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New York City Department of Finance
Legal Affairs Division
375 Pearl Street, 30th Floor
New York, NY 10038

Re: Comments on Proposed Regulations re Surcharge on Property that Does Not Serve as a Primary Residence

The New York City Department of Finance (the "Department") requested comments on proposed regulations it issued in connection with chapter 32 of title 11 of the New York City Administrative Code ("Administrative Code"), which imposes a surcharge (the "surcharge") on certain residential properties that do not serve as the primary residence of the owners of such properties, their immediate family members or a tenant.

These comments are submitted in response to the Department's request. Each of the changes and clarifications described below should apply to the fiscal year beginning July 1st, 2026, and to each subsequent fiscal year until the surcharge is no longer in effect.

1. Regulations Should Explain the Timing for the Determination of Primary Residence.

The surcharge applies if a covered owner does not use a covered property as a primary residence. Under Administrative Code § 11-3201, the determination of primary residence is made as of the taxable status date (January 5th) immediately preceding the fiscal year in which the surcharge is imposed. The regulations should clarify that the surcharge for a July 1st through June 30th fiscal year is determined based on the facts for the prior calendar year. For example, the determination of whether a surcharge applies for the fiscal year July 1st, 2027, through June 30th, 2028, would be based on a covered owner's use of the property during the 2026 calendar year. Additionally, a mechanism should be provided to permit a covered owner to establish that the surcharge should not apply based on facts that develop during the current calendar year relating to primary residence.

2. Regulations Should Provide that a New York City Residence of a Person that is a Statutory Resident of New York City Should be Considered a Primary Residence.

The legislative findings of the statute indicate that residents of New York City and many who do business here contribute daily to the city through their economic activity and the taxes they pay. The findings suggest that the surcharge is intended to apply to those who own second homes because they contribute less to the city's economy and pay less taxes than those who live in the city.[1] However, without further guidance, the surcharge could apply to many individuals who are regularly present in the city, who contribute to its economy and who pay income taxes and sales taxes to the city. We believe additional guidance is needed to provide that the surcharge should not apply to statutory residents of New York City who own second homes in the city.

Under New York Tax Law § 1305(a)(2), Administrative Code § 11-1705(b)(1)(B) and 20 NYCRR § 105.20(a)(2), for purposes of New York City's personal income tax, a person is a resident of the city if he maintains a permanent place of abode in the city and spends in the aggregate more than 183 days of the taxable year in the city (unless such individual is in active U.S. military service).[2] 20 NYCRR § 105.20(c) provides that presence within New York City for any part of a calendar day generally constitutes a day spent within the city.

Many second homes in New York City are owned by people that are statutory residents of New York City for income tax purposes. These statutory residents pay income taxes and sales taxes to the city and contribute to its economy. Consider, for example, a New Jersey resident who owns a residential condominium dwelling unit in the city and who is taxed as a statutory resident because she commutes to work in Manhattan five days a week. This individual pays New York City personal income taxes on her worldwide income and New York City sales taxes with respect to her purchases of goods and services. These taxes help fund and maintain important city services. Additionally, this individual contributes to the city's economy through her labor and consumer spending. Nonetheless, without further guidance, this individual – and many other similarly situated statutory residents – could be subject to the surcharge.

Guidance is needed to clarify that the surcharge should not apply to statutory residents of New York City who own second homes in the city. Regulations should provide that a New York City residence of a person who is a statutory resident of New York City should be considered a

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[1] We are not aware of any legislative hearings or studies on which the legislative findings are based.

[2] *See* 20 NYCRR § 295.3(a) (providing that New York City residency is determined under the same rules and definitions used for New York State residency).

primary residence for purposes of Proposed 19 RCNY § 62-06 and Administrative Code §§ 11-3201 and 11-3203.[3]

3. Guidance is Needed to Clarify the Application of the Surcharge to Leased or Subleased Property

Under Administrative Code §§ 11-3201 and 11-3202, if a property is leased or sub-leased to a natural person occupying such property pursuant to a bona fide lease agreement negotiated in an arm's-length transaction with a term of not less than one year, and the lessee or sub-lessee occupies the property as his primary residence as of the January 5th immediately preceding the fiscal year in which the surcharge is imposed, the surcharge will not apply for such fiscal year. We believe additional guidance is needed to clarify the application of these rules to common leasing and subleasing circumstances.

First, there are many scenarios in which a leased property may not be occupied as a primary residence for short periods of time, which could coincide with the January 5th taxable status date. If a leased property is not occupied as a primary residence on January 5th, then, absent further guidance, the surcharge will apply for the immediately following fiscal year. For instance, a one-year lease may end on December 31st, and the landlord may only be able to find a new lessee willing to start a one-year lease on February 1st, which would result in the imposition of the surcharge. Additionally, consider for example a lessee who enters into a lease that begins on February 1st, 2027, and ends on January 31st, 2028. If, for any reason, the lessee ceased to use the residence as a primary residence starting on January 1st, 2028, then the property would be subject to the surcharge for the fiscal year beginning July 1st, 2028, even if a new lessee entered into a one-year lease starting on February 1st, 2028. We believe that a single taxable status date with respect to leases and subleases could lead to impositions of the surcharge in circumstances where the landlord is leasing the property for all or substantially all of the year, and regulations should provide clarity on this issue.

Second, it is common for bona fide, arm's-length lease arrangements to involve month-to-month tenancies. For instance, when a tenant remains in a property after their one-year lease has expired without a formal renewal, the landlord may accept rent and thereby convert the agreement into a month-to-month tenancy under state law. Assuming that the lease arrangement is bona fide and an "arm's length transaction" within the meaning of Proposed 19 RCNY § 62-01, we believe that holdover month-to-month tenancies after a one-year lease and other month-to-month tenancies that have a cumulative term of at least one year should not be subject to the

[3] Note that for income tax purposes, undergraduate college students are deemed not to have a permanent place of abode in New York City even if they own or lease a covered property in New York City. See 20 NYCRR § 105.20(e)(1). Undergraduate college students who reside in a covered property should be considered to have a primary residence in New York City.

surcharge. Regulations should provide clarity on bona fide, arm's-length lease arrangements with month-to-month tenancies with a cumulative term of at least one year.

4. Guidance is Needed to Clarify the Application of the Surcharge to Ownership by Trusts and Entities.

Administrative Code § 11-3201 provides that if property is held in trust, the beneficial owners of the trust that are the sole beneficiaries of the trust are considered covered owners. Administrative Code § 11-3201 also provides that if property is held by a partnership, corporation, or limited liability company, partners, shareholders, or members of the partnership, corporation, or limited liability company holding a majority interest in such entity are considered covered owners. We believe additional guidance is needed to clarify the application of these rules to more complicated situations involving trusts and tiers of entities.

First, it is extremely common for trusts to provide for contingent or residual beneficiaries, and the existence of those beneficiaries should not cause the surcharge to apply to property held in trust where the trust's primary beneficiaries use the property as their primary residence. Accordingly, regulations should provide that contingent beneficiaries of a trust are disregarded in determining whether a person is a covered owner of property held in trust.

Second, guidance is needed to clarify the application of these rules to situations involving tiers of entities or trusts that own interests in entities. For example, a trust may own an interest in a limited liability company that owns property, or a limited liability company may own an interest in another limited liability company that owns property. The existence of such tiers alone should not cause property to be subject to the surcharge if persons that own a majority of the beneficial interests in the entity use the property as a primary residence.

Accordingly, regulations should provide that if a trust holds an interest in a partnership, corporation, or limited liability company that owns property, then covered owners should include persons who are the sole beneficiaries of a trust that owns a majority interest in such partnership, corporation, or limited liability company. In addition, if a partnership, corporation, or limited liability company is owned by one or more other partnerships, corporations, or limited liability companies, then covered owners should include the natural persons who own a majority of the ultimate beneficial interests in the property-owning entity (looking through intermediate entities).

As stated above, these changes with respect to the treatment of trusts and tiers of entities should apply to the fiscal year beginning July 1st, 2026, and to each subsequent fiscal year until the surcharge is no longer in effect.

5. Regulations Should Provide that a Bona Fide Purchaser of a Covered Property Should Not Be Responsible for Any Surcharge Liabilities or Tax Liens Resulting from a Prior Owner's Actions or Residency Status.

Proposed 19 RCNY § 62-04(a) provides that the Department may conduct an audit for the purposes of determining the amount of the surcharge owed by a covered property, including any determination relating to primary residence, and the Department may audit any certification or documentation of primary residency submitted to the Department within six years of submission. Under Administrative Code § 11-3205, both the surcharge and any resulting tax lien attach to the covered property.

Over the course of a six-year audit lookback period, legal title to a covered property may change hands many times. Consider, for example, a situation where a prior owner had submitted inaccurate or misleading information in his certifications and documentation of primary residency, and subsequently, legal title to the covered property changed hands within the six-year audit lookback period. At the time of an audit and receipt of a notice of penalty from the Department pursuant to Proposed 19 RCNY § 62-04(c), the current owner of the covered property may be subject to the surcharge and any resulting tax lien because of the prior owner's actions, even if the current owner occupies such property as his primary residence.

A bona fide purchaser of a covered property should not be responsible for any surcharge liabilities or tax liens resulting from a prior owner's actions or residency status. Regulations should provide that a bona fide purchaser of a covered property should acquire such property free and clear of (i) any potential surcharge liabilities or penalties imposed with respect to a prior owner's actions or residency status and (ii) any related tax liens.

Roberts & Holland LLP respectfully requests that the Department address these issues before adopting final regulations. If you would like to discuss any aspects of our comments, please contact Lary Wolf at lwolf@rhtax.com. Thank you for your consideration.