STATE RENT AND EVICTIONS REGULATIONS

REGULATORY IMPACT STATEMENT

1. STATUTORY AUTHORITY:

The Emergency Housing Rent Control Law ("RCL"), Laws of 1946, Chap 274, subdivision 4(a), as amended by the Laws of 1950, Chap. 250, as amended, as transferred to the Division of Housing and Community Renewal ("DHCR") by the Laws of 1964, Chap. 244, provides the authority to the DHCR to amend the State Rent and Eviction Regulations ("SRER"). The Housing Stability and Tenant Protection Act of 2019, Ch.36 of the Laws of 2019 ("HSTPA"), enacted June 14, 2019, and Ch. 39 of the Laws of 2019 ("Clean-up law") further empowered and required DHCR to promulgate rules and regulations to implement and enforce various provisions of HSTPA.

2. LEGISLATIVE OBJECTIVES

The RCL requires, because of a serious public emergency, the regulation of residential rents and evictions to prevent the exaction of unreasonable rents and rent increases and to forestall other disruptive practices that would produce threats to public health, safety and general welfare. The RCL is further designed to assure that any transition from regulation to normal market bargaining with respect to such landlords and tenants is administered with due regard to these emergency conditions. See RCL §8581(1).

DHCR is specifically authorized by RCL §8584(4)(a) to promulgate regulations and is specifically empowered by HSTPA to promulgate regulations to implement and enforce new provisions added, as well as provisions amended or repealed by HSTPA and the accompanying Clean-up law.

3. NEEDS AND BENEFITS

DHCR has not engaged in an extensive amendment process with respect to these regulations since 2014. As noted, in June 2019 there were significant amendments to the rent laws by HSTPA and there has already been significant litigation interpreting those laws. In addition, DHCR has had years of experience in administration which informs this regulatory process, as does its continuing dialogue during this period with owners, tenants, and their respective advocates. DHCR personnel have engaged in forums and meetings since the passage of HSTPA where the administration and implementation of the law was discussed. The needs and benefits of some of the specific modifications proposed are highlighted below.

a. Individual Apartment Improvements (IAIs)

HSTPA itself mandated most of the regulatory amendments made with respect to this section. An owner is entitled to a rent increase for an IAI when there has been a reasonable and verifiable modification, including improvements to the housing accommodation, increase in the services provided by the owner, or new furniture or furnishings or substantial increase in dwelling space provided by the owner.

HSTPA made changes to the IAI process that are being implemented, including:

- Requiring written consent from the tenant on an approved DHCR form.
- Requiring filings with DHCR for IAIs made to vacant and occupied apartments to be supported by before and after photographs, an itemized list of work performed, along with a description or explanation of the reason or purpose of such work, which will be made part of the DHCR rent registration records and retained in a centralized electronic retention system.

- In buildings with 35 units or less, the amount of rent that can be increased is limited to 1/168th the cost of the improvement.
- In buildings with more than 35 units, the increase in rent is limited to 1/180th the cost of the improvement.
- No more than three (3) separate IAI increases may be collected over a 15-year period and the total cost of eligible improvements cannot exceed $15,000.
- Exclusive of installation of items such as appliances that do not need licensed contractors, all work must be done by a licensed contractor with no common ownership between the contractor and the owner in order to pass along these increases.
- Prohibition on increases based upon the installation of similar equipment, or new furniture or furnishings within the useful life of such new equipment, or new furniture or furnishings.
- Prohibition on increases where there are any outstanding hazardous and immediately hazardous violations of the Uniform Fire Prevention and Building Code (Uniform Code), local fire code, or local building and housing maintenance codes at the time of installation that pertain to the subject apartment.
- New IAI increases collected for the first time after June 14, 2019, are temporary and will be removed from the rent in 30 (thirty) years, at which time, the legal rent will be adjusted to include the removal of applicable guideline increases.

The proposed regulations implement the statutory requirements. The one known area of dispute is from the HSTPA Clean-up law. The legislature added a law exempting IAIs before HSTPA's effective date from HSTPA's limitation on the monetary limitation of

$15,000 within a 15-year period. It has been asserted that this language also exempts those IAIs from the new amortization formula if completed but not implemented prior to HSTPA. DHCR is not adopting that interpretation as there is no support for that interpretation in either HSTPA or the Clean-up law.

b. Major Capital Improvements (MCIs)

The MCI provisions are another area that HSTPA changed and directed that DHCR promulgate regulations. The changes were to be made effective immediately to the extent feasible, but with a one-year period for implementation where necessary. These changes include:

- Modification to the MCI definition which incorporates new "green" installations.
- The removal of MCI increases after thirty (30) years.
- Amortization of costs over twelve (12) years for buildings with thirty-five (35) or fewer units and twelve and a half (12.5) years for buildings with more than thirty-five (35) units.
- Modification of the annual cap on collectability from six (6) percent per year to two (2) percent per year.
- Commencing on or after June 14, 2019, the collection of any rent increases due to any MCI approved on or after June 16, 2012, and before June 16, 2019, shall not exceed two (2) percent in any given year for any tenant in occupancy on the date the MCI was approved.
- The creation of a reasonable cost schedule.
- Prohibition of rent increases due to immediately hazardous violations as well as hazardous violations pertaining to the subject building.

- MCIs are also no longer allowed for work done in individual apartments that is not otherwise an improvement to the entire building which is largely directed at the prior practice of building-wide installations of new kitchens and bathrooms.
- The prohibition of MCIs in buildings with 35 percent or fewer rent regulated units.
- DHCR has already promulgated regulations regarding the reasonable costs but has now moved them from a stand-alone section to one more fully integrated with the other regulatory provisions to conform to HSTPA. In addition, the reasonable costs regulations have been modified to clarify the fact-based and case-by-case standard for review as actually applied by DHCR. These procedures give the regulated parties notice and another opportunity to comment on them as modified.

c. High Rent/High Income Deregulation

HSTPA repealed the high rent/high income provisions of the rent laws with an exception with respect to the rules governing Real Property Tax Law §421-a (16). The Clean-up law clarified that units lawfully deregulated, prior to the effective date of HSTPA, remain deregulated.

The elimination of the high rent/high income provisions is required by HSTPA. While the high rent/high income deregulation provisions were considered as a necessary adjunct to the rent law and central to its purposes by some, the position is not borne out by objective evidence. DHCR's annual registration data and processing records reveal that, in total, High-Rent/High-Income Deregulation removed a total of 166 apartments from rent regulation in 2019 and 115 apartments in 2018.

d. Maximum Rent

HSTPA made changes with respect to the establishment of the maximum rent. The proposed regulations reflect the changes as follows:

- Where a maximum rent established on or after January first, two-thousand twenty, is higher than the previously existing maximum rent, the landlord may not collect an increase from a tenant in occupancy in any one year period of more than the lesser of either seven and one-half percentum or an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board, pursuant to McKinney Unconsolidated Laws §8624.
- If the period for which the rent is established exceeds one year, regardless of how the collection thereof is averaged over such period, the rent the landlord shall be entitled to receive during the first twelve months shall not be increased by more than the lesser of either seven and one-half percentum or an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board, pursuant to McKinney Unconsolidated Laws §8624, over the previous rent.
- Any additional annual rents shall not exceed the lesser of either seven and one-half percentum or an average of the previous five years of one-year rent adjustments on rent stabilized apartments as established by the rent guidelines board, pursuant to McKinney Unconsolidated Laws §8624 of the rent paid during the previous year.
- Where a housing accommodation is vacant on January first, nineteen-hundred seventy-two, or becomes vacant thereafter by voluntary surrender of possession

by the tenants, the maximum rent established for such accommodations may be collected.

- No annual rent increase authorized pursuant to this act shall exceed the average of the previous five annual rental adjustments authorized by a rent guidelines board for a rent stabilized unit pursuant to section 4 of the emergency tenant protection act of nineteen seventy-four.
- No order increasing or decreasing a maximum rent previously established pursuant to the regulations shall be collectible until the first day of the first month beginning sixty (60) days from the date of mailing of notice of approval to the tenant.

e. Succession Rights

Family members remaining in a rent-controlled unit after the vacatur of the named lease holder have the right to remain in the apartment. HSTPA made no changes to the statutory provisions regarding succession. However, DHCR has always been empowered to promulgate regulations, first by its general rent stabilization rule making authority, see, Rent Stabilization Association v. Higgins, 83 N.Y.2d 156, 608 N.Y.S.2d 930 (1993) and subsequently by Public Housing Law §14. The regulations require contemporaneous occupancy by the family members with the named leaseholder for two years as their primary residence prior to the permanent vacatur of the named leaseholder. (9 NYCRR §2104.6)

Presently, there is a split between two departments, the Appellate Division 1st Department and 2nd Department as to how to measure the two-year period. The First Department has held that if the named leaseholder executes a lease, even if that

leaseholder has vacated the apartment, the two years are then measured from the end of that lease. Third Lenox Terrace Assoc. v. Edwards, 91 A.D.3d 532, 937 N.Y.S.2d 41 (1st Dept. 2012). The Second Department, at DHCR's urging, has taken a more pragmatic approach, reviewing the period of actual physical vacatur of the named lease holder even if it happened before the execution of the lease. Jourdain v. DHCR, 159 A.D.3d 41, 70 N.Y.S.3d 239 (2nd Dept. 2018). Also, the Second Department has already provided a similar rule with respect to rent controlled tenancies. Although those cases relate to rent-stabilized tenancies, not rent-controlled, DHCR determined that clarification for rent-controlled tenants was also an appropriate change. True fraud and an extended period of misrepresentation will not be rewarded by adopting the *Jourdain* approach which DHCR will use as an exception to the actual physical vacatur date. However, evicting long term family residents because the named leaseholder may have been in the process of moving out during the renewal period or was simply postponing an anticipated problematic and difficult interaction with their landlord over whether remaining family had the right to stay is simply too harsh a rule.

While executing the lease renewal by the vacating named leaseholder may have been inappropriate, the Court of Appeals has ruled (reversing DHCR) in other contexts that an unrelated program violation (failing to advise DHCR of the family member's occupancy) should not supersede the actual facts that such person was remaining a family member and the purpose of these rules is to assure family cohesion and prevent their displacement. Murphy v. DHCR, 21 N.Y.3d 649, 977 N.Y.S.2d 161 (2013). This regulation is an opportunity to provide even more clarity as to DHCR's intentions with respect to implementation as the agency delegated to promulgate these succession

regulations. This modification has limited impact with respect to rent control as both departments already follow a practical rule based upon the physical vacature of the original tenant of record since it is rare that rent control tenants get additional leases after their initial lease.

In addition, current regulations allow spouses of leaseholders to be added to leases without going through the full succession process. These proposed regulations will allow domestic partners of leaseholders the same protections.

f. High Rent Vacancy Deregulation

HSTPA eliminated high rent vacancy (as well as high rent/high income) deregulation as of June 14, 2019, with limited exceptions for Real Property Tax Law §421-a (16), not applicable here.

g. Applying changed rules at PAR

The proposed regulation provides that when a law or regulation changes during the pendency of a PAR proceeding, the rules in effect at the time the Rent Administrator (RA) makes its decision controls unless the equities or avoiding undue hardship require otherwise. This rule reverses the presumptions built into the prior regulation of generally applying new rules on PAR subject to the equitable and hardship exceptions. The rule change conforms with the major implementation requirements of HSTPA based on Matter of Regina Metro. Co., LLC v DHCR, 35 NY3d 332, 154 N.E.3d 972 (2020).

High Rent/High Income cases and cases involving High Rent vacancy where an RA order was issued prior to the passage of HSTPA will largely use pre-HSTPA rules, and any apartment lawfully deregulated prior to the HSTPA, remains deregulated. In MCIs, the effective date contemplated a year-long implementation of the new rules,

with certain express retroactive modifications to the implementation of existing orders (where even those changes were made prospectively) and prohibited the issuance of new orders based on the HSTPA standard. These modifications all point to excluding these standards to orders issued prior to the HSTPA, but which are pending on PAR. Further, the regulation also conforms the legal rule with the evidentiary fact rule of not accepting new evidence generally on PAR.

h. Actual Physical Address for Registration

Part of the requirements of the SRER is that each owner register their building upon change in ownership. The proposed regulation requires owners to provide an actual physical address instead of utilizing a post office box address. This rule meets a need of assuring a methodology to serve or contact ownership when necessary or to greater enhance understanding of the true characteristics of ownership and liability.

i. Demolition

The new regulations:

- Add a "good faith" requirement to demolition.
- Requires the applicant at the time of the application to submit proof of financial ability to complete the proposed work, along with proof that the local building department has already approved the plans for demolition.
- Increases the stipends given to residents displaced by demolition by calculating it based on the average rent for non-regulated vacant apartments multiplied by six years.
- Allows DHCR to revoke a demolition order if the owner fails to act in good faith or fails to undertake construction within a reasonable time.

- Permits DHCR to initiate enforcement proceedings *sua sponte* for failure to comply and make those penalties applicable to subsequent purchasers.

The regulations also require an owner to demonstrate the financial ability to demolish and re-construct as part of its application rather than supply it before a determination is made. The regulations provide that an owner can apply and receive approval to demolish a building if they present an approved plan and proof of financial ability to complete the project. Requiring an owner to submit an approved building plan and the financial ability to complete the plan with the filing of the application will allow for more appropriate and timely processing and facilitate the screening of improperly filed applications.

The amended regulations clarify DHCR's powers with respect to enforcement. The law and regulations contain penalties and remedies which DHCR can apply to enforce its demolition orders. Under SRER §2105.8, an owner can be found guilty of harassment for filing false documentation with DHCR in order to obtain approval of a demolition project. DHCR has always had the inherent authority as set forth in SRER §2107.8 to revoke orders based on irregularities, illegalities or fraud. These administrative remedies are cumulative and, as expressly set forth in the proposed amended regulations, they are not intended to supplant other causes of actions and remedies that may inure before DHCR, the courts or any other administrative bodies based on the failure of an owner to comply with the requirements of an approved demolition plan. Successor owners shall be bound by the terms and conditions of DHCR's order. Any remedies and penalties prescribed shall apply to subsequent owners as well as to the owner whose application is granted.

4. COSTS

There are no additional direct costs imposed on tenants or owners by these amendments as owner direct costs are capped at $20 per unit per year. The amended regulations do not impose any new program, service, duty or responsibility upon any state agency or instrumentality thereof, or local government. Owners of regulated housing accommodations will need to be more vigilant to assure their compliance with changes and the changes themselves in many instances do require additional filings by owners. For example, IAIs now require contemporaneous filing with DHCR of certain proof, i.e. before and after photographs, that was only necessary to produce previously in the context of an overcharge case or a direct demand by the tenant closely associated with the lease execution. The proof is of a kind an owner looking to establish the propriety of the IAI increase would have maintained prior to HSTPA in the event of a subsequent overcharge claim. HSTPA may require additional costs to owners as explained in the Regulatory Flexibility Analysis with respect to MCIs. Compliance costs are already a generally accepted expense of owning regulated housing. In general, as in the example provided above, the increased compliance costs are less a product of the promulgation of these regulations, but the enactment of the HSTPA.

In some instances, there are increased penalties if the regulations are violated, however, these consequences are consistent with the existing law or otherwise necessary to secure compliance. Tenants will not incur any additional direct costs through implementation of the proposed regulations but, as some of these regulatory standards have become more complex, may themselves be making additional submissions in the context of DHCR proceedings to resolve factual issues created by these new standards.

5. LOCAL GOVERNMENT MANDATES

The proposed rulemaking will not impose any new program, service, duty or responsibility upon any level of local government.

6. PAPERWORK

The amendments will increase the paperwork burden essentially due to the changes made by HSTPA. There will be additional costs associated with filings and the need for additional record retention. Specific claims that a changed regulation may create hardship or inequity can and will be raised in the context of the administrative applications, themselves, where such factual claims can be assessed. However, consistent with HSTPA and the court decisions interpreting it, DHCR has mitigated some of these additional paperwork concerns by expressly promulgating a regulation that makes the application of these new statutory standards on PAR the exception rather than the rule.

7. DUPLICATION

The amendments do not add any provisions that duplicate any known State or Federal requirements except to the extent required by law. There are instances where a rent-controlled property participates in another State, City or Federal housing program. In those instances, there may be a need to comply with the SRER requirements as well as the mandates of that City, State or Federal program.

8. ALTERNATIVES

As stated previously, much of these new regulations are a product of HSTPA, itself foreclosing much examination of alternatives. Nevertheless, DHCR considered a variety of alternatives to certain rules which were not exactly proscribed by the HSTPA. Most often, however, the choices were questions of appropriate statutory interpretation.

a. Individual Apartment Improvements (IAIs)

The proposed amendments are necessary for DHCR to be in compliance with the legislative requirements outlined in Part K of HSTPA. Two major examples of such statutory implementation are: 1) the implementation of the15 year/$15,000 IAI rule to improvements installed prior to the effective date of HSTPA but where increases themselves were not effective until after HSTPA and 2) the need for licensed contractors for installation of IAI's. It was suggested that the rule in the Clean-up law exempting these installations from counting against the 15-year/$15,000 cap should also apply to the new amortization rules. However, the amortization was not included in the Clean-up law as an exception.

Moreover, the effective date requirements of HSTPA required that IAI changes be implemented, to the extent feasible, as effective immediately as possible. These provisions, DHCR believes, effectively precluded the suggestion of carving out an exception for amortization. As to the requirement of installation of IAIs by licensed contractors, DHCR did not see such a requirement as an appropriate reading of the statute where local building code and rules did not require licensed contractors. Instead, DHCR saw the inclusion of this new requirement as one more issue DHCR must now check where such licensed contractor is required for such installation as part of an IAI review of an overcharge. For example, a requirement that the "installation" of a new refrigerator which is simply plugged in, should be by someone licensed, when no such license exists, did not square with DHCR's view of the meaning of the provision.

DHCR also believes installation of appliances where the prior appliance was installed more than 15 years before (and before the enactment of HSTPA) was not meant

to be part of the $15,000 cap on three IAIs for the 15-year period. Such a reading of the statute simply left too much to happenstance where there was a necessary replacement that could not otherwise be planned.'

b. Major Capital Improvements (MCIs)

DHCR used its knowledge and experience in carrying out its operational responsibilities in creating a process around review of the prohibition of approvals where certain specific violations are extant. Various alternative options were suggested, none of which were effective as operational models: one was to deny an MCI application immediately whenever such a violation was placed. The second was to hold such MCI grant in abeyance indefinitely until the violation was cleared. The first option fails to recognize the exigencies of building operation and the well settled nature of a long outstanding violation clearance system. The second option fails to recognize the need for, and long settled doctrines of administrative finality. Instead, DHCR took its present process of review for violation at the time of application, approved as part of the "Portofino" litigation. (Portofino Realty Corp. v. DHCR, 2017 N.Y. Misc. LEXIS 5273, 2017 NY Slip Op 32773 (U) (Sup. Ct., Kings Co., 2017), aff'd 193 A.D.3d 773 (2d Dept.) (2021)). DHCR then added the HSTPA mandatory review and cure period prior to the final issuance of an MCI order. This combination provides for orderly processing of MCI applications, clearance of violations, but also the outright denials of MCI applications where such violations are not cleared.

Two ancillary provisions, although not directed to be changed by HSTPA, in DHCR's assessment, needed to be changed to give the HSTPA effect. First, DHCR's prior regulation enabled an agreed upon increase in rent for new services where 75% of

the residential tenants agreed to the service. With the new HSTPA rule, in denying any MCI increases in buildings with less than 35% regulated tenancies, the application of the 75% standard based on using all tenants, could potentially undermine that 35% statutory limitation. Under DHCR's new rule, 75% of the residential tenants may still change the service, but it takes 75% of the rent regulated tenants to agree upon any increase associated with such a change.

Also, historically, DHCR had an evidentiary standard to judge the quality of an MCI. That standard facially precluded an independent inspection by DHCR of the MCI where an engineer certified correct installation and operation, unless 51% of the original complaining tenants disputed the certified opinion. Although such a rule may still be persuasive in many instances as to efficacy of the MCI, it no longer made any sense as an absolute prohibition against a DHCR inspection, in light of HSTPA's statutory command that 25% of all MCI installations be inspected. Such a self-imposed limitation by DHCR on certain inspections could serve to defeat that legislative directive and unreasonably limit selection of buildings for those inspections.

As with deregulation and overcharge, DHCR determined, as an issue of law, that new MCI rules needed to be applied to pending proceedings before the Rent Administrator, but not those pending at PAR.

c. High Rent/High Income Deregulation

There are no alternatives to this amendment. The elimination of this deregulation was part of HSTPA. DHCR repealed the entirety of the high rent/high income provisions just as the equivalent section was removed in its entirety from the statute by the legislature.

The division between pending RA proceedings (where the new law was applied) and PAR proceedings is dictated by what was already "lawfully deregulated" by DHCR order (and now just subject to PAR) and those that were still pending. Deregulation does however require the expiration of any time period contained in such order establishing the date of deregulation. If the required time period had not expired prior to the enactment of HSTPA, the conditions for deregulation had not been lawfully completed prior to HSTPA's enactment.

d. High Rent Vacancy Deregulation

DHCR repealed the entire high rent vacancy deregulation section just as the equivalent section was removed in its entirety from the statute by the legislature. DHCR considered maintaining historical references to high rent/vacancy deregulation. The applicability to the various standards as they changed over various periods of time have been settled up to 2015 have now been settled by Altman v. 285 West fourth, LLC, 31 N.Y.3d 178 (2019). However, the impact of the changes made by the Rent Act of 2015 has been the subject of other litigation. In People's Home Improvement LLC v. Kindig, the Court held that the rent in effect prior to vacancy controlled whether the rent exceeded the threshold to effect deregulation. More recently in 3265 Starr LLC v. Martinez, 202 N.Y. Misc. Lexis 6681, the Appellate Term 2nd Department reached the opposite conclusion. DHCR does not believe that the *3265 Starr decision* will necessarily be the final word from the courts nor is it yet ripe for resolution by regulation. DHCR shall instead for the time being makes its own assertion in cases that come before it which will be subject to judicial review.

e. Applying Changed Rules at PAR

DHCR considered a variety of alternatives to many of these new rules, as set forth in part in the Needs and Benefits sections. DHCR considered continuing the rule presently in place. The current regulations provide that "unless undue hardship or prejudice would result therefrom, where a provision is amended, or an applicable statute is enacted or amended during the pendency of a PAR, the determination shall be in accordance with the changed provision." However, DHCR decided that it would not be feasible to continue applying the current rules given the complexity of HSTPA, its actual legislative directions on implementation, and the Court of Appeals recent decision in *Regina Metropolitan*, all of which are discussed in the Needs and Benefit section.

9. FEDERAL STANDARDS

The proposed amendments do not exceed or duplicate Federal standards. Many of HSTPA's provisions and rent regulation generally are the subject of current litigation as to their constitutionality.

10. COMPLIANCE SCHEDULE

By the time of final promulgation of these rules, HSTPA will have been extant for a significant period. Therefore, it is not anticipated that regulated parties will uniformly require time to comply with the proposed rules. To the extent that DHCR believes they do reflect rules not required by HSTPA, the rules themselves are generally made expressly prospective. Moreover, DHCR regulations provide for an option of additional grace periods for implementation.