



JPB Advocacy and Major Projects (AMP) Committee
Meeting of September 27, 2023

Supplemental Reading File

<u>#</u>	<u>Subject</u>
1	Clipper BayPass Participation Agreement_Final

CLIPPER® BAY PASS PILOT PROGRAM PARTICIPATION AGREEMENT

This Clipper® BayPass Pilot Program Participation Agreement (the “Agreement”) is entered into as of the ____ day of _____, 2023 (the “Effective Date”), by and among the Metropolitan Transportation Commission (“MTC”) and the following transit operators participating in the Clipper® BayPass Pilot Program (referred to herein individually as an “Operator” or collectively as the “Operators”)¹:

Alameda-Contra Costa Transit District (“AC Transit”); Golden Gate Bridge Highway and Transportation District (“GGBHTD”); the San Francisco Bay Area Rapid Transit District (“BART”); the City and County of San Francisco, acting by and through its Municipal Transportation Agency (“SFMTA”); the San Mateo County Transit District (“SamTrans”); the Santa Clara Valley Transportation Authority (“VTA”); the Peninsula Corridor Joint Powers Board (“Caltrain”); Central Contra Costa Transit Authority; City of Fairfield, as the operator of Fairfield and Suisun Transit; City of Petaluma; Eastern Contra Costa Transit Authority; Livermore/Amador Valley Transit Authority; Marin County Transit District; Napa Valley Transportation Authority; Solano County Transit; Sonoma County Transit; Sonoma-Marín Area Rail Transit (“SMART”); Vacaville City Coach; Western Contra Costa Transit Authority; San Francisco Bay Area Water Emergency Transportation Authority; City of Santa Rosa; and City of Union City.

MTC and the Operators are referred to herein collectively as the “Parties” or individually as a “Party”.

RECITALS

WHEREAS, on November 15, 2021, the Fare Integration Task Force, a special committee of the Clipper Executive Board, consisting of transit operators, MTC, and county transportation agencies, adopted a Bay Area Transit Fare Policy Vision Statement which called for the “deployment of an all-transit agency institutional/employer pass demonstration pilot in 2022, with a focus on educational institutions, affordable housing properties, and employers of various sizes, pending available resources/technical considerations;” and

WHEREAS, as of January 1, 2023 several Operators offer their own employer/institutional pass products, such as AC Transit’s EasyPass Program, Caltrain’s GO Pass Program, SamTrans’ Way2Go Program, and VTA’s SmartPass Program, collectively referred to as “Preexisting Institutional Pass Products;” and

WHEREAS, the Clipper BayPass Pilot Program was created in 2022 under the direction of the Fare Integration Task Force in order to deliver on the commitment to establish an institutional/employer pass pilot to evaluate the impact that an unlimited institutional regional transit pass may have on transit ridership, revenues, and customer experience. The Clipper BayPass Pilot Program is administered by staff from MTC and BART; and

WHEREAS, the Clipper BayPass Pilot Program utilizes the Clipper fare payment system product known as the “Events Pass”. The Clipper BayPass Pilot Program provides individual participants with a transit pass good for unlimited travel on all transit services operated by the Operators that accept Clipper, with the exception of Cable Car service operated by the SFMTA (“Clipper BayPass”); and

WHEREAS, on August 1, 2022, the Parties launched Phase 1 of the Clipper BayPass Pilot Program at the University of California, Berkeley, San Francisco State University, San Jose State University, Santa Rosa Junior College and 13 affordable housing properties managed by MidPen Housing Corporation (“Clipper BayPass Phase 1 Participants”); and

WHEREAS, Operators consented to participate in Phase 1 of the Clipper BayPass Pilot Program prior to the August 1, 2022 launch of the program through written consent, consisting of governing board approval and/or executive director/general manager approval as conveyed to MTC by respective Operators; and

WHEREAS, Clipper BayPass Phase 1 Participants received Clipper BayPass at no cost as each of these institutional participants was in an existing contractual relationship with at least one Operator to purchase a transit pass product that provided access to one or more Operators' transit service. MTC allocated State Transit Assistance funds to each Operator, starting in FY 2022-23 and to continue until the conclusion of the Phase 1 Pilot, to backfill any revenue impact from use of the Clipper BayPass by Clipper BayPass Phase 1 Participants; and

WHEREAS, Phase 2 of the Clipper BayPass Pilot Program will offer the Clipper BayPass product for sale to up to 10 employers and/or institutions in the Bay Area with a combined total of up to 20,000 individuals. Each employer/institutional customer of Phase 2, with the exception of Preexisting Institutional Pass Product customers, will enter into a one-year contract with MTC which will set forth the financial terms of the purchase of the Clipper BayPass product. Contracts will be subject to renewal on an annual basis, with financial terms subject to change. Preexisting Institutional Pass Product customers will maintain their existing contractual relationship with the Operator offering their Preexisting Institutional Pass Product with a separate additional contract with MTC for Phase 2 of the Clipper BayPass Pilot unless the Operator, MTC, and customer mutually agree to another contracting arrangement; and

WHEREAS, Phase 2 of the Clipper BayPass Pilot Program will begin on December 1, 2023 and continue to no later than June 30, 2026; and

WHEREAS, the Clipper BayPass program is designed with a goal of generating new riders and new revenue sources for transit operators, and to broaden access to institutional pass programs; and

WHEREAS, During Phase 2 of the Clipper BayPass Pilot Program, Clipper BayPass will not be offered at a price that undercuts the cost of any Preexisting Institutional Pass Products. The cost of Clipper BayPass to any employer will be above the cost of any Preexisting Institutional Pass Product for operators that serve the employer's physical location. Service is defined as a rail station or bus stop within three miles of an employer's physical location; and

WHEREAS, During Phase 2 of the Clipper BayPass Pilot Program in San Mateo County and Santa Clara County, Clipper BayPass will only be offered to Preexisting Institutional Pass Product customers of Caltrain's GoPass Program within three miles of a Caltrain rail station or VTA's SmartPass Program outside of three miles of a Caltrain rail station; and

WHEREAS, Phase 2 of the Clipper BayPass Pilot program is designed in a manner that protects existing transit operator revenues, especially for operators with existing institutional pass programs; and

WHEREAS, MTC and Clipper BayPass project staff will continue to engage with operator staff and executives to share pilot findings, project updates, and to collect feedback from transit operators about the program; and

WHEREAS, MTC and Clipper BayPass project staff will proactively seek input and consent from Operators before any long-term program is established; and

WHEREAS, it is the understanding of the parties that the pricing and revenue distribution terms in this agreement do not establish a precedent for pricing or revenue distribution in any post-pilot Clipper BayPass program that might be established. The terms of any such future program are subject to later negotiation. Any Operator will have the discretion to participate or not participate in any future post-pilot Clipper BayPass program that that might be established;

NOW, THEREFORE, in consideration of the facts recited above, the Parties agree as follows:

ARTICLE I
Operator Responsibilities

Each Operator agrees to:

- A. Participate in the Clipper BayPass Pilot program for the remaining period of the Phase 1 Pilot, lasting until July 31, 2024.
- B. Participate in the Clipper BayPass pilot program for the entirety of the Phase 2 Pilot lasting from the Effective Date until no later than June 30, 2026.
- C. Provide in-kind staff and administrative support needed to successfully deliver and administer the Clipper BayPass Pilot program at the Operator.
- D. Partner with MTC, other Operators, and/or their designated third-party consultants for the Clipper BayPass Pilot to organize evaluation and research activities including surveys, focus groups, and other similar research methods over the course of the Pilot.
- E. Facilitate the payment to the Operator of revenues generated by the sale of Clipper BayPass to institutions during Phase 2 by MTC.

ARTICLE II
MTC Responsibilities

MTC agrees to:

- A. Administer the Clipper BayPass Pilot program for the remaining period of the Phase 1 Pilot, lasting until July 31, 2024.
- B. Administer the Clipper BayPass Pilot program for the entirety of the Phase 2 Pilot lasting from December 1, 2023 until no later than June 30, 2026.
- C. Provide in-kind staff and administrative support needed to successfully deliver and administer the Clipper BayPass Pilot program, including managing the contractual relationship with employer customers, customer support, new business development, financial management, public information, communications, and technology support/operations.
- D. Provide regular updates to the Fare Integration Task Force or any designated successor body on the status of the Clipper BayPass Pilot program.
- E. Conduct an evaluation of the Clipper BayPass Pilot, as directed by the Fare Integration Task Force or any designated successor body.

- F. Collect revenue generated by sales from the Phase 2 Clipper BayPass Pilot Product (“Phase 2 revenue”) under the terms of individual contracts with employer/institutional customers.
- G. Allocate Phase 2 revenues and any other approved funds to the Parties under the terms set forth in Article III.

ARTICLE III Program Revenues

- A. Any Phase 2 revenue generated by the sales of Clipper BayPass to an employer/institutional customer that was not a customer of an Operator’s Preexisting Institutional Pass Product on either January 1, 2020 or on the Effective Date shall be allocated by MTC amongst the Parties based on actual passenger usage of the Clipper BayPass Phase 2 product at a rate equal to a regular Adult Clipper fare for each trip taken.
- B. Any Phase 2 revenue generated by the sales of Clipper BayPass to an employer/institutional customer that was a customer of an Operator’s Preexisting Institutional Pass Product on either January 1, 2020 or on the Effective Date shall first be allocated to the Operator holding the Preexisting Institutional Pass Product contract with the employer/institutional customer in an amount equal to the cost of the Preexisting Institutional Pass Product for that employer/institutional customer during the current fiscal year at the time. Remaining revenues not allocated to the Operator holding the Preexisting Institutional Pass Product contract will be available to allocate according to the process described in subsection A.
- C. Should the Phase 2 revenue be in excess of the amount needed to reimburse Operators under the terms described in Article III, subsections A and B, these additional revenues up to a limit of \$1,000,000 or whatever costs were incurred by MTC to establish the Phase 2 program, whichever is less, shall be available to reimburse MTC for the operation and management of the Clipper BayPass Pilot program subject to the approval of the Fare Integration Task Force or any designated successor body. All additional excess revenues, beyond the limit described above, will be allocated to transit operators based on each operator’s share of overall Phase 2 ridership.
- D. Should the Phase 2 revenue be insufficient to reimburse Operators under the terms described in Article III, subsections A and B, MTC may use budgeted and MTC Commission approved funds (“revenue backstop”), currently \$5,000,000 as of the Effective Date, as an alternative source of funding to reimburse Operators.
- E. The project team, consisting of MTC and BART staff, will keep the Fare Integration Task Force or any designated successor body updated on a regular basis on Phase 2 revenues, usage, and interested customers, and MTC will not enter into additional contracts with employer/institutional customers if it is determined by MTC that the \$5,000,000 revenue backstop may be insufficient to fully reimburse Operators the terms described in Article III, subsections A and B.
- F. Should any existing employer/institutional customer of one of the Operators’ Preexisting Institutional Pass Products express an interest in purchasing the Clipper BayPass product, the Clipper BayPass will only be offered to the existing employer/institutional customer as upgrade to their Preexisting Institutional Pass Product. MTC will manage a

supplemental contract for the BayPass upgrade, and the Parties will strive to align operational processes between the Clipper BayPass and the Preexisting Institutional Pass programs.

ARTICLE IV Indemnification

- A. Mutual Indemnification.** No Party to this Agreement (including any of its directors, commissioners, officers, agents or employees) shall be responsible for any damage or liability occurring by reason of anything done or omitted to be done by any other Party under or in connection with this Agreement. Pursuant to Government Code Section 895.4, each Party agrees to fully indemnify and hold other Parties harmless from any liability imposed for injury (as defined by Government Code Section 810.8) occurring by reason of anything done or omitted to be done by such indemnifying Party under or in connection with this Agreement and for which such indemnifying Party would otherwise be liable.
- B. Operator Indemnification of MTC.** Notwithstanding the provisions of Subsection A above, each Operator shall indemnify, hold harmless, and defend MTC (including any of its directors, commissioners, officers, agents or employees) from any and all claims or liability resulting from any action or inaction on the part of such Operator relating to its responsibilities under or in connection with this Agreement.
- C. MTC Indemnification of Operators.** Notwithstanding the provisions of Subsection A above, MTC shall indemnify, hold harmless, and defend each Operator (including any of its directors, commissioners, officers, agents or employees) from any and all claims or liability resulting from any action or inaction on the part of MTC under or in connection with this Agreement.

ARTICLE V Term

The term of the Agreement shall begin upon the Effective Date and continue until June 30, 2026, unless terminated by written agreement of the Parties.

ARTICLE VI Changed Circumstances

Any Party may initiate informal discussions among the Parties concerning the provisions of this Agreement, based on its assessment that changes in other factors external to the Agreement indicate that it would be in the best interests of one or more Parties to consider revisions to the Agreement. If a majority of Parties agree, the Parties will then jointly evaluate the changed circumstances to determine what, if any, revisions to the Agreement are necessary or desirable. Any agreed-upon changes shall require an amendment to the Agreement approved and executed by all Parties.

ARTICLE VII Legal Representation and Common Interest

The Parties recognize a mutuality of interest, and a need for joint cooperation in legal matters relating to Clipper. In furtherance of this common interest, any communications among Parties and counsel for any of the Parties shall be confidential and protected from disclosure to any third party by each and every privilege – including, but not limited to, the attorney-client privilege, the attorney work product privilege, and the pooled information privilege – notwithstanding the dissemination of the communications and work product among Parties by the counsel that made the information available in the first instance. If

information covered by the privileges is requested by a third party pursuant to a subpoena or other discovery request, then counsel receiving the request shall notify in a timely fashion the counsel who disclosed the information so that the privileges against disclosure may be asserted.

Should any Party withdraw from or otherwise terminate its participation in the Clipper program, such withdrawal or termination shall not impair the privileges that protect any information that has been shared prior to such action. Any Party that withdraws or terminates its participation in the Clipper program shall promptly return all privileged materials that the Party has received.

ARTICLE VIII
Confidential Information

Either MTC or an Operator (the “Receiving Party”) may, in the course of carrying out its responsibilities under this Agreement, have access to proprietary or confidential information owned by the other Party (“the Disclosing Party”), the disclosure of which to third parties may damage the Disclosing Party. Such proprietary or confidential information must be held by the Receiving Party in confidence and used only in performing its responsibilities as provided in the Agreement. The Receiving Party shall exercise at least the same standard of care it would use to protect its own proprietary or confidential information.

SIGNATURES ON SUBSEQUENT PAGES

IN WITNESS WHEREOF, this Agreement has been duly authorized and executed by the Parties hereto on the dates specified below by their duly authorized representatives.

Metropolitan Transportation Commission

Approved as to form:
Kathleen Kane, General Counsel

Name: Andrew B. Fremier
Title: Executive Director

Matthew Lavrinets, Senior Counsel

Date: _____

Alameda-Contra Costa Transit District

Approved as to form:

Name: Michael A. Hursh

Title: General Manager

Date: _____

Jill A. Sprague, General Counsel

**Golden Gate Bridge, Highway and
Transportation District**

Approved as to form:

Name: Denis J. Mulligan
Title: General Manager

Kimon Manolius, General Counsel

Date: _____

San Francisco Bay Area Rapid Transit District

Approved as to form:

Name: Robert M. Powers

Title: General Manager

Date: _____

Matthew Burrows, General Counsel

**City and County of San Francisco
Municipal Transportation Agency**

Approved as to form:
David Chiu, City Attorney

Name: Jeffrey Tumlin
Title: Director of Transportation

Robin M. Reitzes, Deputy City Attorney

Date: _____

San Mateo County Transit District

Approved as to form:

Name: April Chan

Title: General Manager/CEO

Date: _____

Joan L. Cassman, General Counsel

Santa Clara Valley Transportation Authority

Approved as to form:

Name: Carolyn Gonot
Title: General Manager/Chief Executive Officer
Date: _____

Evelynn Tran, General Counsel

Peninsula Corridor Joint Powers Board

Approved as to form:

Name: Michelle Bouchard

Title: Executive Director

Date: _____

James Harrison, General Counsel

Central Contra Costa Transit Authority

Approved as to form:

Name: William Churchill

Title: General Manager

Date: _____

Julie Sherman, General Counsel

City of Fairfield
Fairfield and Suisun Transit

Approved as to form:

Name: David Gassaway
Title: City Manager

David Lim, City Attorney

Date: _____

City of Petaluma

Approved as to form:

Name: Peggy Flynn

Title: City Manager

Date: _____

Eric W. Danly, City Attorney

Eastern Contra Costa Transit Authority

Approved as to form:

Name: Rashidi Barnes
Title: Chief Executive Officer

Eli Flushman, General Counsel

Date: _____

Livermore/Amador Valley Transit Authority

Approved as to form:

Name: Christy Wegener
Title: Executive Director

Michael N. Conneran, General Counsel

Date: _____

Marin County Transit District

Approved as to form:

Name: Nancy E. Whelan

Title: General Manager

Date: _____

Kerry Gerchow, County Counsel

Napa Valley Transportation Authority

Approved as to form:

Name: Kate Miller
Title: Executive Director

Osman Mufti, General Counsel

Date:_____

Solano County Transit

Approved as to form:

Name: Beth Kranda
Title: Executive Director

Bernadette Shilts Curry, County Counsel

Date: _____

City of Santa Rosa

Approved as to form:

Name: Maraskeshia Smith

Title: City Manager

Date: _____

Sue A. Gallagher, City Attorney

Sonoma-Marín Area Rail Transit District

Approved as to form:

Name: Eddy Cumins
Title: General Manager

Thomas Lyons, General Counsel

Date: _____

Vacaville City Coach

Approved as to form:

Name: Brian McLean
Title: Assistant Director of Public Works

Melinda C. H. Stewart, City Attorney

Date:_____

Western Contra Costa Transit Authority

Approved as to form:

Name: Robert Thompson

Title: General Manager

Date: _____

Michael N. Conneran, General Counsel

**San Francisco Bay Area Water Emergency
Transportation Authority**

Approved as to form:

Name: Seamus Murphy

Title: Executive Director

Date: _____

Steve Miller, General Counsel

Sonoma County Transit

Approved as to form:

Name: Bryan Albee
Title: Transit Systems Manager

Jeremy Fonseca, General Counsel

Date: _____

City of Union City

Approved as to form:

Name: Joan Malloy

Title: City Manager

Date: _____

Kristopher J. Kokotaylo, City Attorney