The Rent Stabilization Association of New York City represents 25,000 diverse owners and managers who collectively manage more than one million apartments in every neighborhood and community throughout the city. We thank the Department for giving us the opportunity to submit these comments on proposed changes that would bring widescale modifications to the Rent Stabilization and Rent Control laws, changes that have no basis in the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") and that go beyond the statutory authority set forth in the summary regulatory impact statement.

On August 31, 2022, DHCR published proposed amendments to various bodies of law that establish rent control and rent stabilization in buildings located in New York State (Tenant Protection Regulations, or "TPR", and State Rent Control Regulations) and New York City (Rent Stabilization Code, or "RSC", and New York City Rent Control Regulations). The purported purpose of this rulemaking as stated by DHCR in the New York State Register is to "implement changes required or informed by the Housing Stability and Tenant Protection Act of 2019". The HSTPA, however, does not provide DHCR with the authority to enact these changes.

The most drastic changes can be delineated into four groups: (1) New Unit Creation/Apartment Combinations; (2) Substantial Rehabilitation and Demolition; (3) Calculating Base Date Rent, Rent Overcharges, and Utilization of the Default Formula; (4) Succession Rights. To be clear, these changes are not required, let alone authorized, by the HSTPA. Rather, DHCR is affirmatively choosing to change decades of policy at a time when property owners are still reeling from the adverse economic, financial, and existential effects of the HSTPA on their buildings and livelihood.

These changes ignore important components of New York rent regulation laws. Although rent increases are limited during New York's ongoing housing emergency, owners are permitted to realize an acceptable return, which is necessary for generating revenue in alternative ways that do not involve increasing rents on existing rent stabilized tenants. This is crucial so that owners can invest in their property while complying with city, state and federal laws and mandates, including the requirements of Local Law 97, which requires buildings in New York City to reduce carbon emissions 80 percent by 2050.

Regulated owners subsidize their existing rent-stabilized tenants' rents, which are too low for owners to meet their operating costs. Legal, first-rent setting following the creation of new units or substantial rehabilitation of buildings generates the revenue needed to provide this "subsidy," as well as the capital needed for unit and building modifications that benefit all tenants. This is how building systems upgrades and mandate compliance are funded. By foreclosing all revenue avenues, not only will buildings suffer, but so too will tenants.

Buildings require constant investment. The proposed amendments would impede rent-regulated owners from making investments in buildings that are well over 50 years old and ignore the

realities that it costs money to keep old buildings habitable and adapt century-old tenements to 21st century living standards. Housing must evolve. While the HSTPA foreclosed many means by which rent-regulated owners were able to generate revenue, these proposed regulations go further than the HSTPA by stymieing the few remaining legal avenues, severely limiting an owner's ability to modernize and adapt their buildings. If adopted, these rules would seek to memorialize an aging building's status quo and disincentivize investment to the detriment of all rent-stabilized tenants, rent-regulated buildings, and overall housing habitability.

New Unit Creation/Apartment Combinations: Under DHCR's proposal, both the TPR (9 NYCRR §2501.1) and RSC (9 NYCRR §2521.1) would be amended to radically change DHCR's long-standing policy of establishing a first rent upon the creation of a new unit when it is either combined with another unit in the building, or created using space from a common area or a previously unutilized area of the building.

The old rule, as stated succinctly by the Appellate Division, First Department, was that "when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless," then a landlord may charge a "first" or "free market" rent; this is "an administratively created policy implemented by DHCR in its capacity as the administrative agency which regulates residential rents." *Matter of 300 W. 49th St. Assocs. v. New York State Div. of Hous. & Community Renewal*, 212 A.D.2d 250, 253 (1st Dept 1995). The Appellate Division goes on to give the following examples of the policy: "such allowance might be granted if a two-bedroom apartment were split into two studio apartments or two smaller dwellings were consolidated to form one large apartment. In either circumstance, the rental history of the prior units would be inapplicable to the newly created apartment for the purposes of determining the stabilized rent as the former unit or units no longer remain." *Id.*

The amendments would reverse this decades-old policy of establishing a first rent for a newly created or combined unit, which would typically be greater than the combined legal rents for each individual apartment. Under this new scheme, an owner would only be permitted to collect the combined legal regulated rents when combining two apartments (and add a limited and temporary IAI allowance for each unit), or if the outside perimeter of a rent-stabilized apartment is either increased or decreased but not combined in whole with another apartment, then the new legal regulated rent would increase or decrease by a percentage that directly corresponds with the increase or decrease in the original unit's square footage. Regardless of DHCR's intention for proposing this change in policy, the ultimate result would be to disincentivize owners from combining apartments or otherwise altering apartments to address changing housing needs.

These amendments should not be adopted, because first and foremost, they would eliminate the one last remaining method for rent-regulated landlords to make improvements to their buildings and realize a return on their investment by doing so. This ability is paramount because realizing a return from their investment enables rent-regulated owners to subsidize their existing rent-stabilized tenants' rents, which are too low for owners to satisfy their operating costs on their own. Moreover, particularly since buildings subject to rent regulation are in an older condition and were

originally often built to house individuals or couples, the ability to combine studio or one-bedroom apartments to create larger apartments with more space and multiple bedrooms that can accommodate families is one that benefits the public generally. Foreclosing on this ability by constraining an owner's ability to set the rent and limiting the permissible pass-along for the cost of work expended in order to create new units wholly disincentivizes owners from undertaking this work and keeps the supply of larger apartments that can accommodate families artificially low.

Additionally, the amendments are silent as to how the rent would be calculated when a rent-stabilized apartment is combined either with an unregulated apartment or with a rent-controlled apartment, as neither have an established "legal regulated rent." The amendments are also silent with respect to combining or dividing unregulated apartments or creating new units from new or previously unutilized space in a rent-stabilized building. These ambiguities must be addressed before any amendments are adopted in their final form, or they will invite further litigation and confusion for both tenants and landlords.

Substantial Rehabilitation: The proposed amendments to the TPR (9 NYCRR §2500.9) and RSC (9 NYCRR §2520.11) would severely restrict an owner's ability to perform a substantial rehabilitation and obtain an order confirming that the building is exempt from regulation. The amendments would: (1) require landlords to replace ***at least*** 75% (rather than at most 75%) of the building systems in order to qualify; (2) eliminate the ability of landlords to make a good faith application for an exemption from this 75% requirement where a building system is structurally sound and does not require replacement, but the preservation of that component is desirable or required by law due to its aesthetic or historic merit; and (3) eliminate the presumption that the building is substandard or seriously deteriorated if it is at least 80% vacant.

These amendments would directly thwart investment by owners into buildings that are at least 50 years, and in many cases a century or more old, with the result that their buildings would remain regulated, but building system upgrades would not be made as there is no financial incentive or ability on the part of the owners to undertake such work. Disincentivizing the rehabilitation of the aging housing stock and throwing hurdles in the way of owners who wish to bring their buildings into the 21st century is detrimental for everyone and has no rational basis in law or fact.

Moreover, there currently is no methodology to determine if a building is in fact in substandard or seriously deteriorated condition until an exemption application is filed. Under the proposed amendments, an owner would have to invest millions of dollars in rehabilitating a building only to discover after this investment that the building was not deemed to be in a sufficiently "substandard" or "seriously deteriorated" condition. This creates an unreasonable risk for owners, and would have the effect of dissuading owners from engaging in doing this work, regardless of whether it is necessary or not..

Demolition: The proposed amendments to the TPR (9 NYCRR §2504.4(f)) and RSC (9 NYCRR §2524.5(a)(2))would severely restrict an owner's ability to demolish their own buildings as follows: (1) change the definition of demolition to require a removal of the entire building

including its foundation; (2) require owners to submit proof of financial ability to complete the demolition as well as approved permits for demolition from the appropriate governmental agency ***at the time of application***; (3) substantially increase the compensation owners must pay to tenants upon an approved application; (4) retaining DHCR's jurisdiction over the building "and any subsequent construction" under the RSL, ***which on its face is unconstitutional***.

The DHCR has always maintained that rent regulation in New York State is constitutional because owners can remove a regulated building from the rental market when they seek to demolish the building; however, retaining jurisdiction over any new construction under the RSL would be in direct contravention of this principal. Additionally, restricting this ability even further and dictating ***how*** a building must be demolished is an encroachment on this last remaining retained right. Encroaching on this right in such an egregious manner constitutes a taking under the Fifth Amendment, as courts have consistently held that limiting an owner's ability to demolish their own building constitutes a taking for which the government must pay just compensation. The NY State Court of Appeals, in *Seawall Assocs. v. City of New York*, 74 NY2d 92 (1989) held that "the prohibition against demolition, alteration, and conversion of the properties to other uses…deny owners…*any right to use* their properties as they see fit." *Id.*, at 108, *citing, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US at 435 (1982). While the Court conceded that there is "no…dispute that the City has the power to prohibit…demolition…the question is who is to pay for this and, mor particularly, whether the City – in accordance with constitutional mandate – must compensate property owners before it can 'place [them] in a business, force[] them to remain in that business and refuse[] to allow them to ever cease doing [that] business", and held that to prohibit owners from demolishing and opting out of rent regulation "simply does not meet the requirements of the Federal and State Constitutions." *Id.*, at 116.

These amendments virtually eliminate a path out of rent regulation that is constitutionally protected, and are unlikely to withstand constitutional scrutiny from higher courts.

Changes to calculation of base date rent, rent overcharges, and the default formula: The Court of Appeals ruled in *Matter of Regina Metro. Co., LLC v. New York State Div. of Housing & Community Renewal*, 35 NY3d 332 (2020) that the HSTPA could not be applied retroactively to calculating pre-HSTPA rent overcharges. While it would appear that these proposed amendments to the TPR (9 NYCRR §2506.8) and RSC (9 NYCRR §2520.6(f) and §2526.7) seek to codify the ruling in *Regina*, as drafted they ultimately misapply it. Bifurcating rent overcharge claims *by the date the complaint is filed* rather than by the date the overcharge occurred (using June 14, 2019, the effective date of the HSTPA) is an incorrect interpretation of *Regina* and is ripe for challenge - a challenge that will likely be successful. Additionally, the concept of a "base date rent" is rendered meaningless for any post-HSTPA-filed complaint, as the amendments set a *de facto* base date of June 14, 2015 for all such claims. This will require all landlords in 10, 20, 30, or 50 years from now to maintain all records going back to 2015 in order to prove the base date rent, an onerous and unrealistic requirement even today and one with extremely severe penalties for landlords who cannot comply.

Moreover, the amendments to the rules which deal with application of the default formula in the TPR (9 NYCRR §2502.6) and RSC (9 NYCRR §2522.6(b) will now permit application of the formula to judicial sales, thus limiting the ability of distressed rent-stabilized buildings to be purchased out of receivership/foreclosure given the unknown and potentially catastrophic liability any future owner could have when purchasing a building where the rents cannot be determined going back to this new June 14, 2015 base date.

Finally, holding that owners must also refund excess rent collected from prior tenants who are not parties in the overcharge proceedings where such determinations were made by DHCR is extremely onerous. While an owner diligently searches for a prior tenant, who never commenced any proceeding, interest and penalties will continue to accrue – again solely to the owner's detriment. In fact, this penalty will apply even in those instances where an owner had no notice or knowledge that an overcharge occurred. Awarding money to non-parties in proceedings lacks utility, common sense, and amounts to over-excessive punishment of owners who, in many cases, inherited overcharge liability from prior owner(s) of the building. This will have the added effect of stifling the rent-stabilized building resale market, further eroding its value as prospective purchasers consider their potential liability.

Succession Rights: Currently, where would-be successor tenants to both rent stabilized or rent controlled apartments have been found by a court to have committed certain fraudulent acts, (e.g., forging the vacated or deceased tenant of record's signature on renewal leases, continuing to make rent payments under the tenant of record's name instead of their own, the law precludes granting them succession rights as a result of these fraudulent acts. This rule of law developed over the past several decades through a robust and voluminous body of caselaw that has addressed situations where occupants hid their identities for years, precluding an owner from investigating any claim that they were family members of the prior tenant of record at the time that tenant either died or vacated. This rule of law disincentivizes fraud and circumvention of succession law.

The proposed amendments of the TPR (9 NYCRR §2503.5(d)(1)), the State Rent and Eviction Regulations (9 NYCRR §2104.6(d)(3)(iv)), the City Rent and Eviction Regulations (9 NYCRR §2204.6(d)(3)(iv)), and the RSC (9 NYCRR §2523.5(b)(2)), would eliminate this rule and permit occupants and would-be successors who intentionally commit fraud on the owner by affirmatively hiding the tenant of record's death or vacatur from the apartment to maintain a succession claim once their fraud is discovered by the landlord.

Adopting this policy as law would enable occupants to live for months, if not years, in a rent-stabilized apartment without coming forward to assert their right to succession. As Appellate Term Justice P.J. Suarez pointed out in their dissent in *Riverton Assoc. v. Knibb*, 11 Misc.3d 14, 16-17 (1st Dept 2005) "[d]eception and forgery should not be encouraged…" and while the motive for that successor's conduct was not clear, the Justice conjectured "perhaps she was trying to avoid any obligation under the lease had she decided to vacate the apartment and live elsewhere. Under that circumstance, the estate of the [tenant of record] would have been liable for the rent, not [her.] Imposing all the obligations of an owner and landlord under a rent-stabilized lease to occupants

who will not even reveal themselves until months or years later is patently unfair and likely unconstitutional overreach.

The reasoning behind the rule as it exists now is clear: the evidentiary burden on the succession issue rests with the claimed successor, who has knowledge of all the necessary facts supporting the claim, such as when the tenant of record died or permanently vacated and how long the would-be successor lived together with the tenant of record before they died or vacated. By not coming forward and asserting a succession claim and instead intentionally putting on a fraudulent ruse for a long time period, robs a landlord of the ability to contemporaneously investigate an occupant's claim for succession, complicating any ability to prove financial and emotional commitment and interdependence between the would-be successor and tenant of record. For example, where an occupant concealed their existence in a rent-stabilized apartment for 13 years following the death of the rent-stabilized tenant of record, forging the tenant's name on successive lease renewals during that 13-year period and paying the rent under the deceased's name, the court held that such occupant waived any claim for succession. *South Pierre Assoc. v. Mankowitz*, 17 Misc.3d 53 (App. Term 1st Dept 2007). As the Appellate Term held in that case, "the creation of a landlord-tenant relationship, whether through succession or otherwise, 'should not be reduced to a matter of gamesmanship, seduction and artifice.'" *Id.*, at 55.

This rule of law should be left undisturbed. There is no rational basis for awarding deceit, fraud, and gamesmanship at the expense of rent-regulated property owners.

Effective Date of Amendments: A general objection we have to the proposed amendments is that the DHCR purports that these rule changes directly flow from the HSTPA, yet they vary significantly with current DHCR practice. The proposed amendments would establish completely new policies that will drastically affect property owners' rights. Property owners have acted in reliance upon these DHCR policies post-HSTPA for over three years now, with no reason to believe that these well-established policies would be revised, since there is absolutely no reference to any single one of them in the HSTPA. Should any changes to these policies be implemented, their effective date must be as provided by RSC §2520.7 and the State Administrative Procedure Act, which requires a prospective effective date.

We have annexed hereto a chart that documents the specific rule changes we believe are beyond the scope of the HSTPA.

Accordingly, the RSA expresses its opposition to the amendments as set forth herein for going beyond DHCR's stated purpose of implementing the HSTPA, and because they disincentivize investment, inhibit business-sensible practices, freeze the housing market, and infringe on constitutionally-protected property rights, all while harming tenants in the process.

Proposed amendment	**Summary**
9 NYCRR §2520.6(d)	Added to the definition of a tenant, to include any person who "is entitled to occupy the housing accommodation as a tenant pursuant to any other provision of this Code."
9 NYCRR §2520.6(f)	Changes definition of base date for claims depending on whether the claim was filed before or after June 14, 2019: (1) For claims filed before June 14, 2019, the date four years prior to the filing date of such claim except where a special provision of this Code, the RSL or other law required maintenance of records or review for a longer period; (2) For claims filed on or after June 14, 2019, the base date shall be June 14, 2015.
9 NYCRR §2520.6(p)	Added the following definition of Common Ownership: "<u>any identity of interest or relationship based on family ties or financial interest between the owner/managing agent of a property and any other entity with which the owner/managing agent conducts business.</u>"
9 NYCRR §2520.7	Adds the following language to effective date of any amendments to the Rent Stabilization Code: "all amendments to this Code shall become effective in accordance with the State Administrative Procedure Act <u>or as otherwise required by law.</u>" Also changes the number of days DHCR may postpone implementation of any such provision where its implementation would require new or significantly revised filing procedures, from 180 to <u>210</u> days.
9 NYCRR §2520.9	Changes effective date of DHCR amendments from the date of filing to "<u>the date of publications of notice of adoption in the State Register…or otherwise required by law.</u>"
9 NYCRR §2520.11(e)	Changes (and renumbering) made to **<u>Substantial Rehabilitation</u>** code provision as follows: • (e)(1) specified percentage of building wide and individual housing accommodation systems that must be replaced has been changed from "not to exceed" 75% to "<u>at least</u>" 75%. • Prior (e)(2) repealed: eliminates ability of owner to demonstrate good cause for replacing a system that was recently installed or upgraded or did not otherwise need replacement, or that was desirable or required by law due to its aesthetic or historic merit. • New (e)(2): no presumption available to owner where building is 80% vacant that building is substandard or seriously deteriorated. • (e)(3) expands findings of harassment to be considered to include findings by HPD, housing court, or any other government entity other than DHCR, and provides that a finding of harassment shall be in force for three years from the date of the finding. • (e)(5) provides that occupied rent regulating apartment will remain regulated if there is a finding that the building has been substantially rehabilitated, until vacated (even if rehabilitated). • (e)(6) adds requirements that for exemption from regulation to apply for apartments where a prior rent stabilized tenant has a right to return: tenant must also express the intent not to return in writing, and DHCR may waive this requirement upon showing of owner good faith. • (e)(7) where an accommodation is uninhabitable and a tenant is under a "dollar order", owner must restore the building to a substantially similar building layout as before, unless it is not financially feasible, in which case tenant may choose between: (1) a demolition stipend; or (2)

	new rent stabilized tenancy in reconfigured apartment with a rent based on comparable rent stabilized rents in the area.
9 NYCRR §2520.11(p)(1)	Amends provision exempting 421-a accommodations from regulation once the benefit expires as follows: "the housing accommodations which were subject to the RSL pursuant to section 421-a and became vacant subsequent to the end of the applicable restriction period"
9 NYCRR §2520.11(p)(3)	Adds provision addressing the exemption of 421-a(16) accommodations from regulation once the benefit expires, and extends regulation of such affordable units from tenant in occupancy at the time of expiration to all successor tenants.
9 NYCRR §2520.11(p)(4)	Adds provision re: exemption of 421-a(16) accommodations from regulation and provides that market rate units may only be deregulated if the legal regulated rent surpassed the deregulated threshold when initially rented, or upon a permanent vacancy the next legal regulated rent surpasses the threshold at that time.
9 NYCRR §2521.1(m) and (n)	**Apartment Combinations/Reconfigurations** (1) Where 2 stabilized apartments are combined: the LRR of the newly created unit is the combined rents of the stabilized units plus IAI allowance for each unit (i.e. $15,000 per unit). This new unit would have to be registered under the same designation as one of the prior RS units. (2) Where 1 rent stabilized unit is combined with 1 unregulated unit- OR- where 1 unregulated unit is made larger by adding a portion of a rent stabilized unit: the newly created unit is subject to rent stabilization, but it is not clear what the new rent would be. (This amendment states that the new rent would be a combination of the prior legal rents for the combined units, but there is no "legal rent" for an unregulated unit.) (3) Where the outside perimeter of a rent stabilized unit is either increased or decreased: the new LRR would increase or decrease by a percentage that corresponds with the increase or decrease in square footage size from the original unit size. (4) The following remain unclear: -what the legal regulated rent is when combining a rent-controlled unit with another unit; -what the legal regulated rent or regulatory status, is when combining unregulated units, dividing unregulated units, combining unregulated units with portions of the common area of the building, or creating new units in new space in a rent stabilized building.
9 NYCRR §2522.5(f)	Amends code provision regarding adding spouses to a rent stabilized lease to permit tenants to also add domestic partners.
9 NYCRR §2522.6(b)	Adds new code provision re: rent overcharge orders and setting the legal regulated rent when it is not readily known/available: -creates an obligation on DHCR to order a refund not just to a current tenant, but to any prior tenant affected by a rent overcharge order, even if they are not a party to the proceeding;

	-removes provision permitting an owner to provide a full rent history from the base date to avoid imposition of the default formula; -removes exemption from the default formula for owners who bought a building from a judicial sale.
9 NYCRR §2523.4(a)	Precludes collection of an MCI increase retroactively to the effective date of a rent reduction order.
9 NYCRR §2523.5(b)	New code provision seeks to eliminate current caselaw bar against a successor who is claiming succession after the tenant of record has fraudulently signed renewals and/or paid the rent after having already permanently vacated the apartment.
9 NYCRR §2524.5(a)(2)	**<u>Demolition applications</u>** -redefines demolition as "the removal of the entire building including the foundation." -adds required compensations to be paid to rent stabilized tenant to include moving expenses, and does not permit an offset of the stipend in the event a tenant does not leave if the tenant is actively appealing DHCR's order. -changes formula for tenant stipend to the difference between tenant's current rent and the average rent for vacant non-regulated units as set forth in the NYC Housing and Vacancy Survey, multiplied by 72.
9 NYCRR §2525.3(a)	Adds the improper removal of a preferential rent to the definition of "Harassment."
9 NYCRR §2526.7(a)-(j)	New provision added regarding the determination of rents, penalties, and fines for proceedings commenced after 6/14/19: -Base Date – defined as the date the most recent reliable annual registration statement was filed and served upon a tenant six or more years prior to the filing of a complaint, but in no event shall it be prior to 6/14/15. -Reliable rent registration – defined as reliable if prior to that rent registration statement but after 6/14/15 the rent history does not contain any unexplained increase in the rent.
9 NYCRR §2526.2(c)	Increases penalties imposed on owners where DHCR finds for harassment/violation of an order.
9 NYCRR §2531.9	Repealed all code provisions re: high rent/high income deregulation and codifies DHCR policy post-HSTPA re: dismissal of pending actions, *only permitting deregulation where an owner obtained an order permitting for same prior to 6/14/19 and the lease expiration date was prior to 6/14/19.*

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