BEFORE THE NEW YORK CITY MAYOR'S
OFFICE OF SPECIAL ENFORCEMENT

Proposed Short-Term Rental Rules	Public Hearing: December 5, 2022

COMMENTS OF AIRBNB, INC., ON SHORT-TERM RENTAL RULES

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INTRODUCTION

Since 2008, Airbnb has provided a platform for Hosts to share their homes with guests around the world. In New York City (the "City"), Hosting has helped thousands of individuals earn supplemental income to support themselves and build economic independence. Unfortunately, the bill passed by Mayor DeBlasio's administration, as interpreted by the Office of Special Enforcement ("OSE"), will create a draconian and unworkable registration system that will prevent responsible Hosts from listing their homes at a time when New York families are navigating the rising cost of living. Airbnb and our Hosts support an effective and transparent regulatory framework that helps responsible Hosts and targets illegal hotel operators. To that end, Airbnb and many members of the Host community have tried to work with the City on these important issues, and have presented the City with specific alternatives that will create an appropriate and balanced framework. Under the City's robust data reporting law, the City already has the information it needs to effectively regulate short-term rental activity. Unfortunately, the Proposed Rules will hurt families and those trying to cope with rising inflation who, in the country's largest city, will have the most prohibitive options to earn supplemental income. Airbnb urges the City to consider the alternatives and comments that have been presented to it, to make appropriate revisions to the Proposed Rules, and to take the necessary time to implement a solution that meets the moment and the needs of New Yorkers.

EXECUTIVE SUMMARY

The Proposed Rules establish a needlessly intrusive, complicated, expensive, and onerous registration and verification system that does not reflect measured rulemaking; rather, it reflects a decision without any stated justification, rationale, or

acknowledgement that it is likely to drastically decrease (if not nearly eliminate) short-term rentals in New York City. The Proposed Rules are arbitrary and capricious for five primary reasons. *First*, they will likely lead to serious, unintended consequences that the OSE failed to consider. *Second*, in developing the Proposed Rules, OSE failed to consider reasonable alternative options. *Third*, OSE has exceeded the scope of authority that the City Council purported to delegate to it. *Fourth*, OSE failed to explain the basis for the Proposed Rules, instead keeping secret whatever analyses (if any) it performed. *Fifth*, to whatever extent proponents of the Proposed Rules may claim OSE was motivated by concerns about affordable housing or tourism, those unstated concerns could not possibly justify the Proposed Rules as a matter of sound logic and economics. Moreover, in addition to being arbitrary and capricious, the Proposed Rules are legally infirm for numerous other reasons.

OSE's arbitrary and capricious decision-making will have serious unintended consequences, which OSE failed to consider:

First, by imposing onerous registration requirements on prospective hosts—including disclosing extensive personal information, gathering and maintaining paperwork, paying a nonrefundable fee, and certifying compliance with laws without having the means to understand them—the Proposed Rules will significantly and unnecessarily burden prospective hosts who wish to offer their homes for short-term rental, if not drive them out of the short-term rental market altogether.

Second, the Proposed Rules will drastically hinder Airbnb's and other booking services' operations in New York City. The Proposed Rules impose burdensome, inefficient, and exorbitant verification requirements on booking services;

shift the responsibility of enforcing short-term rental laws from OSE to booking services; and establish what will in effect operate as a strict liability framework for accidental noncompliance with the rules. OSE's verification requirements and procedures are technically untenable and necessitate extensive platform re-designs. The result will be significant revenue losses in New York City with no justification for that impact. Because the Proposed Rules require booking services to verify that prospective hosts are permitted to list their homes for short-term rental using four discrete data points that each require an *exact* match in OSE's electronic verification system, they ensure that Airbnb will be unable to verify some registered hosts—even those who made inadvertent or scrivener's errors in their personal information—and thus force Airbnb to either de-list those hosts or subject itself to possible fines.

Third, the Proposed Rules raise serious safety and privacy concerns for hosts and their households and for guests, and there is no indication OSE took these concerns into account. The Proposed Rules require prospective hosts to disclose extensive information about themselves and their household members, make their full addresses publicly available, and divulge their full legal names. The safety implications of the Proposed Rules will disproportionately burden those vulnerable to stalking, harassment, and domestic or other violence; LGBTQ people; and undocumented people. And people who are more likely to have a name that is not their full legal name—for identity, privacy, safety, or other reasons—will face additional deterrents. Furthermore, the Proposed Rules place guest and host safety at risk because they incorporate unreasonable interpretations of City codes that would prohibit locking any doors within a

short-term rental unit and allow hosts and guests unfettered access to one another's private spaces.

Fourth, New York City tourism will suffer because fewer short-term rentals will be available to visitors, and OSE has not done any analysis to demonstrate that the hotel industry will be able to meet the demand for short-term accommodations. Moreover, the boroughs other than Manhattan contain more than half of Airbnb's New York City listings—which generate tourism dollars for these neighborhoods—and will thus incur disproportionate harm from the Proposed Rules.

Fifth, the Proposed Rules will disproportionately harm hosts, guests, and other participants in the short-term rental market who are members of historically marginalized groups, as well as travelers with needs that hotels cannot address, and there is no indication that OSE considered this impact. Contrary to the City's public policy of promoting equal opportunity, the Proposed Rules create heightened barriers to short-term rental registration for (among others) undocumented people, LGBTQ people, and survivors of violence. For guests, the Proposed Rules' restriction of short-term rentals will most severely harm low-income travelers, as well as others—such as medical students, interns, travelers in town for medical treatment, and travelers visiting family members in the outer boroughs—whose needs hotels cannot adequately meet. And by hurting the City's tourism industry, the Proposed Rules will disproportionately harm immigrants and communities of color, who work a significant share of tourism jobs.

In formulating the Proposed Rules, OSE failed to consider—without explanation or justification—reasonable alternatives that could have achieved the objectives of Local Law 18/2022. It identified no rational connection between the facts at play and the

choices that it made and instead proceeded under a veil of secrecy. Many less onerous requirements for hosts and booking services were available to OSE, including some that have been raised by community members, but there is no indication that OSE considered them.

OSE exceeded the scope of the authority that the City Council purported to delegate to it by imposing onerous requirements on hosts and booking services that the City Council did not mandate, engaging in unauthorized legislative policymaking, and conferring upon itself unfettered discretion to decide whether short-term rentals that comply with New York law are nevertheless ineligible for registration based on OSE's own unauthorized policy judgments.

OSE failed to explain the basis for the Proposed Rules and instead kept secret the data and analyses on which it might have relied (if any). OSE did not identify market failures or reasons why current market outcomes are sub-optimal and must be addressed by regulation. Indeed, there is no extant market failure that would justify the unintended consequences of the Proposed Rules.

To whatever extent proponents of OSE's Proposed Rules purport to be concerned about housing affordability and increasing rental costs, the Proposed Rules are not rationally related to either concern. And if the Proposed Rules were instead motivated by a desire to bolster the City's hotel sector at the expense of other stakeholders in the tourism industry and the public—as the underlying legislation may well have been, according to a statement by its sponsor—that would be an improper and unjustified exercise of any rulemaking authority or of the City's police power.

In addition to being arbitrary and capricious, OSE's Proposed Rules are legally infirm because they exacerbate defects underlying Local Law 18/2022—including, but not limited to, the Local Law's breach of two prior settlement agreements between the City and Airbnb. Moreover, the Proposed Rules were promulgated pursuant to an overbroad and unlawful delegation of legislative power; exceed the City's police power and violate New York's Home Rule Law, including because they are inconsistent with and preempted by the state's Real Property Law; are preempted by the federal Communications Decency Act; are unconstitutionally vague; subject hosts and booking services to unconstitutional searches; impose an unconstitutional tax; authorize excessive fines; and infringe upon constitutionally protected privacy and associational rights.

Airbnb urges OSE and the City to continue engaging in dialogue, to study the relevant issues and the impact of its proposed rulemaking, and ultimately to promulgate rules that reflect the economic realities of the short-term rental market and its benefits to New Yorkers.

COMMENTS

I. The Proposed Rules Are Likely to Lead to Serious Unintended Consequences and as Such Are Arbitrary and Capricious.

A. The Proposed Rules Will Have a Substantial Chilling Effect on Host Participation in the Short-Term Rental Market.

As evidenced by the wealth of comments already submitted in response to the Proposed Rules, short-term rental hosts are, by and large, people who live and work in the City looking to earn a bit of supplemental income by sharing their homes and communities with visitors. The overbroad and burdensome requirements set forth in the Proposed Rules will substantially chill these hosts from engaging in the lawful short-term

rental trade.[1] There will be hosts who simply cannot meet these requirements, and hosts who are unwilling to try—to the ultimate detriment of New Yorkers.

The Proposed Rules will deter host participation in the short-term rental market in at least four ways.

First, as part of the initial eligibility and registration requirements, the Proposed Rules require hosts to disclose a substantial amount of personal and potentially sensitive information, as well as information to which hosts may not even have access, and to make onerous and sweeping certifications about compliance with New York City laws and codes. These requirements include:

- Providing identification and two forms of proof of occupancy under section 21-03(4)–(6), including information about the host's period of tenancy in the dwelling if the host is a tenant;
- Disclosure of the full legal names of all permanent occupants of the dwelling, and of "the nature of their relationship to" the host under section 21-03(3)(f);
- Certification under section 21-03(7) that the host understands and will comply with the Zoning Resolution, the Multiple Dwelling Law, the Housing Maintenance Code, New York City Construction Codes, and other laws "including but not limited to" various local codes. Under

[1] Indeed, numerous comments submitted in response to the Proposed Rules indicate that the onerous requirements will substantially deter hosts from participating in the short-term rental market. *See, e.g.*, Inna Volchek, Comment to *Registration of Short-Term Rentals*, N.Y.C. RULES (Nov. 16, 2022, 10:05 p m.), https://rules.cityofnewyork.us/rule/registration-of-short-term-rentals ("My only way to afford a housing [sic] is to Airbnb one of the bedrooms while kids are in the dorm. Please don't take it away."); Alyssa, Comment to *Registration of Short-Term Rentals*, N.Y.C. RULES (Nov. 18, 2022, 11:44 a m.), https://rules.cityofnewyork.us/rule/registration-of-short-term-rentals ("Without the option of Airbnb, I will not be able to pay my bills and live in my apartment. Please do not take this income support away from struggling New Yorkers."). And, in fact, Santa Monica, Boston, and San Francisco—cities that have implemented short-term rental registration systems comparable to that contained in the Proposed Rules—each saw decreases in the number of short-term rental listings after the registration systems were put in place. Kate Cargle, *Data shows declining Airbnb listings as city cracks down*, SANTA MONICA DAILY PRESS (July 18, 2018), https://smdp.com/2018/07/18/data-shows-declining-airbnb-listings-as-city-cracks-down/; Will Feuer, *Airbnb has removed thousands of listings in Boston as new rule takes effect ahead of the company's presumed IPO next year*, CNBC (Dec. 3, 2019), https://www.cnbc.com/2019/12/03/in-boston-airbnb-tasked-with-removing-thousands-of-illegal-listings html; Steve Dent, *Airbnb cuts half of San Francisco listings as new laws kick in*, ENGADGET (Jan. 19, 2018), https://www.engadget.com/2018-01-19-airbnb-san-francisco-listings-cut-in-half.html.

section 21-13, these certifications carry with them the potential for monetary penalties for making false statements;

- Disclosure of the "month and year the [host] began residing in" the relevant dwelling under section 21-03(3)(i);

- Provision of a "diagram of the dwelling unit, that includes (i) all rooms in the unit, (ii) locations of fire extinguishers, (iii) normal and emergency exit routes from the unit to the building that contains the unit, and (iv) which room or rooms will be used to house short-term lodgers" under section 21-03(3)(g);

- Certification that the host is not prevented from renting through the terms of their lease or other agreement under section 21-03(9), which is not only onerous but shifts power to withhold consent to the host's landlord, regardless of tenants' rights contained in the Real Property Law. Additionally, under section 21-13, these certifications carry with them the potential for monetary penalties for making false statements; and

- Agreement under section 21-03(8) to report all listings to OSE "prior to such listing being used to make an agreement for short-term rental," which neither defines what constitutes "use," nor considers potential limitations on a host's practical ability to make the disclosure *before* that listing is "used" on a booking service.

These burdensome requirements—along with the numerous other registration requirements not specifically highlighted in this Comment—will deter a substantial number of hosts from attempting to register their short-term rentals. The requirements will particularly deter hosts who are themselves part of marginalized groups or live with members of such groups—including but not limited to LGBTQ people and undocumented people—and who may have cause to be concerned about disclosing their full names and household compositions.[2]

[2] These concerns may be especially salient for undocumented people in light of OSE's use of technology from Palantir. Brendan O'Connor, *How Palantir Is Taking Over New York City*, GIZMODO (Sept. 22, 2016), https://gizmodo.com/how-palantir-is-taking-over-new-york-city-1786738085. Since 2014, Palantir has worked with U.S. Immigration and Customs Enforcement to identify undocumented immigrants. *See* CNBC, *Watch CNBC's Full Interview with Palantir CEO Alex Karp at Davos*, (Jan. 23, 2020), https://www.cnbc.com/2020/01/23/palantir-ceo-alex-karp-defends-his-companys-work-for-the-government html.

Second, under the Proposed Rules, hosts have significant and burdensome ongoing obligations that will compound the rules' deterrent effect. In particular, registered hosts must:

- Comply with OSE's interpretations of relevant laws and codes as incorporated into the Proposed Rules, regardless of their reasonableness. For example, under section 21-10(12), hosts are not permitted to allow guests to lock their doors, despite privacy and safety concerns for vulnerable travelers;

- Maintain records of all short-term rental transactions for seven years under section 21-10(5);

- Report any changes to the information submitted as part of their registration application, except changes to their phone number or email address, to OSE within five days, under section 21-06(1)–(2). Thus, for example, hosts would have to report any changes to the composition of their household to OSE within five days of the change;

- Report all listings to OSE under section 21-06(3), even if the new, unreported listing concerns the same registered dwelling as a previously disclosed listing and does not differ from that listing in any material way; and

- Post and maintain an exit and floor plan diagram as well as the registration certificate in the dwelling under section 21-10(2)–(3).

Third, even after hosts successfully register and comply with the continuing obligations under the Proposed Rules, the registration renewal requirements impose yet more recurring burdens and hurdles, making it nearly impossible for hosts to plan for the future. Under section 21-05(1), hosts must renew their registration every two years or, if the host does not have the right to occupy the unit for a full two years, upon the date through which the host has the right of occupancy. This registration renewal process requires hosts to certify, under section 21-07(2), that they have retroactively complied with the relevant local laws and codes and with the Proposed Rules. Under section 21-13, these certifications carry with them the potential for monetary penalties for

making any false statements. Hosts will be subject to such frequent renewal requirements that they may have to refrain from accepting reservations for weeks or months in advance of the expiration of their registrations, in order to make sure that they are not running afoul of the Proposed Rules. Altogether, these renewal requirements will have a substantial chilling effect on hosts, not only because they are so onerous, but also because there will be such uncertainty about how to achieve compliance, as well as a lack of understanding of the scope of the representations that hosts are required to make.

Fourth, sections 21-03(11) and 21-07(3) of the Proposed Rules require that hosts pay a non-refundable $145 fee when initially applying for registration and for each subsequent renewal. This registration fee will significantly deter hosts—especially those who host only occasionally throughout the year or who seek registration preemptively in the event that they might wish to host in the future, as the registration fee will make up a more significant share of their earnings. What is more, after a host applicant pays the $145 non-refundable fee, their building may be added to the prohibited building list, foreclosing the applicant from recouping that fee by offering their home for short-term rental. *See* §§ 21-03(14), 21-09.

Past experience indicates that onerous requirements like those in the Proposed Rules will deter hosts from applying for registration. Beginning in December 2020, Local Law 2020/064 ("Local Law 64") required booking services to disclose to OSE, on a quarterly basis, the hosts' names, listing addresses, email addresses, and phone numbers associated with certain types of short-term rental listings. In order to comply with this law, Airbnb alerted hosts that, if they offered those types of short-term rentals, Airbnb would be required to share their personal and listing data with the City. If a particular

host did not wish to consent to the disclosure as a condition of continuing to offer short-term rentals, Airbnb would block them from offering short-term rentals on the platform. Faced with that choice, more than 29,000 hosts elected to leave the short-term rental market rather than agree to have their information disclosed to the City. Economic analysis indeed shows that the volume of non-Class B Airbnb listings in New York City fell by 21% in the six months following Local Law 64's implementation compared to comparator cities.[3] Some of the impacted hosts may have exited the short-term rental market out of fear that OSE would use the data to engage in overbroad enforcement of the local laws restricting short-term rentals.

Thus, history suggests that a significant number of hosts will likely choose to forego short-term rental revenue rather than consent to OSE's collection of the personal identifying information that the Proposed Rules require applicants to disclose during the registration process, which is even more detailed than that required under Local Law 64, as well as the additional onerous requirements set forth in the Proposed Rules.

Even if hosts were willing to provide the substantial amount of personal information and documentation required by OSE to secure a short-term rental registration, the sheer number of vague and difficult-to-parse attestations and ongoing reporting and recordkeeping obligations will deter large numbers of otherwise eligible hosts from continuing to participate in the lawful short-term rental market. As discussed above, hosts are expected to expose themselves to liability by certifying their understanding of, and compliance with, non-specified provisions of law (§§ 21-03(7), 21-

[3] MICHAEL SALINGER, CHARLES RIVER ASSOCS., SHORT-TERM RENTALS IN NEW YORK CITY: AN ECONOMIC ANALYSIS OF PROPOSED RULES ¶ 41 (Dec. 3, 2022) (hereinafter "CRA REPORT"). The CRA Report, along with a copy of this Comment, are submitted via email. This Comment is also submitted via the NYC rules website.

13); to maintain records of every short-term rental for at least seven years (§ 21-10(5)); and to comply with numerous other bureaucratic mandates before, during, and long after they ever welcome a visitor to New York City to stay in their registered short-term rental. The heavy burdens that the Proposed Rules impose on hosts are likely to dissuade even those unconcerned with the required disclosures of personal identifying information from pursuing registration. OSE's overactive enforcement environment will compound this deterrent effect.

This chilling effect of the Proposed Rules will disproportionately impact hosts who offer their homes for short-term rental infrequently—often to mitigate personal economic hardships—without taking long-term rental opportunities off the market. The burdens of the Proposed Rules, including the application fee and extensive required disclosures of personal information, are the same for hosts who rent space in their homes for a few days per year as they are for hosts who rent space in their homes regularly throughout the year. The cost of the application fee will therefore be more heavily borne by hosts who have fewer reservations across which to spread the cost.[4] Accordingly, hosts who have been intermittently renting what would otherwise be vacant space in their homes will be the most likely to drop out of the short-term rental market because of the Proposed Rules.

The Proposed Rules' host registration requirements are so onerous that they are expected to significantly decrease the number of short-term rentals available and, potentially, lead to an exodus of hosts from the market, thereby resulting in an effective ban on short-term rentals in New York City.

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[4] CRA REPORT ¶¶ 33, 46.

B. The Proposed Rules Will Dramatically Limit the Ability of Airbnb and Other Booking Services to Provide a Service That Greatly Benefits New York City, Gravely Damaging the Short-Term Rental Market.

The Proposed Rules separately impose burdensome, inefficient, and costly verification and reporting requirements on Airbnb.

1. Verification Requirements

Nothing in the administrative record reflects that OSE considered important aspects of the technical and other problems its verification requirements would create, their deterrent effect on hosts and Airbnb, or their potentially significant impairment of Airbnb's New York City short-term rental business.

As a threshold matter, Airbnb will have to modify its host-facing interface for New York City hosts to require them to submit details that Airbnb will then be required to enter into OSE's contemplated electronic verification system, such as the host's registration number. *See* § 22-02(2). Airbnb will additionally have to build an application programming interface ("API") to submit information provided by New York City hosts to OSE's electronic verification system. Not only will this API have to be able to submit host information to OSE's system and receive confirmation numbers, but it will also need to track registration expiration dates, tri-monthly listing reverification deadlines, and changes to host information that would trigger the reverification requirement in section 22-02(5). Airbnb estimates that it will need to devote approximately 1,000 hours of engineering time to build the technology required to comply with the Proposed Rules, and approximately an additional 10 hours per month to staff and maintain the technology. Inexplicably, as of this writing, Airbnb has received

no technical specifications from OSE, notwithstanding the extraordinary complexity of the contemplated verification scheme.

Moreover, for each short-term rental that is not within a class B multiple dwelling (i.e., a dwelling such as a hotel that is, as a rule, occupied transiently),[5] the Proposed Rules require the booking service to verify four distinct items if it is to collect a fee: (i) the street address of the short-term rental, (ii) the host's full legal name, (iii) the associated registration number, and (iv) the uniform resource locator or listing identifier for the relevant STR offering. *See* § 22-02(1)–(2). Apparently, OSE's electronic verification system will fail to confirm registration if there is so much as a single character typo—by the host, the booking service, or OSE—in any of those four data points (e.g., "Ave." instead of "Avenue" or the middle initial being used versus the full middle name). The Proposed Rules contemplate no mechanism for identifying near-matches, allowing confirmation based on any fewer than the four data points, or identifying and correcting errors in hosts' information. Hosts and Airbnb may thus expend resources—including the non-refundable registration fee and the booking service fee of $2.40 per verification, *see* § 22-04(3)—attempting to use OSE's electronic verification system, only to have confirmation of a lawful short-term rental rejected for a minor clerical error.

The problems resulting from the verification requirements will be exacerbated by the fact that the Proposed Rules subject Airbnb to what essentially amounts to a strict

[5] "A 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household." MDL § 4(9).

liability framework. On their face, the Proposed Rules appear to require all four pieces of information (host's full name, street address, registration number, and uniform resource locator or listing identifier) to exactly match the information in the electronic verification system, *see* § 22-02(1)–(2), and to penalize booking services harshly for collecting fees in the absence of four exact matches, even when any informational errors were inadvertent, *see* § 22-05. Because of the high stakes, booking services will be forced to de-list any host whose information does not exactly match the information available through the electronic verification system, lest they inadvertently collect a fee from such a host and incur a fine.

This verification scheme will negatively impact hosts and guests as well. Hosts who are not already deterred from participating in the short-term rental market by OSE's registration requirements could nonetheless have their listings removed from booking services without notice, even if they have pending guest reservations, if there is even a scrivener's error in their registration or listing that prevents the booking service from completing OSE's required electronic verification. Guests whose reservations are unexpectedly canceled, in turn, may find themselves in the potentially unsafe situation of being in New York City with nowhere to stay or scrambling for last-minute accommodations at far higher prices.

2. Reporting Requirements

The Proposed Rules also impose arduous and unwarranted monthly reporting requirements on Airbnb over and above the data Airbnb already shares with OSE. The Proposed Rules require Airbnb to retain all unique confirmation numbers generated by the verification process and compile that data with other transaction-specific information on a monthly basis for disclosure to OSE. *See* §§ 22-02(4), 22-03. Specifically, Airbnb

must produce, "in the format published on [OSE's] website," and through a "secure portal" accessed from that website, a monthly report listing each uniform resource locator or listing identifier associated with transactions processed by Airbnb. § 22-03(1). That monthly report must include not only the confirmation number obtained via verification, but also the number of transactions associated with the verification. *Id.*

To comply with the mandatory monthly reporting provision in section 22-03, Airbnb will have to devote employee time and other company resources to collecting, maintaining, and producing a substantial amount of data. Airbnb will have to collect the data subject to this reporting requirement, store it, determine in which month's report it must be included, organize it into OSE's chosen format, and then electronically submit it to OSE each month.

OSE has not articulated a rationale for the reporting requirements. Specifically, the record indicates no reason for requiring Airbnb to report the aggregate number of bookings associated with particular registrations, especially where Local Law 18/2022 does not purport to regulate the number of compliant bookings that a particular dwelling may host, and only requires transaction-specific information. *See* Local Law 18/2022 § 26-3202(b).

The verification requirements in the Proposed Rules also impose on Airbnb—at substantial cost—the obligation of enforcing OSE's host regulatory scheme. Specifically, Airbnb will need to implement a delay period for the live publication of New York City-based rental listings on its platform to provide time for it to ensure that the short-term rental has been verified. It will also need to collect full legal names from hosts in New York City—something Airbnb does not currently require and that hosts may resist

because of safety and privacy concerns—in order to submit such names to the electronic verification system. Each of these changes to the platform and its processes will divert Airbnb resources to an enforcement regime that is OSE's responsibility to execute.

Further, Airbnb will have to hire additional personnel to monitor communications from OSE, such as the email account to which OSE will send notices of registration revocations. Given that OSE will presume that a booking service knows of a registration revocation five business days after it has been notified via email (§ 22-02(7)), booking services will need to assign staff to closely monitor communications and manually take any necessary action. Airbnb projects that it will devote some 500 hours of personnel time to establishing programs to comply with the Proposed Rules, including corresponding with OSE and supporting host communications, and that it will continue to allocate approximately 125 hours per month to maintaining these operations. These costs that Airbnb must incur to enable host compliance with the registration requirements and submit to OSE's reporting scheme impermissibly commandeer Airbnb's resources to enforce OSE's regulatory objectives.

Finally, Airbnb will face reductions in its revenue as a result of OSE's drive to extinguish the lawful short-term rental trade and will simultaneously have to expend resources to engage in an expensive redesign of its platform and participate in the costly and onerous verification and reporting scheme. Considering that the implementation of Local Law 64 led 21% of hosts to choose to deactivate their listings rather than agree to potential disclosures of their personal information to OSE,[6] Airbnb anticipates that, at a minimum, a comparable proportion of active hosts may choose to forgo the registration

[6] CRA REPORT ¶ 41.

process (which involves even more burdensome disclosures from hosts than Local Law 64). Because Airbnb's annual revenue in the New York City market decreased in the wake of Local Law 64, the implementation of the Proposed Rules is likewise expected to negatively impact revenue. If Airbnb must remove all New York City listings until each listing can be verified in accordance with section 22-02, it estimates that it would lose the vast majority of its short-term rental revenue in the City until that verification can be completed.

C. The Proposed Rules Introduce Serious Safety and Privacy Concerns for Hosts and Their Households, and There Is No Indication in the Administrative Record that OSE Took into Account Any of These Concerns.

1. Safety and Privacy Concerns Related to Personally Identifying Information

The Proposed Rules' treatment of personally identifying information is unreasonable and ignores serious safety concerns. The Proposed Rules require hosts to disclose an invasive amount of personally identifying information to obtain and maintain a short-term rental registration. Under the Proposed Rules, hosts must provide their full legal names in order to apply for registration and must submit those names to their booking services for verification. §§ 21-03(3), 22-02. The Proposed Rules also force hosts to disclose extensive personal information to the City about themselves, their residence history at their dwelling, the members of their household, and their relationships to their household members. § 21-03(3). Once registered, hosts have a duty to update the City with changes to any of their information (including changes to the composition of their household) other than their phone number or email address, within five business days of the change. *See* § 21-06(1)–(2). The Proposed Rules thus require a host who is facing the birth or death of a household member, or another life-altering

event like a divorce, to update the City within days of the change, or face the loss of their short-term rental registration. Hosts must also consent to the ongoing disclosure of their full addresses on a City website visible to the public. § 21-03(12).

The disclosure of address information and the requirement that hosts use their legal names expose hosts in vulnerable domestic or immigration situations and others at risk of stalking, harassment, or violence. Those risks are even more acute for household members whose information, associated with a particular address, may be disclosed to the City, possibly without that person's knowledge, if someone else in their household decides to pursue a short-term rental registration. The requirement to disclose household composition uniquely burdens LGBTQ individuals, who are more likely to have privacy and safety concerns regarding their associational relationships. Moreover, registered hosts' full legal names will be printed on a certificate provided by OSE, which must be "conspicuously post[ed]" in the short-term rental, thereby providing hosts' full legal names to all guests regardless of whether a host wishes to share that information. §§ 21-03(16), 21-10(3). This requirement poses an especially critical safety concern for transgender or nonbinary hosts, who may be outed to their guests based on differences between the host's full legal name and the name by which they call themselves. And given the requirements in the rules to identify the number of individuals residing at the home and their relationship to the host, there are implications for the safety and privacy of children who live in the home as well.

The State of New York recognizes the safety risks inherent in requiring the disclosure of full residential addresses by requiring state and local agencies to accept substitute addresses for survivors of sexual and domestic violence as well as for

reproductive health services providers who are enrolled in the State's address confidentiality program.[7] Yet, OSE's disclosure requirements will conflict with those state law protections for the confidentiality of survivors of violence. OSE does not explain why it would create such a conflict, or even a point of tension, with state law, nor how it will obtain a waiver from the state law in order to be able to demand its desired disclosures.[8] OSE has offered no justification for why it needs to associate all household members residing with hosts with their residential addresses, such that it should be permitted to override the State's expectation that survivors of violence and individuals facing threats of violence should not have to disclose their residential addresses to OSE.

2. Safety Concerns Related to Unlocked Doors

The Proposed Rules' hostile treatment of locked doors within rentals is unreasonable and ignores serious safety concerns of hosts and guests alike. Under OSE's existing interpretations of local housing and building codes, all hosts are prohibited from locking any doors within a short-term rental unit, meaning that hosts would be unable to prevent short-term rental guests from accessing, for example, their children's rooms, or sensitive material in home offices, storage rooms, or host bedrooms, even when hosts and their household members are sleeping.[9] Likewise, vulnerable guests are prohibited from

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7 N.Y. EXEC. LAW § 108.

8 For an agency to receive a waiver from the Secretary of State to require residential addresses from program participants in spite of state law, agencies must explain why they cannot change their internal procedures to meet statutory or administrative obligations without the need for residential addresses. N.Y. COMP. CODES R. & REGS. tit. 19, § 134.8 (2021).

9 *Information for Hosts*, N.Y.C. OFFICE OF SPECIAL ENFORCEMENT, https://www.nyc.gov/site/specialenforcement/stay-in-the-know/information-for-hosts.page (last visited Nov. 19, 2022) ("Internal doors cannot have key locks that allow guests to leave and lock their room behind them. All occupants need to maintain a common household, which means, among other things, that every member of the family and all guests have access to all parts of the dwelling unit.").

locking their rented room to maintain privacy and safety while staying in someone else's home.

OSE's interpretation is unreasonable because, with respect to Class A multiple dwellings (which are dwellings occupied for permanent residence purposes),[10] the Housing Maintenance Code could be read to require only that "every member of the family," and not the boarders, roomers, or lodgers maintaining a common household with the family, must have access to all parts of the dwelling unit. *See* N.Y.C. ADMIN. CODE § 27-2004(a). Without addressing that construction of the Housing Maintenance Code, OSE has incorporated its own unreasonable interpretation into the Proposed Rules by specifically providing that guests cannot have a locking mechanism that would allow them to exclude others from the room in which they are staying, § 21-10(12), and in so doing, has attempted to insulate its unreasonable interpretation from challenge by arbitrarily giving that interpretation the force of law. OSE has provided no justification for this requirement, which seemingly serves no purpose other than to deter hosts from offering short-term rentals and guests from safely availing themselves of such accommodations.

There is no indication that OSE has considered the dangers that the Proposed Rules pose to hosts, their household members, and guests.

[10] "A 'class A' multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes." MDL § 4(8)(a).

D. The Proposed Rules Will Significantly Harm Tourism and the New York City Economy, and This Harm Will Disproportionately Impact Historically Disadvantaged Groups.

Airbnb guests contribute meaningfully to New York City's economy through tourism expenditure. The availability of short-term rentals has been shown to affect travel patterns such that guests have longer stays, travel more frequently, explore more neighborhoods, and are more likely to travel to otherwise cost-prohibitive areas.[11]

Regulating short-term rentals out of the market will reduce tourism and harm the City's economy. Because the lower average cost of renting Airbnb properties enables greater spending, tourists who are forced to stay in hotels will have less money to spend in the local economy. The Proposed Rules will also reduce tourism by reducing the supply of short-term accommodations during peak demand. Airbnb properties provide surge capacity during such periods—including in the summer months and the winter holiday season—when hotel rooms are nearly booked out.[12] Airbnb's ability to provide surge capacity is inherent in its business model, as Airbnb allows hosts the flexibility to list their properties during peak periods (such as New Year's Eve) and de-list them at other times.[13] The hotel supply, by contrast, is more rigid, as hotels cannot be built during peak times and taken off the market when tourism is slower. It follows that with fewer short-term rentals on the market, the City's surge capacity would decline, enabling fewer tourists to visit on peak dates. Decreased tourism would deprive the City of what

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[11] *See generally* Iis P. Tussyadiah & Juho Pesonen, *Impacts of Peer-to-Peer Accommodation Use on Travel Patterns*, 55 J. TRAVEL RES. 1022 (2016).

[12] CRA REPORT ¶¶ 88–90, fig. 7. During the summer months and winter holiday season, hotel occupancy rates are over 90%. *Id.* ¶¶ 88, 90, fig. 7. For instance, in 2019, during periods of peak demand when hotel occupancy rates exceeded 90%, Airbnb occupancy rates only fluctuated between 78% and 86%. *Id.* ¶ 90, fig. 7.

[13] CRA REPORT ¶ 92, fig. 9. Airbnb's ability to provide surge capacity is also shown by the fact that short-term rentals, even more so than hotels, are subject to seasonality. *See id*. ¶¶ 89–91, figs. 7, 8.

has proven to be a significant component of its economic recovery from the COVID-19 global pandemic. The City's tourism sector has rebounded to 85% of pre-pandemic levels.[14] Short-term rentals play a particularly important role in the City's economic rebound, as tourists and returning New Yorkers often prefer geographic flexibility during their stays.

The Proposed Rules will particularly harm the City's economy and residents in boroughs outside Manhattan. While the majority of the City's hotels are in Manhattan, Airbnb listings are more geographically dispersed across the boroughs.[15] Indeed, fewer than half of total Airbnb listings are in Manhattan, with Brooklyn and Queens home to 37% and 13% of Airbnb listings, respectively.[16] Short-term rentals thus promote tourism and local spending in more geographically diverse areas of the City. Not only do boroughs outside Manhattan appeal to tourists, but they also contain more than 40% of the City's tourism employment.[17] Analysis shows that the presence of short-term rentals in a neighborhood leads to an increase in retail investments and tourism infrastructure.[18] The economies of these neighborhoods, in which local business owners have made investments, will thus tend to be those most disproportionately harmed by the reduction in short-term rental supply that will result from OSE's Proposed Rules.

Relatedly, the Proposed Rules will disproportionately harm historically disadvantaged groups, including low-income individuals, communities of color,

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14 Rossilynne Skena Culgan, *NYC tourism has rebounded to 85% of pre-pandemic levels*, TIME OUT (Nov. 16, 2022), https://www.timeout.com/newyork/news/nyc-tourism-has-rebounded-to-85-of-pre-pandemic-levels-111622.

15 CRA REPORT ¶¶ 96–97, fig. 10.

16 CRA REPORT ¶ 97, fig. 10.

17 CRA REPORT ¶ 99.

18 CRA REPORT ¶ 95; *see also id.* ¶¶ 94, 98, tbl. 8.

immigrants, and low-skilled workers.[19] Members of communities of color work 66% of tourism jobs in the City, with immigrants working 46%—both higher shares than the City's average in the total work force.[20] Furthermore, workers in the tourism sector earn a lower median annual wage than the overall median for the City.[21] Indeed, the tourism sector is an important source of low-skill, low-wage jobs,[22] and the short-term rental model also facilitates the employment of household workers, including cleaners. In the absence of adequate short-term rental supply, already-disadvantaged workers will suffer further harm.

There is no indication that OSE considered the significant harm to tourism, workers in the tourism industry, and the New York City economy that will result from the Proposed Rules.

E. The Proposed Rules Disproportionately Harm Historically Marginalized Groups, and There Is No Indication That OSE Considered This Impact.

The Proposed Rules will disproportionately harm hosts, guests, and others involved in the short-term rental market who are members of historically marginalized groups, including undocumented people, transgender and nonbinary people, LGBTQ people, and survivors of sexual or domestic violence. As the City's charter expressly states, "[i]t is the public policy of the city to promote equal opportunity,"[23] yet there is no indication that OSE considered the ways in which the Proposed Rules are contradictory. Indeed, the Proposed Rules disproportionately burden members of the very same classes

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19 CRA REPORT ¶¶ 100–01, tbl. 9.
20 CRA REPORT ¶ 101.
21 CRA REPORT ¶ 100; *see also id.* tbl. 9.
22 *See* CRA REPORT ¶ 100, tbl. 9.
23 N.Y.C. CHARTER § 900.

that the City's Human Rights Law protects from discrimination in employment, housing, and other contexts.[24]

In particular, as discussed *supra* Section I.C, the Proposed Rules' registration and verification requirements will disproportionately harm hosts who are or who have household members who are undocumented, LGBTQ, or survivors of violence. Members of each of these historically marginalized groups face heightened safety concerns from disclosing personal identifying information, and transgender or nonbinary hosts who use a different name than that which they were assigned at birth may face additional difficulties with the exact full legal name match required by the online verification system.

Contrary to the City's stated public policy, the Proposed Rules establish procedures that, if adopted by an employer or landlord, the City's Human Rights Commission may challenge as illegal. Specifically, the City advises employers and landlords that "[c]onditioning a person's use of their name on obtaining a court-ordered name change or providing identification in that name" is a violation of the New York City Human Rights Law,[25] but the Proposed Rules require hosts to submit their full legal names in order to obtain registration and undergo verification, and to print their full legal names on a certificate that they must display to guests. §§ 21-03(3), 21-03(16), 21-10(3), 22-02(1)–(2). Moreover, the City requires employers to provide reasonable

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[24] *See* N.Y.C. ADMIN. CODE tit. 8 (protected classes under New York City Human Rights Law include immigration or citizenship status, gender identity, marital status and partnership status, sexual orientation, and status as a victim of domestic violence, stalking, and sex offenses).

[25] N.Y.C. COMM'N ON HUM. RTS., LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102 5 (2019), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf.

accommodations for the needs of survivors of sexual violence, domestic violence, and stalking,[26] but the Proposed Rules contemplate no mechanism for survivors of violence—even those who merely reside in a home where someone else wishes to host a short-term rental—to avoid the disclosure of their addresses and other personal identifying information. There is no indication that OSE has considered the ways that the Proposed Rules will disproportionately impact hosts who belong to historically marginalized groups or the ways in which they are inconsistent with the City's anti-discrimination public policy.

Further, the restriction of short-term rentals will disproportionately impact low-income New Yorkers and visitors whose needs are not adequately met by hotels, such as medical students, interns, patients in town for medical treatment, and visitors who wish to stay near friends or family members.[27] Short-term rentals may also provide access to amenities, like kitchens, that some guests with medical conditions need to travel safely. The average daily rate for Airbnb listings in New York City is less than that of hotels,[28] such that short-term rentals provide a more affordable lodging option for low-income travelers who may not otherwise be able to afford to visit the City—to attend a family celebration or funeral, for example, or for any other reason. Likewise, as discussed *supra*

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[26] *See* N.Y.C. ADMIN. CODE § 8-107(27).

[27] As one member of the public commented, "My Airbnb provides a place for people coming to visit their adult children who attend City College or Columbia University and live in the area. Often, I host families with a family member who are coming to NYC for medical procedures/treatments at New York Presbyterian Hospital. There are no hotels up here. Being close to the hospital makes it easier for family members to travel between the apartment and the hospital and provide support to their patient. Many of these people are on special diets and need to make their own meals." Comment of Lovelynn (Nov. 18, 2022, 12:09 p.m.), https://rules.cityofnewyork.us/rule/registration-of-short-term-rentals.

[28] Pre-pandemic, between August 2018 and February 2020, monthly Airbnb ADR (provided by Airbnb) was approximately 37% lower than monthly Hotel ADR (obtained from NYC & Company).

Section I.D, workers in the tourism sector are more likely to be low-income individuals, immigrants, or members of communities of color.

The administrative record reflects no consideration of these harms, nor of the harms that the Proposed Rules will cause to hosts and guests in historically marginalized groups.

II. OSE Failed to Consider Reasonable Alternative Regulatory and Policy Options.

As discussed further *infra* Section IV, OSE has failed to articulate a justification or goal for the Proposed Rules. But, no matter the justification, before proceeding, OSE should consider whether more targeted regulations could deliver better results. Here, it is obvious that OSE failed to consider a number of reasonable alternatives that would be less burdensome but would still carry out the duties purportedly delegated to it by Local Law 18/2022 (assuming such delegation and the underlying law are valid). Specifically, there is no indication in the Proposed Rules that OSE considered any of the following reasonable alternatives:

A. Host Disclosures

OSE could have required less onerous disclosures from hosts as part of the registration process. Hosts are required to disclose, among other things, their full legal name, a current phone number, an email address, the type of dwelling unit being used for short-term rental, the full legal name of all permanent occupants in the dwelling unit and their relationship to the host, a complete diagram showing all rooms in the unit (including those not being used to house short-term guests), and the month and year the host began residing in the dwelling unit. § 21-03(3). There is no indication that OSE considered whether it was in fact necessary for host applicants to disclose all of this information. In

particular, there are no reasonable grounds for OSE to require disclosure of the date a host began residing in the unit, or the full legal name of every member of the household and their relationship to the host, especially given the substantial safety and privacy concerns implicated by such a disclosure, discussed *supra* Section I.C.

B. Host Application Certifications

OSE could have proposed a rule requiring that hosts applying for a short-term rental registration make specific representations that they agree to comply with short-term rental restrictions. For example, a host might have been required to make an affirmation to the effect of: "I agree not to rent to more than 2 guests," "I agree to keep my unit in good repair," or "I agree to post a diagram of normal and emergency exit routes." Instead, OSE arbitrarily required that hosts certify that they will comply with various enumerated and unenumerated provisions in local laws and codes. *See* § 21-03(7) ("[A]n applicant shall be required to certify that they understand and agree to comply with applicable provisions of the zoning resolution, multiple dwelling law, housing maintenance code, New York city construction codes and other laws and rules relating to the short-term rental of dwelling units in private dwellings and class A multiple dwellings, or in class A dwelling units within mixed use buildings.").

C. Host Renewal Affirmations

OSE could have proposed a rule requiring that hosts seeking a renewal make specific representations that they have not engaged in particularized violations of short-term rental restrictions. For example, a host might have been required to make an affirmation to the effect of: "I have kept my short-term rental registration posted in my unit," "I have kept my unit in good repair," or "I have not been found by OSE to have violated short-term rental regulations." Instead, OSE arbitrarily required that hosts

certify past general compliance with the administrative code and OSE rules. *See* § 21-07(2).

D. Host Record Retention

OSE could have selected a more reasonable retention period for host records. The Proposed Rules provide that, where a booking service does not provide reports meeting OSE's criteria, hosts must retain a record of every short-term rental transaction in a digital spreadsheet for a period of seven years. § 21-10(5). There is no indication that OSE has a rationale for requiring hosts to retain records for a period that is over three times longer than the term for which a registration is valid, and that is longer than the periods required in other City licensing and permitting regulations. *See, e.g.*, N.Y.C. HEALTH CODE § 161.13 (permitted operator of a pet grooming business or boarding kennel must maintain self-inspection results for one year); § 167.35 (permitted operator of a "bathing beach" must maintain a log of the number of daily users, lifeguards on duty, water conditions, and other information for 12 months); N.Y. GEN. BUS. LAW § 45 (pawnbrokers must retain records of transactions for at least six years). Moreover, although the host record retention requirement contains a carveout applicable when a booking service "can provide a report to a registered host that meets the criteria of this subsection," § 21-10(5), platforms whose data retention policies follow privacy best practices would retain data for substantially less than seven years, effectively nullifying the carveout.

E. Host Identification of Listings

OSE could have allowed hosts flexibility in providing a uniform resource locator or listing identifier for their short-term rental unit. But under the Proposed Rules, hosts are required to disclose a listing identifier and associated booking service name to OSE

prior to any listing being "used." § 21-03(8). Because "used" is undefined, hosts are effectively tasked with providing the listing identifier to OSE at the very instant they post a listing on a booking service platform, before any short-term rental guest has a chance to interact with the listing—if that is even practically possible. There is no indication that OSE considered more reasonable alternatives, like allowing hosts to provide their listing identifier within a reasonable period of time.

F. Host Renewal Period

OSE could have required renewals less frequently, provided for a larger window of time for renewal applications, and/or required itself to evaluate renewal applications within a specific period of time and issue the renewal before a host's registration expires. A host registration lasts for the shorter of two years or the period during which a host has a legal right to occupy a unit, § 21-05, and hosts may submit an application for renewal only within 90 days before expiration of a current registration, § 21-07(1). This short 90-day period means that, every two years (or less), hosts will risk having to cancel bookings if their registrations are not renewed. Even if a host applies 90 days before their registration expires, they may not have their registration renewed until the days before their registration expires, or later. Hosts who are themselves renters, and therefore may have registrations that expire each year, will have to apply for renewal so frequently that they will spend nearly a quarter of each year in limbo. This burdensome requirement appears designed to drive hosts out of the short-term rental market, as there is no indication that OSE had any other rationale for imposing it.

G. Booking Services Four-Point Verification Criteria

OSE could have evaluated less burdensome alternatives to a four-point verification system. *See* section 22-02(1)–(2) and *supra* Section I.B. OSE failed to even

consider alternative options like requiring booking services to include registration numbers in the quarterly reports that they were already required to submit to OSE. By requiring booking services to verify four data points, OSE is effectively shifting the responsibility of ensuring that registrations were validly issued from itself to booking services. It is not booking services' responsibility to ensure that OSE did not issue an improper or duplicative registration, and there is no reason to require an exact match across four separate data points unless OSE is attempting to make these requirements onerous and drive hosts and booking services out of the market. For the same reasons, OSE's failure even to evaluate the possible reasonable alternative of a notice and takedown regime was arbitrary and capricious.

H. Booking Services Unique Confirmation Code

Section 22-02(4) of the Proposed Rules requires that booking services "retain all unique confirmation numbers for use in meeting the reporting requirement" set forth in the Proposed Rules. This unique confirmation number, which booking services will receive after submitting information to the electronic verification system, imposes yet another unnecessary burden on booking services, which will also be tracking registration numbers and which already track listings using other platform-specific identifiers. The unique confirmation number will be especially burdensome to track because it is subject to change as registrations expire and could perhaps even change every 90 days during the quarterly verification process.

OSE could have provided for less burdensome alternatives. For example, OSE could have permitted booking services to track listings using the platform-based listing identifiers they already use, instead of inventing a new, unique confirmation number. Or,

at the very least, OSE could have provided that the unique confirmation numbers would not be subject to change with each verification.

Requiring booking services to maintain yet another code is simply another attempt to make these requirements as difficult as possible and drive hosts and booking services out of the market. There is no indication that OSE considered whether it could have achieved its unstated objectives (if any) by allowing booking services to use the listing identifiers that they already use.

I. Booking Services Registration Expiration "Codes"

The Proposed Rules require booking services to decipher a code within the unique confirmation number to determine for themselves when a registration will expire, and the Proposed Rules charge booking services with knowledge of each expiration. § 22-02(3) ("The processing of a transaction by a booking service relying on a code that contains the expiration date shall be presumptive evidence that the booking service is aware of the expiration date of the registration."). Booking services are then required to reverify a registration within two calendar days of the expiration date—contained in code within the unique confirmation number—on top of the quarterly reverification requirements. § 22-02(5).

OSE evidently failed to consider any less burdensome options. For example, OSE could have provided for notification to booking services when a registration has expired, as OSE is required to do under section 22-02(7) if a registration is revoked.

J. Booking Services Verification Frequency

OSE could have proposed rules that did not include a quarterly reverification requirement. Section 22-02(5) requires that booking services reverify each and every listing (i) within three calendar months of the previous verification, (ii) within two

calendar days of the expiration date for a registration, (iii) whenever it knows or "should have known" that the data used to verify the listing has changed. OSE did not consider whether the quarterly reverification requirement is necessary, or even productive, in light of the duplicative requirement that booking services reverify a listing when a host's information has changed or a host's registration expires, and the effective requirement that booking services remove a listing upon notice of revocation.

Thus, under the Proposed Rules, booking services will have to reverify listings nearly constantly, even when there is no reason to believe reverification is necessary. What is more, booking services will have to assume the nebulous responsibility of reverifying a listing when they "should have known" of a change. This requirement will, in effect, improperly and unjustifiably shift to booking services OSE's responsibility to ensure that hosts are complying with the rules, and may make it so difficult for booking services to comply with the Proposed Rules that they become unable to continue operating in the short-term rental market.

K. Booking Services Time to Respond to Revocation

OSE could have allowed a longer, more appropriate timeline for booking services to respond to OSE's revocation of a registration. Section 22-02(6)–(7) provides that booking services will be notified by email if a host's registration is revoked, and that booking services are charged with such knowledge within five business days of receipt of the email. This timeline imposes a disproportionate burden on booking services. If OSE mistakenly issues a registration or spends weeks in the process of revoking a registration, a host about to lose their registration could continue booking short-term rentals for months in advance. But, upon email notification, the booking service might be tasked with *immediately* cancelling reservations scheduled to occur in a matter of days, or even

reservations already occurring. There is no indication OSE chose this *immediate* timeframe upon reasoned consideration, or that this time frame is relevant to accomplish OSE's (undisclosed) purposes. Indeed, as discussed *supra* Section I.B, effectively forcing booking services to cancel reservations at the last minute implicates guest safety concerns, with no apparent countervailing benefit. The time frame for taking down affected listings should instead be a more reasonable length of time, perhaps a few weeks or a month.

L. Booking Services Verification and Reverification Fees

OSE should have proposed a less burdensome and more consistent fee structure. Section 22-04(1)–(2) provides that booking services must register with OSE to use the electronic verification system and pay an initial registration fee of $2.40 per listing, based on the number of listings it "reasonably believes" it will verify during the calendar year. Booking services must also pay $2.40 for each listing submitted for verification during a calendar year, with the exception of listings on the Class B multiple dwellings list, which will not be subject to any fee. § 22-04(3).

First, there is no indication that the fee amount is rationally selected or in any way related to the cost of maintaining the electronic verification system.

Second, the Proposed Rules impose an undue burden on booking services to verify thousands of listings which could potentially be used during a calendar year, but for which the booking service may never collect a fee. For example, booking services will have to pay fees each year to verify a host that keeps an active listing but rents less than once per year. Booking services will also have to pay fees for ineligible hosts who list their homes without valid registration. This undue burden is compounded by the onerous and unnecessary reverification requirements that could cause booking services to

have to pay a fee for a listing more than once during a calendar year if, say, there is an error in the verification process or a host changes their last name.

Third, the Proposed Rules do not impose fees equally across all verified listings. Assuming that the fee is imposed in order to recoup some cost on OSE's part (and is not simply imposed as a deterrent to engaging in the short-term rental market), OSE acted irrationally in providing that there is no fee for verification of Class B multiple dwellings. OSE has provided no explanation as to the differential treatment for booking services that primarily rely on Class B multiple dwellings, as opposed to Class A multiple dwellings or private homes.

Thus, there is no indication that OSE considered more reasonable alternatives such as reduced fees, reimbursement of fees paid for invalid rentals, requiring fees for only the initial verification, or reasonable and appropriate fees applied equally across all types of dwelling units.

M. Booking Services Reporting

OSE could have reduced the frequency of booking services' reporting requirements to be quarterly or annually, instead of monthly, or OSE could have permitted booking services to use a reporting period aligned with their current business practices, rather than mandating an arbitrary monthly reporting period. Section 22-03(1) requires that booking services submit monthly reports identifying the number of transactions the booking service processed in reliance on each listing identifier and OSE-provided unique confirmation number, and section 22-03(3–6) mandates a strict one-month reporting period and requires booking services to submit reports within 15 calendar days of the conclusion of each reporting period.

OSE has not articulated any rationale for these onerous reporting requirements. In fact, Airbnb's current practice is to provide quarterly reports, and OSE has not indicated that this practice is not working.

N. Booking Services Fines

OSE could have provided for a more reasonable penalty scheme for noncompliance by booking services, and/or could have provided for safe harbors. Section 22-05 imposes steep penalties on booking services for collecting fees from an unregistered listing and for failing to comply with reporting requirements. *See infra* Section VI.H. OSE could have provided for more reasonable fees aimed at remediation rather punishment. The Proposed Rules' inappropriately punitive fees are all the more unreasonable given that the Proposed Rules contain *no* safe harbors. For example, booking services could be charged a penalty for collecting a fee when a registration became invalid *during* a short-term rental stay, when there was an error in the verification process, or when OSE believes a booking service "should have known" of a change in a host's circumstances. Booking services could also be charged a penalty totaling the entirety of a booking services' fees collected during a calendar year, for just a *one-time* error in its monthly reporting. OSE cannot articulate any justification for this fine scheme or for not pursuing more reasonable, proportionate, and substantially lower fine amounts.

O. Prohibited Buildings List

OSE failed to consider the reasonable alternative of providing a prorated refund of the $145 host application fee in instances where the host's building is added to the prohibited buildings list after the host has already applied for registration.

OSE's failure to consider these reasonable alternatives, as well as its failure to consider the other policy issues and legal infirmities identified in this Comment, have resulted in Proposed Rules which are arbitrary and capricious.

III. OSE Has Exceeded the Scope of Authority Delegated to It by the City Council.

Local Law 18/2022 purported to delegate to OSE the authority to do only the following:

- Prescribe the "form and manner of applying for a short-term rental registration or renewal thereof," § 26-3102(b), (j);
- Set an "application or renewal fee," § 26-3102(c)(8);
- Establish a period for which a registration is valid, § 26-3102(h);
- Establish procedures for the creation of a prohibited buildings list, § 26-3102(l);
- Prescribe a "form and manner" in which hosts must post emergency egress information and registration certificates, § 26-3103(a);
- Prescribe a "manner" in which hosts must keep records and provide them to the agency, § 26-3103(c);
- Establish a minimum reverification period for booking services, § 26-3202(a) (providing OSE "may" establish a minimum period);
- Establish a "manner and form" in which booking services must report transactions to the agency, § 26-3202(b); and
- Set a fee for booking services' use of the electronic verification system, § 26-3202(c).

In creating the Proposed Rules, OSE exceeded the powers that the City Council purportedly delegated to it in at least three respects.

First, the Proposed Rules impose requirements and penalties beyond those authorized by the City Council. Specifically, section 21-03(3) of the Proposed Rules requires that a host who applies for registration disclose (i) the full legal names of all

permanent occupants of the dwelling as well as their relationship to the host and (ii) the month and year the host began residing in the dwelling unit. This requirement exceeds the power that the City Council purportedly delegated to OSE because the City Council did not mandate those disclosures as a condition of eligibility for registration. Likewise, section 21-13(3) imposes fines on hosts for "[m]aking a false statement" in connection with a registration application, but the City Council provided only that OSE could assess penalties for *material* false statements. *See* Local Law 18/2022 § 26-3104(c). OSE had no power to impose fines for immaterial false statements.

Section 22-02(3) of the Proposed Rules charges a booking service with the responsibility of knowing each registration's expiration date. This requirement exceeds OSE's delegated power because the City Council did not impose such an onerous requirement on booking services. Similarly, section 22-02(7) charges a booking service with the responsibility of knowing that a registration has been revoked five business days after OSE notifies the booking service via email. This requirement exceeds OSE's delegated power because the City Council provided only that OSE would notify booking services of revocations—not that booking services would be required to track revocations. *See* Local Law 18/2022 § 26-3102(m).

Second, the Proposed Rules reflect OSE's unauthorized policy judgments. And even if the City Council had authorized OSE to make such policy judgments (it has not), there is no indication that OSE used special expertise in the field of short-term rental regulation to develop the Proposed Rules. In developing sections 21-03(3) and 21-13(3), which impose broad disclosure requirements on hosts and penalties for even immaterial false statements, OSE appears to have made an unauthorized policy judgment to deter

prospective hosts from attempting to list their homes for short-term rental. In developing section 22-02(3), which charges booking services with the responsibility of knowing each registration's expiration date, OSE appears to have made an unauthorized policy judgment to deter booking services from operating in the City altogether. And in developing section 22-02(7), which charges booking services with the responsibility of knowing that a registration has been revoked five business days after OSE notifies the booking service via email, OSE appears to have either (i) made an unauthorized policy judgment to deter booking services from operating in the City altogether or (ii) picked the five-business-day rule arbitrarily. OSE's decision to create an API, yet separately route revocation notifications via email, also reflects arbitrary and capricious decision-making.

Third, the Proposed Rules incorporate and give the effect of law to OSE's unreasonable interpretations of local laws and ordinances, including by requiring that registered hosts refrain from allowing guests exclusive access to a separate room with a locking mechanism and by categorically prohibiting the offer of short-term rentals of entire dwellings. *See, e.g.*, § 21-10(12)–(13). None of those restrictions appear on the face of Local Law 18/2022. Rather, OSE has conferred upon itself unfettered discretion to decide whether short-term rentals that comply with New York law are nevertheless ineligible for registration based on OSE's own unauthorized policy judgments.

IV. OSE Failed to Explain the Basis for the Proposed Rules, and Has Instead Chosen to Keep Secret Whatever Analyses It Performed (If Any at All).

OSE has articulated no justification or goal for the Proposed Rules, leaving stakeholders and members of the public with no way to determine whether the Proposed Rules will meet the ends OSE may have sought to achieve. OSE did not identify market failures or reasons why current market outcomes are sub-optimal and must be addressed

by regulation. That is because there is no extant market failure that would justify the Proposed Rules. In fact, the short-term rental model encourages an efficient market because it provides available housing capacity that would otherwise go to waste. In particular, the model allows a given home to be used for both permanent and temporary occupancy.[29] Moreover, the short-term rental model is more efficient than the hotel model. Because hotels must maintain the capacity for periods of peak demand, they have underutilized space during off-peak periods.[30] By contrast, short-term rentals are more scalable, as hosts can choose to list or de-list their properties according to demand.[31] Short-term rentals thus reduce the need for underutilized hotel space.

Not only has OSE refused to identify any justifications for its Proposed Rules, but it has also refused to disclose any of the underlying data or analyses on which it may have relied. OSE has neither disclosed nor described the data it may have analyzed, the methodologies it may have employed, the outputs of those analyses, or how any of that figured into its decision-making process. Airbnb submitted a FOIL request on November 4, 2022, seeking information related to Local Law 18/2022 and any information OSE relied upon in the rulemaking process. Airbnb followed up on November 18 and December 1, 2022. Airbnb has received no response as of December 3, 2022.

Affected parties cannot properly comment on the Proposed Rules without understanding OSE's decision-making process. It is axiomatic that notice of a proposed rule must provide an accurate picture of the agency's reasoning, so as to allow interested parties an opportunity to participate in a meaningful way in the discussion and

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29 CRA REPORT ¶ 65.
30 CRA REPORT ¶ 88.
31 CRA REPORT ¶¶ 89, 92.

formulation of the final rules. Otherwise, the whole process of notice and comment rulemaking is theater. OSE's failure to articulate a justification, goal, or any underlying data is particularly concerning given the Proposed Rules' significant impact on New Yorkers and the New York tourism economy.

V. To Whatever Extent Proponents of the Proposed Rules May Claim OSE Was Motivated by Affordable Housing or Tourism Concerns, Those Unstated Concerns Cannot Possibly Justify the Proposed Rules.

Though OSE has not provided any goal or justification for the Proposed Rules, some proponents of the Proposed Rules have suggested that limiting short-term rentals will increase the affordable housing supply in New York or will somehow benefit the hospitality industry. Even if OSE had articulated those justifications or concerns for its approach (and it has not), the Proposed Rules are not rationally related to these concerns and thus do not effectuate a valid health, safety, comfort, or welfare purpose.

A. The Proposed Rules Will Not Improve Housing Affordability in New York City.

Insofar as proponents of the Proposed Rules attempt to justify them by citing concerns about housing affordability, the Proposed Rules will not alleviate the housing affordability issues in New York City in the way proponents have argued.

Legislative history suggests that Local Law 18/2022 was driven by a concern about housing affordability in New York City. Councilmember Ben Kallos—the sponsor of Local Law 18/2022—stated at a December 8, 2021 legislative hearing that Local Law 18/2022 was an effort to "respond[] to New York City's affordable housing crisis by hopefully bringing as many as 19,000 apartments back on the market—many of which

might even be affordable."[32] Though unsupported by the legislative record, it was his belief that "soon to be vacant air B&B [sic] units" would all be used to house homeless New Yorkers.[33] Yet neither the legislative history nor OSE has shown (nor could they show) that the Proposed Rules will increase the availability of affordable housing in New York City or alleviate homelessness.

First, the Proposed Rules ignore the fact that short-term rentals allow housing to be used more efficiently while providing economic benefit to the homeowner or tenant. In other words, when New Yorkers are able to earn supplemental income by offering unused or under-used space in their homes as a short-term rentals, housing becomes more affordable, not less. In 2019, the last full calendar year before the onset of the COVID-19 pandemic, the median income for Airbnb hosts in New York City from home sharing was approximately $3,400.[34] Without this supplemental income, homeowners and tenants would see the share of their income that must be spent on rent or a mortgage go up by nearly 10 percentage points.[35]

Second, there is no economic analysis showing that the Proposed Rules will increase housing availability or affordability. The only economic analysis before OSE to date (except for any analysis that OSE itself has conducted or commissioned but chosen to keep secret), which has been submitted with this comment, does not show that the Proposed Rules will have such an effect. Proponents of the Proposed Rules may believe that restricting short-term rentals would bring more long-term housing supply

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[32] Dec. 8. 2021 Hearing on Int. No. 2309 Before the Comm. on Housing and Buildings, Hearing Transcript at 6:17–21.
[33] *Id.* at 7:2–4.
[34] CRA REPORT ¶ 76, tbl. 6.
[35] CRA REPORT ¶ 79.

onto the market. But this belief rests on the flawed assumption that an effective ban on short-term rentals would cause all housing units previously rented as short-term rentals to be converted to long-term rentals. In reality, many hosts use their homes as short-term rentals on a limited and temporary basis, such as renting an unused guest room that is often used by family, or renting their entire primary residence while the host is on vacation, traveling for work, or caring for a relative out of town.

If hosts cannot use these spaces as short-term rentals, those housing units would simply be withdrawn from the housing market altogether, rather than be converted to long-term rentals. Indeed, economic analysis shows that many hosts would make *more* income from using a space as a long-term rental: approximately 85% of non-Class B short-term rental listings in the City are not rented enough to earn more revenue from short-term rentals than they could from being rented out on a long-term basis.[36] The fact that most hosts rent out space in their homes below this "break-even" level is a strong indication that they largely retain their spaces for personal use, rather than renting out their spaces full-time, and further shows that these spaces would not become available on the long-term rental market if it became effectively impossible to host short-term rentals. Thus, without providing any benefit to the housing market, leaving these units empty would deprive the City of the social benefits of short-term rentals—renting to a neighbor's in-laws who want to stay close to their family, providing "surge capacity" during the busy holiday season, or renting to a community member undergoing home renovations who needs to stay near work and school for a couple of weeks.

[36] CRA REPORT ¶ 69, tbl. 4.

B. The Proposed Rules Will Have a Negative Effect on Tourism.

Although OSE has not indicated that the Proposed Rules are intended to benefit the hotel industry, the Proposed Rules will have the effect of limiting access to the market for tourist accommodations and diverting tourists to the traditional hotel industry, while simultaneously hampering all other stakeholders in the tourism sector.[37]

Specifically, there is no indication that OSE has considered the likelihood that the Proposed Rules will decrease the City's capacity to accommodate tourists and thereby hamstring the City's tourism sector. As discussed *supra* Section I.D, short-term rentals are critical in providing accommodation capacity when there is a surge in demand; without an ample and reliable supply of short-term rentals, existing hotels will not suffice to accommodate these peaks in tourist demand for accommodation.[38] Yet neither the City Council nor OSE has suggested that the hotel sector will grow to accommodate those tourists who are displaced from short-term rentals by the Proposed Rules, nor have they advanced any other solution to this problem. As a result of this decreased supply of tourist accommodations, either tourism revenue and jobs in the sector will be lost as tourists forgo visits to the City, or additional hotels will be built, exacerbating the very problem of housing availability and affordability by driving commercial development in locations that could have been developed for long-term rentals instead.[39]

In addition to restricting the supply of tourist accommodations, the Proposed Rules may also restrict the tourism sector, as price-sensitive tourists who would have

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[37] Indeed, in a legislative hearing, Councilmember Kallos indicated that the legislation underlying the Proposed Rules was intended to divert tourists to hotels, stating: "Housing should be for New Yorkers. Hotels should be . . . for tourists. It's as simple as that." Dec. 9, 2021 City Council Stated Meeting on Int. No. 2309, Hearing Transcript at 35:25–36:2. But the Proposed Rules' actual effect is likely to cause harm to the City's tourism industry and the New Yorkers who depend on it.

[38] CRA REPORT ¶¶ 88–90.

[39] CRA REPORT ¶¶ 94–95, 102–03.

chosen to stay in a lower-cost, short-term rental may be deterred from visiting the City. To the extent that this reallocation of demand for tourist accommodations were an intended objective of the Proposed Rules—and there is no statement in the record of any valid objectives at all—it would be an inappropriate regulatory objective that privileges special interests at the expense of the welfare of all other stakeholders.

Finally, the curtailment of the tourism industry that could result from the Proposed Rules will have negative ramifications for the New York City residents who work in the sector. Tourism is a key industry in New York City that supports over 283,000 jobs.[40] Although the Proposed Rules may well benefit the hotels, this industry is only one of many subsectors within tourism.[41] By reducing the City's tourist capacity, the Proposed Rules will significantly and negatively impact the rest of the tourism sector, hurting not only former or potential short-term rental hosts, but also the great number of New York City residents who hold and depend on jobs in the tourism industry unrelated to hotels. Critically, the tourism jobs that the Proposed Rules would jeopardize are disproportionately held by historically disadvantaged groups, including members of communities of color, immigrants, and low-income individuals.[42] And the tourism jobs that would be eliminated would also disproportionately affect neighborhoods outside of Manhattan.[43]

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40 CRA REPORT ¶ 85.
41 CRA REPORT ¶ 93.
42 CRA REPORT ¶¶ 100–01.
43 CRA REPORT ¶¶ 97–99.

VI. OSE's Proposed Rules Are Legally Infirm for Additional Reasons and Further Exacerbate Underlying Legal Defects in Local Law 18/2022.

A. Local Law 18/2022 and OSE's Proposed Rules Breach the Terms of the City's 2016 and 2020 Settlements with Airbnb.

1. 2016 Settlement

In 2016, Airbnb sued the City in the U.S. District Court for the Southern District of New York ("SDNY"), alleging that section 121(1) of New York's Multiple Dwelling Law ("MDL")—which makes it "unlawful to advertise" short-term rentals in Class A multiple dwellings—violated the Communications Decency Act, 47 U.S.C. § 230. Airbnb and the City reached a Settlement Agreement (the "2016 Settlement") wherein the City promised to "permanently refrain" from enforcing MDL section 121(1) and its implementing regulation against Airbnb, "including retroactively and/or under any theories of direct or secondary liability." 2016 Settlement § 1, No. 16-cv-8239 (S.D.N.Y. Dec. 5, 2016), Dkt. 32. In exchange, Airbnb dismissed the litigation without prejudice. *Id.* § 3.

Local Law 18/2022 section 26-3202 and Proposed Rule section 22-02 are a *de facto* restriction on advertising short-term rentals because they prohibit the collection of fees for unregistered listings, which, in practice, will need to be removed. These provisions of the Local Law and Proposed Rules thus amount to a material breach of the City's promise in the 2016 Settlement.

2. 2020 Settlement

In yet another instance of the City's disregard for previous promises made in court proceedings when unlawful regulations were challenged, Local Law 18/2022 section 26-3202(b) and Proposed Rule section 22-03 amount to breaches of a subsequent settlement agreement. In 2018, the City Council passed Local Law 2018/146 ("Local

Law 146"), which required that booking services submit periodic reports to OSE detailing each transaction for which the booking service charged or collected a fee. Airbnb sued the City in SDNY, alleging that Local Law 146 violated various provisions of constitutional and statutory law. In 2019, the court preliminarily enjoined the City from enforcing Local Law 146, citing Airbnb's viable Fourth Amendment claim.[44]

In 2020, Airbnb and the City executed a Settlement Agreement (the "2020 Settlement"), wherein the City promised that the Office of the Speaker of the City Council and the Office of the Mayor would "make best efforts" to make certain amendments to Local Law 146, and Airbnb promised to dismiss the lawsuit. 2020 Settlement § 1.01.1 & Ex. A, § 1.01.4, No. 18-cv-7712 (S.D.N.Y. June 12, 2020), Dkt. 157-1. The amendments included:

1. limiting Airbnb's reporting obligation to (a) short-term rentals of entire dwelling units or short-term rentals rented to three or more individuals at the same time, and (b) short-term rentals rented for more than four days; and
2. requiring reports on a quarterly, rather than monthly, basis.

2020 Settlement Ex. A §§ 1, 26-2102.[45]

Local Law 18/2022 section 26-3202(b) and Proposed Rule section 22-03 broaden the reporting requirements to which the City agreed in the 2020 Settlement in two ways. *First*, they require Airbnb to report *all* registered listings, as opposed to only the types of listings enumerated in the 2020 Settlement. *Second*, they increase the frequency of mandated reports from quarterly to monthly.

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[44] *See Airbnb, Inc.* v. *City of New York*, 373 F. Supp. 3d 467, 495, 501 (S.D.N.Y. 2019).

[45] The amended version of Local Law 146 was enacted as Local Law 2020/064, discussed *supra* Section I.A.

Local Law 18/2022 section 26-3202(b) and Proposed Rule section 22-03 thus materially breach the 2020 Settlement, particularly its implied covenant of good faith and fair dealing. Even if the City has performed its express promise to use best efforts to amend Local Law 146, it has breached an implied promise not to change the law in a way that conflicts with the more favorable reporting requirement that Airbnb specifically negotiated.

B. Local Law 18/2022 Is an Overbroad and Unlawful Delegation of Legislative Power by the City Council, and Thus Any Rule Promulgated Thereunder Is Infirm.

Local Law 18/2022 impermissibly delegates legislative power to OSE because it imposes no requirement on OSE ever to issue a registration and thus entrusts the agency with an overbroad and vague mandate. Instead of establishing preconditions that would require OSE to grant a registration, the Local Law provides that "[n]o short-term rental registration shall be issued unless" the applicant satisfies the enumerated requirements. § 26-3102(c). The Local Law thus could be construed as conferring upon OSE unfettered discretion to deny all registration applications, even for hosts whose units can be lawfully rented short-term.

Local Law 18/2022 impermissibly delegates legislative power to OSE for the additional reasons that it (i) affords OSE too much discretion to revoke registrations whenever the agency "discovers information that would have precluded [it] from granting the registration had [the information] been known at the time," § 26-3104(d)(5), and (ii) empowers OSE to establish registration and renewal fees without imposing any cap or guideline, § 26-3102(c)(8). OSE cannot cure these underlying impermissible delegations by tying its own hands through rulemaking.

C. The Proposed Rules Exceed the City's Police Power and Violate the Home Rule Law in Three Ways.

Because the Proposed Rules effectively ban the lawful trade in short-term rentals; lack any rational connection to promoting the health, comfort, safety, and welfare of New Yorkers; and are inconsistent with and preempted by the Real Property Law, the Proposed Rules exceed the City's police power and violate its home rule authority under Article IX of the New York Constitution, section 10(1) of the Home Rule Law, and section 28(a) of the New York City Charter.

1. Effective Ban on Lawful Short-Term Rental Trade

As discussed above, *supra* Section I.A, the Proposed Rules impose such onerous requirements on hosts, Airbnb, and other booking services that the Proposed Rules will effectively ban short-term rentals. *First*, the Proposed Rules create an overwhelming deterrent to hosts wishing to lawfully engage in the short-term rental market, both through burdensome registration and operating requirements and because of the threat of penalties. This will lead to a decrease in the number of hosts willing to offer short-term rentals, and OSE has not conducted any analysis to ensure that hosts who engage in the short-term rental market infrequently—say to cover unexpected expenses or help out a community member—will be able to continue offering them. *Second*, this decrease in available hosts will lead to a significant decline in revenue for booking services like Airbnb. *Third*, the Proposed Rules require booking services to make significant and unreasonable expenditures in order to lawfully operate in the City. *Fourth*, booking services will be at risk of a punishing strict liability framework. Altogether, the Proposed Rules imposed on both hosts and booking services are so burdensome as to effectively

ban the lawful trade of short-term rentals, in excess of OSE's police power and in violation of its home rule authority.

2. Lack of Rational Connection to Promoting Health, Safety, Comfort, and Welfare

Additionally, and as discussed *supra* Section IV, OSE has failed to articulate any justification or goal for the Proposed Rules. It is unclear what, if any, market failure OSE is attempting to remedy, or how extinguishing the short-term rental market promotes the health, comfort, safety, and welfare of New Yorkers. Indeed, hundreds of New Yorkers are able to make ends meet through home-sharing, and home-sharing promotes a thriving and equitable tourism industry that supports local businesses. To the extent OSE believes that the Proposed Rules will have a positive effect on the City's housing supply, neither OSE nor the City has made any findings to support that the Proposed Rules have a reasonable relationship to *any* harm, let alone the City's affordable housing supply. Because they fail to promote the health, comfort, safety, and welfare of New Yorkers, the Proposed Rules are in excess of OSE's police power and in violation of its home rule authority.

3. Inconsistency with and Preemption by Real Property Law

The Proposed Rules are preempted by section 235-f(3) of the Real Property Law, which provides that any lease or rental agreement shall be construed to permit occupancy by "one additional occupant" who is not part of the immediate family of the tenant; and by section 226-b of the Real Property Law, which provides that every tenant in a dwelling with four or more residential units is entitled to sublet the residence, subject only to landlord consent that cannot unreasonably be withheld. These provisions recognize that tenant hosts are entitled to accommodate at least one additional unrelated

occupant in their homes and, if they live in a Class A dwelling with four or more units, to sublet to guests subject to reasonable landlord consent. The Proposed Rules purport to nullify these rights by (i) conditioning registration of tenant hosts on a certification that the terms of their lease or another agreement do not preclude them from acting as hosts for short-term rentals and (ii) by permitting landlords and building owners to place their buildings on the prohibited building list based on an analogous certification, without considering in either case whether the referenced contractual restrictions are enforceable in light of the Real Property Law. §§ 21-03(9), 21-09. Because the Proposed Rules give landlords and building owners veto power over a tenant host's registration, and therefore over their ability to share their home with guests consistent with the Real Property Law, the Proposed Rules are incompatible and preempted.

D. The Proposed Rules Are Unconstitutionally Vague.

The Proposed Rules violate the Due Process clauses of the Fourteenth Amendment and Article I, Section 6 of the New York Constitution because they include unconstitutionally vague requirements that do not put hosts on notice of their obligations for initial registration, renewal, and compliance during the active period of a registration. For example, section 21-03(7) requires that an applicant certify that they "understand and agree to comply with applicable provisions" of various state and city laws and "other" unspecified "laws and rules relating to the short-term rental of dwelling units," "including but not limited to" a few particular provisions referenced by their citation alone. That language does not give hosts generally, much less those without training in land use law, a reasonable opportunity to know how to conform their behavior to comply with the certification.

Similarly, during a registration's active period, section 21-10(1) requires that hosts refrain from operating short-term rentals in violation of certain specified New York laws and New York City codes. And section 21-07(2) requires that a host seeking to renew their registration affirm that, during the preceding registration period, they have complied with "all provisions of chapter 31 of title 26 of the administrative code" as well as the Proposed Rules that incorporate the previously referenced enumerated and unenumerated laws and codes. Those provisions do not provide a registered host with the opportunity to understand the content of the legal obligations they are undertaking or the specific scope of the short-term rental restrictions that the Proposed Rules reference. And what is more, they require that a renewing host then retroactively affirm that they have complied with such vaguely described obligations while imposing monetary penalties for making a "false statement" in the renewal application (which false statement need not even be material to be penalized under section 21-13(3), as discussed above).

The Proposed Rules contain other unconstitutionally vague provisions that rest on undefined terms and ambiguous language. For example, section 21-03(8) requires that applicants agree to disclose listings prior to "us[ing]" those listings to "make an agreement for short-term rental," and section 21-06(3) likewise requires registered hosts to actually disclose listings prior to "using" them. But the Proposed Rules do not put hosts on notice of whether they must disclose the listing prior to accepting a first reservation thereunder, or even prior to the listing being made available for potential guests to view on a booking platform. Provisions such as these do not inform hosts of how to behave such that they can safely attest that they have complied with the Proposed Rules during the registration period.

For these reasons, the Proposed Rules are unconstitutionally vague under the Due Process clauses of the U.S. and New York constitutions.

E. The Proposed Rules Are Preempted by the Communications Decency Act.

Section 230 of the CDA aims to support "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." 47 U.S.C. § 230(b)(2). In support of this goal, it immunizes computer service providers from liability for their role as "publisher[s]" of posts by third parties and expressly preempts laws that are inconsistent with the CDA. § 230(c), (e). Because the Proposed Rules effectively require booking services to monitor and remove user information posted to the booking services platforms, and therefore impose liability on booking services in their role as publishers, the Proposed Rules are preempted by the CDA.

Section 22-02(2) provides that booking services are responsible for providing, through an application program that feeds into the electronic verification system, (i) the street address of an STR, (ii) the host name, (iii) the associated registration number, and (iv) the uniform resource locator or listing identifier. Booking services are then provided with a unique confirmation number and effectively required to use this number to continuously ensure that no host rents a property through its platform without registration. § 22-02(3)–(7). If they do not, booking services risk steep and punishing fines. § 22-05.

Airbnb's platform is currently designed in such a way that, when a guest submits a reservation for a stay with an Airbnb host, the reservation is under some circumstances instantaneously passed on to the host; and Airbnb plays no active role in the communication between host and guests on an ongoing basis. But, because the Proposed

Rules put Airbnb at risk of substantial fines for interactions that occur on its platform, Airbnb will be forced to monitor user interactions and/or make significant changes to its API. In effect, Airbnb will be required to redesign its platform so that all user interactions can only be carried out if a host is verified through OSE's system before the time of booking. And Airbnb will be required to monitor that reservation, the host's registration status, and any listing information bearing on the validity of the host's registration, all from the date a reservation is made through the end date of each and every booking. As discussed *supra* Section I.B, changes to Airbnb's API, business model, and other systems will be costly and onerous.

F. The Proposed Rules Will Violate New Yorkers' Fourth Amendment Rights.

1. Hosts' Fourth Amendment Rights

The Proposed Rules will, if implemented, violate hosts' rights under the Fourth Amendment and Article I, Section 12 of the New York Constitution because they authorize an unreasonable administrative search of those hosts' sensitive, personal information in which they have a reasonable expectation of privacy without providing for an opportunity for pre-compliance review. Under section 21-03(3), an applicant cannot obtain a short-term rental registration unless they provide extensive personally identifying information about themselves, including their full legal name and address as well as the month and year in which they began residing at their dwelling. The applicant must also disclose the "full legal name" of all other permanent occupants who reside in their household as well as their relationship to the applicant. Because hosts cannot freely consent to supplying this information when they would be deprived of the opportunity to

offer short-term rentals if they do not, an opportunity for pre-compliance review is required, and the Proposed Rules provide none.

Once registered, hosts must also amend their applications, on an ongoing basis, to account for most updates to information upon which their initial application relied. § 21-06(1). This means that hosts must notify OSE of any changes to the composition of their household within five business days of such change or face penalties ranging from $100 to $5,000, which can only be avoided by providing the requested information. § 21-06(1)–(2); 21-13(3), (6).

The Proposed Rules compound this unreasonable intrusion by further providing that certain information disclosed by hosts in connection with their applications will be made publicly available on the City's open data portal. § 21-03(12). Such information subject to public disclosure includes the full address of a registered dwelling and the uniform resource locators that would allow any user of the open data portal to connect that address to a host's narrative description, photos, and host profile information associated with a particular listing.

Taken together, these data disclosure requirements, which allow no opportunity for pre-compliance review, authorize an unreasonable administrative search in violation of hosts' right under the U.S. and New York constitutions.

2. Booking Services' Fourth Amendment Rights

The Proposed Rules also violate booking services' rights under the Fourth Amendment and Article I, Section 12 of the New York Constitution because the Proposed Rules authorize an unreasonable administrative search of Airbnb's records. Section 22-03 of the Proposed Rules requires booking services to submit monthly reports

of each transaction including (i) the booking service's listing identifier, (ii) the confirmation number the booking service receives from the electronic verification system, and (iii) the number of transactions that the booking service processed in reliance on that unique confirmation number. By requiring Airbnb to report this data—which is not available elsewhere and could be used by competitors to Airbnb's detriment—without an opportunity for pre-compliance review, the Proposed Rules impose an unreasonable administrative search on Airbnb.

G. The Proposed Rules Impose an Unconstitutional Tax.

The Proposed Rules impose a tax that the City is powerless to assess pursuant to its home rule authority and general police power. Specifically, sections 22-04(2) and (3) require Airbnb to pay an initial fee to use the electronic verification system that is equivalent to $2.40 per listing provided during registration, and, thereafter, $2.40 per listing verified in a calendar year. Airbnb will be required to verify hundreds, or likely thousands or tens of thousands, of listings for which it may never derive any benefit in the form of fee collection, if the listing is not used during the calendar year or a host posts a listing without registration.

H. The Proposed Rules Impose Excessive Fines.

The Proposed Rules impose excessive fines in violation of the Eighth Amendment of the U.S. Constitution and Article I, Section 5 of the New York Constitution.

1. Excessive Fines on Hosts

Section 21-13(3) is excessive and punitive, rather than solely remedial, because it imposes penalties ranging from $500 to the lesser of $5,000 or three times the revenue generated by the short-term rental for operating a short-term rental in violation of restrictions contained in local laws and codes. The amount of the penalty does not

consider the severity or circumstances of the underlying violation, and the Proposed Rules do not provide an opportunity to cure.

Section 21-13(3) also imposes fines of $1,000 for "making a false statement" in connection with a registration application or renewal, without regard for whether the false statement was material. In addition to exceeding the jurisdiction conferred by Local Law 18/2022, which included a materiality requirement, *see* Local Law 18/2022 § 26-3104(c), this penalty is punitive and excessive.

2. Excessive Fines on Booking Services

Section 22-05(2) of the Proposed Rules caps penalties for the improper collection of fees at $1,500 or three times the fee collected by the booking service. Section 22-05(2) allows OSE to collect this penalty for "each" transaction that violates section 22-02, which, in turn, imposes a long list of onerous requirements on booking services. Such a high penalty is punitive rather than solely remedial. It is also grossly disproportional to the gravity of the violation it purports to penalize.

Likewise, section 22-05(3)–(4) caps penalties for reporting violations at the greater of $1,500 or the total amount of fees that the booking service collected for transactions related to the registration number or uniform resource locator during the preceding calendar year. These penalties, too, are punitive rather than solely remedial. They also appear to apply for even a one-time violation of the Proposed Rules' monthly reporting requirement and are thus grossly disproportional to the gravity of the violation they purport to penalize.

I. The Proposed Rules Infringe upon Informational Privacy and Associational Rights.

Section 21-03(3)(f) of the Proposed Rules requires that as part of their application for short-term rental registration, hosts must provide, among other things, the full legal names of all permanent occupants of their dwelling unit and the nature of those occupants' relationships to the applicant. A host's household composition is private, personal information, which the Constitution protects from government intrusion, and in which hosts and their household members have a reasonable expectation of privacy. For instance, household composition may reveal a person's LGBTQ identity—information that one may reasonably expect to keep private from the government. Section 21-03(3)(f) thus infringes on the privacy rights of hosts and their household members to an extent that is unreasonable in light of OSE's purported interests (which OSE has not even attempted to articulate). Likewise, section 21-03(3)(f) is a government intrusion on the constitutional rights of hosts and their household members to intimate association.

CONCLUSION

For the foregoing reasons, the Proposed Rules are arbitrary and capricious and otherwise legally infirm, and Airbnb urges OSE and the City to reconsider them.

Dated this 3rd day of December, 2022.

Respectfully submitted,

/s/ Nathan Rotman

Nathan Rotman
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