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September 11, 2012

Joseph J. Lhota
Chairman and Chief Executive Officer
347 Madison Avenue
New York, NY 10017-3739

Sent by U.S. Mail and Facsimile

Re: MTA Advertising Policy

Dear Mr. Lhota:

We understand that the Metropolitan Transportation Authority ("MTA") is re-examining its policies regarding the acceptance of "non-commercial viewpoint advertisements" at its facilities.[1] We are writing to highlight barriers to any subject matter restraints that MTA may be considering as part of this re-examination. You are already aware of the First Amendment barriers that U.S. District Judge Engelmayer "pointedly" suggested at footnote 14 of American Freedom Defense Initiative v. Metropolitan Transportation Authority, 11 Civ 6774 (PAE) (S.D.N.Y. July 20, 2012), which enjoined enforcement of the MTA's existing policy. We write to emphasize that the Connecticut Constitution interposes additional barriers, which Judge Engelmayer's First Amendment ruling does not address.

The barriers are at least three-fold.

First: eschewing federal-style forum analysis, the Connecticut Supreme Court has held that Connecticut's Constitution – specifically its speech clauses, Article First, Sections 4 and 5 – "provides greater protection for expressive activity than that provided by the first amendment to the federal constitution." Leydon v. Town of Greenwich, 257 Conn. 318, 348 (2001), citing State v. Linares, 233 Conn. 345, 380-81 (1995). Under Leydon and Linares, speakers have access to government property unless the government can prove that "the manner of expression is incompatible with the normal activity of a particular place at a particular time." Id. By displaying advertising, the MTA acknowledges that this manner of expression is compatible with the places where it appears. It is difficult to imagine that the subject-matter of a particular advertisement could render the advertisement incompatible.

Second: Conn. Const. Article First, Section 4 reads, "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." The courts of other states have interpreted similar language – so markedly different from that of the First Amendment – as prohibiting every form of discrimination based on subject matter or other speech content. E.g., State v. Henry, 732 P.2d 9 (Or. 1987). The Connecticut Supreme

[1] http://www.acorn-online.com/joomla15/wiltonbulletin/news/localnews/129041-train-ads-cause-furor-charges-of-anti-islam-bigotry.html

Court has intimated that it is receptive to this approach. Barrett v. Burns, 212 Conn. 176, 178 n.1 (1989). See Martin B. Margulies, Connecticut's Free Speech Clauses: A Framework and an Agenda, 65 Conn. Bar Journal 437, 438-441 (1991). Under this approach, the MTA cannot reject an advertisement merely because it expresses a "non-commercial viewpoint" – or, for that matter, because it is "demeaning," "political," or "controversial."

Third: sibling state court decisions likewise interpret language, similar to Section 4's, as "absolutely" prohibiting prior restraints (in contrast to the strict scrutiny mandated under the First Amendment). E.g., State v. Coe, 679 P.2d 353, 359 (Wash. 1984); Henry, supra. Again, the Connecticut Supreme Court has intimated that it is receptive to this approach, based both on Section 4 and also on Section 5 ("No law shall ever be passed to curtail or restrain the liberty of speech . . . ."). Cologne v. Westfarms Assocs., 192 Conn. 48, 63 & n.9 (1984). A subject-matter restriction upon advertising would operate as a classic prior restraint, inasmuch as it would empower the MTA to screen each advertisement's content before allowing it to appear.

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For these reasons, as well as on familiar First Amendment grounds, we respectfully urge you to reject any subject-matter constraints on advertising at MTA facilities. Thank you for your attention.

Yours truly,

Sandra Staub
Legal Director

Martin Margulies
Cooperating Attorney

SJS/jjs

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