction in January 2023. The injunction prohibits Metro from enforcing its prohibition against non-commercial advertising and its exception for ads from non-profits who are co-sponsored by a government agency. Metro conducted a global review of its advertising policy in response to the District Court's ruling.

### **BACKGROUND**

Metro's System Advertising Policy addresses both agency assets and advertising content. The scope of assets covered by Metro's advertising policy has grown over the years. Metro's initial advertising policy was adopted in 2000, and at that time its scope was limited to Metro's bus fleet. The policy was revised several times thereafter to increase its scope: in 2005 to include rapid transit bus vehicles; in 2008 to include trains and stations, and in 2017 to include Orange Line bus vehicles. As a result of those revisions, Metro's advertising policy covers all Metro systemwide assets.

Regarding content, the policy was revised multiple times in 2013. The first 2013 revision prohibited

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messages injurious to Metro's interests. This revision followed the blanketing of the system with ads from personal injury law firms, many of which targeted Metro passengers involved in bus accidents. The second revision included the exception for non-profit organizations to partner with a governmental agency in submitting advertising that advances the joint purpose of the non-profit organization and the governmental agency (Exception 2 in Attachment B). In 2017, the policy language was expanded to address new products and advertising technologies. E-cigarettes and vaping were added to the list of prohibited advertising content, while digital platforms (web, mobile, and social media) were added as channels where Metro may display digital advertising. Metro's current advertising policy allows only commercial advertising content, with exceptions for advertising by government entities and advertising by non-profits that are co-sponsored by a government entity.

In 2021, PETA filed a lawsuit against Metro, alleging that Metro's non-commercial advertising prohibition and the exception to that prohibition for ads co-sponsored by a government agency (i.e., "Exception 2") violated the First Amendment. On December 19, 2022, the court granted summary judgment in favor of PETA. The court found that: (1) Metro's non-commercial advertising prohibition was reasonable but not sufficiently definite and objective to prevent arbitrary or discriminatory enforcement; and (2) Metro's Exception 2 to its non-commercial advertising prohibition for ads co-sponsored by a government agency was unreasonable and viewpoint discriminatory. A final judgment and permanent injunction was entered on January 4, 2023. The injunction prohibits Metro from both enforcing its non-commercial advertising prohibition and Exception 2.

Metro appealed on February 2, 2023. On February 10, 2023, Metro moved to stay the injunction pending appeal or, in the alternative, for a three-month period to allow Metro to complete its review of its advertising policy. On March 17, 2023, the District Court granted a three-month stay of its injunction to allow Metro time to modify its advertising policy to address the issues identified in the Court's order on summary judgment. During the three-month stay, Metro may continue enforcement of the current non-commercial advertising prohibition and Exception 2. In response to the ruling by the U.S. District Court, staff has revised Metro's advertising policy to address the issues raised by the Court and implement other updates and improvements. Staff recommends that the Board consider and adopt the revised advertising policy discussed herein.

## **DISCUSSION**

Metro's display of advertising carries with it a responsibility to protect the agency from potential litigation and to be cognizant of the association that can potentially be drawn by the public between advertising images posted on Metro assets and Metro services, while also complying with the rights of advertisers under the First Amendment. Metro's acceptance of transit advertising does not provide or create a general public forum for expressive activities, and Metro does not intend its acceptance of transit advertising to convert its buses, trains, and facilities into public forums for public discourse and debate. The purpose and intent are to accept advertising as an additional means of generating revenue to support Metro's transit operations.

When adopted in 2000, the Policy's Advertising Content Guidelines included a prohibition on non-commercial advertising. The prohibition against noncommercial advertising serves several policy purposes, including but not limited to: (1) maximizing advertising revenue and preserving the value of

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the advertising space; (2) maintaining a position of neutrality and preventing the appearance of favoritism or endorsement by Metro; (3) preventing harm or abuse that may result from imposing views on a captive audience; (4) avoiding vandalism and preserving aesthetics; (5) maximizing ridership and maintaining a safe environment for riders and the public; (6) avoiding claims of discrimination and maintaining a non-discriminatory environment for riders; (7) reducing administrative burden and the diversion of resources from transit operations; and (8) preserving Metro's business reputation as a professional, effective and efficient provider of public transit services. The prohibition against noncommercial advertising is also intended to minimize the risk that Metro buses, trains, and facilities will be designated a "public forum." If Metro advertising space were designated a public forum, Metro could be required to accept and display any type of message from any source. Furthermore, Metro has always reserved the right to reject any advertising content submitted for display on its properties and/or to order the removal of any advertising posted on its properties. Metro also monitors First Amendment litigation against public transit authorities to mitigate risk and identify best practices, which informs its policy revisions.

The proposed policy changes will address the issues raised in the District Court's ruling and relevant First Amendment jurisprudence, and allow staff to continue to operate and generate revenue from commercial advertising with an objective, neutral policy that is capable of reasoned application. The revised language refines the definition of commercial advertising and mitigates risks of running afoul of First Amendment protections by clarifying that its policy applies regardless of whether the proponent is a commercial or nonprofit organization, and by providing objective guidelines to determine whether an ad qualifies as commercial. The revised procedure clarifies the roles and responsibilities of those involved in the content review process. The policy also eliminates subject matter restrictions and further refines definitions for prohibited categories in order to minimize Metro's potential exposure to First Amendment litigation. A redline copy has been provided to compare the current and proposed policy changes (Attachment C).

Commercial advertising revenues are an important supplemental revenue source supporting Metro's transportation operations. Metro's purpose in allowing advertising to be displayed in and on Metro property is to maximize supplemental revenues by monetizing Metro-owned assets. The System Advertising Policy provides programmatic structure for multiple revenue programs at Metro, consisting of:

- Commercial advertising on bus and rail, generating over \$300 million into 2030;
- Transportation Communications Network (TCN), estimated to earn \$300 million to \$500 million over 20 years;
- Commercial Sponsorship and Adoption, estimated to earn \$150 million over 25 years.

### **Policy Language: Key Proposed Changes**

The key proposed changes to Metro's System Advertising Policy, include the following:

1. Elimination of government sponsored ad exception for non-commercial ads.

2. Clarification that Commercial Advertising is the only permitted form of advertising, unless advertiser is a federal, state, LA County governmental entity, or Metro.
3. Inclusion of:
  - a. Revised Policy Purpose statement and objectives
  - b. Disclaimer of Endorsement
4. Excludes advertising that “expresses or advocates an opinion, position or viewpoint on a matter of public debate.”
5. General reorganization and clarification.

### **Policy Application: Key Proposed Changes**

The Procedures have been revised to clarify the role and responsibilities of stakeholders in the advertising content review process:

- A. Advertising Vendors** sell, post and maintain all commercial advertising on Metro properties. All proposed transit advertising must be submitted to the Advertising Vendor for initial compliance review. The Advertising Vendor will perform a preliminary evaluation of the submission to assess its compliance with this policy. If, during its preliminary review of a proposed advertisement, the Advertising Vendor is unable to make a compliance determination, it will forward the submission to the Metro’s advertising panel for further evaluation. The Advertising Vendor may at any time discuss with the entity proposing the advertisement one or more revisions to an advertisement, which, if undertaken, would bring the advertisement into conformity with this Advertising Policy. The Advertising Vendor will immediately remove any advertisement that Metro directs it to remove.
- B. Metro’s Advertising Panel** will review the proposed advertisement for compliance with the guidelines set forth in this policy and will direct the Advertising Vendor as to whether the proposed advertisement will be accepted. In the discretion of the advertising panel, any proposed transit advertising may be submitted to Metro’s Marketing Executive for review.
- C. Metro’s Marketing Executive or Designee** shall conduct a final review of proposed advertising at the request of Metro’s advertising panel. The decision of the Marketing Executive to approve or reject any proposed advertising shall be final.
- D. Metro’s Advertising Panel or the Marketing Executive** may consult with other appropriate Metro employees, including Metro’s legal counsel, at any time during the review process.

### **DETERMINATION OF SAFETY IMPACT**

There is no safety impact by adopting this policy.

Staff will manage the advertising program and ensure contractors work in compliance with Metro Safety policies and certifications.

### **FINANCIAL IMPACT**

There is no financial or budgetary impact by adopting this policy.

...Equity\_Platform

### **EQUITY PLATFORM**

Advertising revenues are an important supplemental revenue source supporting Metro's transportation operations, including providing service in Equity Focus Communities to serve customers who rely on our system. The advertising program accepts multi-cultural and multi-language advertisements that provide alignment and inclusion of Metro's diverse communities. The proposed changes are necessary to address issues found by the U.S. District Court in Metro's current advertising policy.

### **IMPLEMENTATION OF STRATEGIC PLAN GOALS**

This board action supports Strategic Goal 5: Provide responsive, accountable, and trustworthy governance within the LA Metro organization. A current Policy provides structure to responsibly manage a commercial advertising program and generate revenue that provide long-term supplemental revenue to support Metro's transportation operations.

### **ALTERNATIVES CONSIDERED**

If the recommended revisions are not adopted, Metro will remain subject to the permanent injunction issued by the U.S. District Court's ruling in PETA vs. LACMTA., and required to accept non-commercial advertisement, potentially including advertisements regarding controversial political and social issues. Not having a compliant policy will delay advertising business decisions and content approvals, and result in loss of revenue. Furthermore, delayed business action may bring on further litigation against Metro.

### **NEXT STEPS**

Upon Board approval, staff will update internal processes and procedures to meet U.S. District Court compliance requirements. The revised Policy will be distributed to advertising vendors and made publicly available for advertisers on Metro's website.

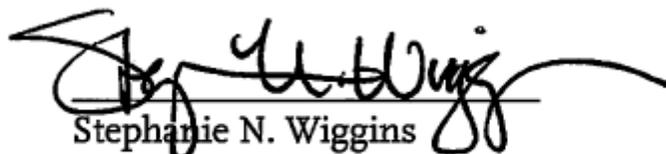
### **ATTACHMENTS**

Attachment A - Proposed Metro System Advertising Policy 2023  
Attachment B - Current Metro System Advertising (COM6)-2017

Attachment C - Redline Version of Metro System Advertising Policy

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