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Report No. 1531
July 8, 2026

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NYC Department of Finance
Legal Affairs Division
375 Pearl Street, 30th Floor
New York, NY 10038
Attn: Timothy Byrne

Re**:** NYSBA Tax Section Comments Concerning Article 30-C of the New York Tax Law (City Surcharge on Property that Does Not Serve as a Primary Residence) and its First Year Administration

Dear Mr. Byrne:

This letter (the "Letter")[1] of the Tax Section of the New York State Bar Association (the "Tax Section") addresses the new surcharge on certain New York City residential properties adopted as part HH of chapter 59 of the laws of 2026 (known as the "Pied-a-Terre tax") and the proposed

[1] This Letter may be cited as New York State Bar Association Tax Section Report No. 1531, "Report of the Tax Section of the New York State Bar Association Concerning Article 30-C of the New York Tax Law (City Surcharge on Property that Does Not Serve as a Primary Residence) and its First Year Administration" (July 8, 2026). The principal author of this Letter is Elizabeth Pascal with substantial assistance from Austin Bramwell, Noah Chase, Alan Halperin, and Richard Reinhold. Helpful comments were received from John Barrie, Paul Comeau, Lucy Farr, Larry Garrett, Deborah Paul, David Schizer, Michael Schler, Jodi Schwartz, Sara Zablotney, and Libin Zhang. This Letter reflects solely the views of the Tax Section and not those of its individual members or any other party. Opinions expressed are those of the Tax Section and do not represent those of the New York State Bar Association unless and until it has been adopted by its House of Delegates or Executive Committee.

regulations that were released on June 5, 2026. As the surcharge's first fiscal year began on July 1, 2026, before final regulations have been adopted, this Letter focuses on the Tax Section's questions and concerns regarding the administration of the surcharge in its first fiscal year, particularly related to the determination of whether a covered property serves as a qualified primary residence. The Tax Section intends to submit a subsequent report addressing longer-term issues related to the surcharge and its administration.

We commend the Department of Finance (the "Department") for issuing proposed regulations promptly. Yet, even after the release of these proposed regulations, we are concerned that the definitions of "primary residence" and "covered owner," as applied to a number of relevant circumstances, remain unclear, with a very short time frame for the Department to issue initial determinations of who is subject to the surcharge and for taxpayers to contest those determinations. Moreover, neither the statute nor the proposed regulations create a clear mechanism to request a refund should a taxpayer believe the surcharge was improperly imposed. As a result, we believe there will be significant confusion among affected taxpayers and subsequent challenges of the surcharge. While we understand that there is no perfect process of administration, and a new law or tax always requires further refinement and guidance as issues arise, we believe that clarifying the definitions of "primary residence" and "covered owner," ideally by identifying standards that will guide the Department's administration of the tax and by including examples that illustrate the application of these standards and address issues discussed in this Letter, will reduce confusion and disputes. We would also urge the Department not to impose penalties in the first year of the surcharge for taxpayers taking a reasonable position under the law in recognition that guidance is still in the process of being developed and issued.

This Letter first summarizes the new law and proposed regulations with respect to the definitions and treatment of "primary residence" and "covered owner," as well as administration of the surcharge in the first year. It then identifies where the Department might provide additional guidance (whether in the regulations or other, more informal guidance) so that owners have a clearer understanding as to what properties are subject to the surcharge and the process for contesting the applicability or calculation of the surcharge.[2] The Tax Section may have additional comments on the law and regulations, particularly regarding Phase Two of the surcharge, but we have focused this Letter on the most critical issues in the first year of administration.

I. Summary of City Surcharge on Property That Does Not Serve as a Primary Residence

Part HH of the 2027 Budget includes legislative findings that establish the purpose of the new surcharge. Most importantly, the findings establish that, "[M]any of [New York City's] most valuable homes are held as second homes, allowing the owners of those homes to reap considerable benefits from the city's broader economy, from city services and from a vibrant real estate market. The legislature finds that it is prudent to impose a surcharge on the owners of those second homes to maintain important city services."[3] As Governor Hochul stated in her announcement of the surcharge when it was proposed in mid-April, "New York City is the greatest city in the world, and the people who call it home should not be left carrying the burden alone."[4] Based on the legislative findings and public statements about the surcharge, the principal intent appears to be to impose the surcharge on owners whose New York City properties are not used as a primary residence by those owners or other qualified users (e.g., an immediate family member or arm's-length lessee).[5]

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[2] We note that Rhode Island recently passed its own Non-Owner Occupied Property Tax Act, which imposes a tax on properties not occupied by its owner. While there are significant differences between the Rhode Island tax and the New York City surcharge, the Rhode Island Division of Taxation issued FAQs that provide clear definitions of "non-owner occupied" and other aspects of the law that should help taxpayers navigate the new tax. *See* Rhode Island General Laws 44-72. FAQs at https://tax.ri.gov/tax-sections/sales-excise-taxes/non-owner-occupied-property-tax.

[3] Section 1, Part HH of Chapter 59 of the Laws of 2026.

[4] *Governor Hochul Announces Pied-à-terre Tax Proposal for Luxury Second Homes Valued at $5 Million or More*, N.Y. Governor's Press Office (Apr. 15, 2026), available at: https://www.governor.ny.gov/news/governor-hochul-announces-pied-terre-tax-proposal-luxury-second-homes-valued-5-million-or-more.

[5] A possible interpretation of this legislative history is that the Pied-a-Terre tax was intended to be imposed only on owners who are not New York City tax residents. We also note that public statements by Governor Hochul, Mayor Mamdani, and others about the Pied-a-Terre tax have also referenced the fact that some luxury properties are vacant for most of the year. See, e.g., id. ("If you can afford a $5 million second home that sits

New Article 30-C of the N.Y. Tax Law and Chapter 32 of the NYC Administrative Code impose a surcharge for the fiscal year July 1 – June 30 (consistent with the fiscal year for property taxes), beginning July 1, 2026.[6] The surcharge is applicable to all "covered properties" in New York City that are not primary residences. That is, the Pied-a-Terre tax is not imposed on a residence used as a "primary residence" by a "covered owner," an immediate family member of the covered owner, or a tenant pursuant to an arm's-length lease. Class One covered property includes 1-3 family residential homes with assessed values at over $5 million. Class Two covered property includes cooperative and condominium dwelling units with assessed values of over $1 million.[7] The lower threshold for co-ops and condos is due to the historically low assessment values on these properties.

For the first two years of the surcharge (fiscal years beginning in 2026 and 2027), the tax rate is between 0.8% and 1.3% of assessed value for Class One property and between 4.0% and 6.5% of assessed value for Class Two property.[8] The Department will establish a methodology for determining the fair market value of condos and co-ops that will be used in the second phase beginning July 1, 2028 and until the surcharge sunsets at the end of the fiscal year beginning in 2031. During the second phase, the surcharge will be imposed on properties valued at more than $5 million with the surcharge rates ranging from 0.8% to 1.3% on all covered properties not used as a primary residence.[9]

For all covered properties, the Department must determine annually whether they are used as a primary residence, either by the covered owner or an immediate family member of the covered owner, or by a tenant pursuant to an arm's-length lease. Section 1352 of Article 30-C states that, "[t]he Department of Finance shall make a determination of primary residence based on factors identified by rules of the Department of Finance,

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empty most of the year, you can afford to contribute like every other New Yorker.") (quoting Governor Kathy Hochul).

[6] Tax Law § 1350; NYC Admin. Code § 11-3202.

[7] Tax Law § 1351(b), (c), (e); NYC Admin. Code § 11-3203.

[8] Tax Law § 1353(a).

[9] Tax Law § 1353(b).

including but not limited to whether such covered property or residential cooperative dwelling unit was occupied in aggregate for a majority of days during a calendar year by a covered owner [and] shall make such initial determination based on information available to such department."[10] Primary residence for a fiscal year is determined as of January 5th prior to the beginning of the fiscal year (the "taxable status date").[11] For the first year of the surcharge, the law requires the Department to provide notice of the initial determination of primary residence no later than August 30th, 2026.[12] In other words, the Department must make an initial determination by August 30, 2026 of whether the owner, immediate family member, or tenant used the property as a primary residence as of January 5, 2026.

Article 30-C grants the Department substantial authority to promulgate rules to both "specify additional factors or documentation that may assist in the initial or final determination" of whether a property is a primary residence and to establish a process for the Department to audit "any certification or documentation of primary residency submitted" within six years of the submission.[13] The statute further permits the Department to establish "any rules necessary to implement" the Pied-a-Terre tax, including but not limited to such things as addressing a change in ownership of a property potentially subject to the surcharge, the notice requirements, and penalties.[14]

The proposed regulations state that, "[u]nless credible information in the possession of the department indicates otherwise, the department will make a determination" that a covered property is used as a primary residence if, beginning for the second year of the surcharge, the owner indicates on the owner's state or federal personal income tax return for the most recent year available that the covered property is the owner's permanent home address; or received the STAR credit for that address.[15] For the first year of the surcharge

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[10] Tax Law § 1352(a)(1).

[11] Tax Law § 1351(q).

[12] Tax Law § 1352(a)(2).

[13] Tax Law § 1352(b).

[14] Tax Law § 1354(e).

[15] *Rules Relating to Surcharge on Certain Non- Primary Residences*, proposed June 9, 2026 (to be codified at 19 Rules of the City of New York (RCNY) § 62-01 - § 62-07), at § 62-06(a)(2) [hereafter 19 R.C.N.Y. § 62-

and afterwards, if the owner received a property tax exemption based on the covered property serving as the owner's primary residence for the immediate prior fiscal year, that would also result in an initial determination that the covered property will be exempt from the surcharge, absent evidence in the Department's possession to the contrary. Pursuant to the proposed regulations, if the Department cannot make an initial determination based upon tax returns or residency-based exemptions or credits, it can use information such as a covered owner having occupied the covered property for a majority of days during the "immediately prior calendar year"[16] or other documents submitted to New York City reflecting the covered property as the owner's primary address.

The initial determination as to whether the property is exempt from the surcharge must be sent (by mail or email, if the owner's email address is on file with the Department) to the owner by August 30, 2026 for the first fiscal year of the surcharge, and no later than January 30th for subsequent fiscal years.[17] Nevertheless, failure to provide notice of an initial determination of non-exemption from the surcharge will not invalidate the imposition of the surcharge.[18] Assuming the initial determination of non-exemption is transmitted, the owner will have 30 days from the date that the initial determination is transmitted to file an appeal through a portal to be set up by the Department.[19] That appeal must include a

06(a)(2) (proposed)]. The STAR (School Tax Relief) credit is a tax credit available for taxpayers who are New York State residents, use the property as their primary residence, and meet certain income criteria. *See* N.Y. Tax Law § 606(eee).

[16] The proposed regulations are more specific than the statute in terms of stating the period to be used for purposes of determining whether a covered owner spent a majority of days during the year at the covered property. Whereas the regulation states that the "immediate prior year" will be used, the statute only refers only to "a calendar year." *See* Tax Law § 1352(a)(1). But since the determination of whether a covered property is a primary residence is made as of January 5th, the difference between the statutory language and proposed regulation may not have much practical meaning.

[17] 19 R.C.N.Y. § 62-06(a)(4) (proposed). It is not clear from the statute or proposed regulations whether the Department will send an initial determination to property owners only if the property is found to be subject to the surcharge or also if the property will be exempt.

[18] Tax Law § 1352(a)(5); 19 R.C.N.Y. § 62-06(a)(4) (proposed).

[19] 19 R.C.N.Y. § 62-06(b) (proposed).

certification that the property is used as a primary residence plus some form of proof.[20] Such proof includes tax returns showing the owner, immediate family member, or lessee used the covered property as a primary residence for the most recently-filed year; or two or more documents, such as a New York driver's license or voter ID card, showing the property as the primary address.[21] If the property is used by an immediate family member or lessee as a primary residence, the owner must provide proof of that relationship in the appeal.[22]

Based on that information, the Department then makes a final determination of primary residence that can only be challenged through a formal appeal.[23] The Department may, however, audit an owner's certification or documentation of residency up to six years after that information is submitted to the Department.[24] Certifications determined to be fraudulent or submitted in bad faith can result in penalties of up to 50 percent of the surcharge amount.[25] For the first fiscal year, the surcharge is due and payable on the same date as the second semi-annual installment of real property taxes on January 1st and is administered by the Department.

II. Implementation Concerns for the First Fiscal Year

As discussed below in detail, the statute does not clearly specify how "primary residence" will be determined, how the Department will weigh various types of evidence to establish primary residence, or who qualifies as a "covered owner" in various ownership structures. The statute does, however, grant broad regulatory authority for the Department to further define these terms and refine how they are applied in specific circumstances. We

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 19 R.C.N.Y. § 62-06(c) (proposed).

[24] 19 R.C.N.Y. § 62-04(a) (proposed).

[25] 19 R.C.N.Y. 62-04(g) (proposed).

appreciate that the proposed regulations address ambiguities in the statute, but many questions remain. We address a number of those questions below.

A. Definition of "Primary Residence"

Article 30-C defines the term "primary residence" simply as "the use of a covered property . . . as of the taxable status date . . . as a primary residence" by a qualified individual.[26] We note that, on the one hand, the statute does not explicitly equate the use of a property as a primary residence with income tax residency—i.e. that is, income tax residency either because the property is an individual's one true permanent home (domicile) or because the individual spends more than 183 full or part days at the property (statutory residency)[27]—although, as discussed further below, the types of proof that might be offered to show that a property is a primary residence touch on one or both of these income tax concepts. On the other hand, the statute does not simply require that a covered owner occupy the property for a majority of days in the year, which is the rule in Rhode Island's Non-Owner Occupied Property Tax, although this is also a factor to be considered. In short, the statute does not provide a detailed and comprehensive definition of primary residence. Rather than provide such a definition, the statute focuses on the mechanisms and information that will be looked at to determine primary residence.

It is clear from the statute that a covered property where the owner essentially lives full time generally will qualify for the exemption. It is also clear from the statute that a property occupied by an owner for only a few weeks a year generally will be subject to the surcharge. But there are many common uses of a property between these two endpoints for which it is not clear from the statute or proposed regulations whether the surcharge will apply.

This problem is exacerbated by the fact that the time periods used to determine primary residence (i.e., the taxable status date of January 5th preceding the surcharge's

[26] Tax Law § 1351(m); N.Y.C. Admin. Code § 11-3201.

[27] An individual only need spend more than 183 full or part days anywhere in New York City – whether or not at that abode -- in New York City to be a statutory resident.

fiscal year as reflected in documentation from the immediately preceding calendar year), are disconnected from the period to which the surcharge applies. While we recognize the administrative hurdles to gathering information to determine primary residence in the context of a surcharge that is imposed prospectively, the disconnect between the time period used to make the determination and the time period to which the surcharge applies (and the significant changes that might arise to how the property is used between those two time periods) is likely to create confusion among taxpayers.

Our principal concern is the lack of clarity around the definition of primary residence that will make both compliance and administration more burdensome for taxpayers and the Department alike. The statute grants the Department broad regulatory authority to further define the term and the standards that will be imposed to make initial and final determinations. We urge the Department to use this authority, not to just lay out different types of proof that could be offered to demonstrate primary residence, but to offer a definition that explains the principles that will be considered and includes examples to illustrate them. Without such standards, it is not clear how the Department will weigh one type of evidence (e.g. the address on the owner's driver's license and tax return) versus another type of evidence (e.g. the number of days spent at the abode).

In light of the considerations and challenges discussed above, we also urge the Department to permit more than the 30 days provided in the proposed regulations, at least in the first year of the surcharge, for taxpayers to respond to initial determinations. In addition, we note that the regulations include additional types of proof, such as the address on a driver's license or voter registration, that can be submitted in a judicial appeal (but not in an informal appeal), to demonstrate that the covered property is used as a primary residence.[28] The types of proof that will be accepted should be the same, whether in an informal appeal of an initial determination or in a formal judicial appeal. We would suggest that final regulations indicate that, in all years of the surcharge, such proof can be submitted as evidence of primary residence in an informal appeal of an initial determination.

[28] 19 R.C.N.Y. § 62-06(b) (proposed).

To help illustrate the need for regulations to provide more clarity around the definition of primary residence and how the term will be applied, we have included some common situations below.

1. Statutory Residency

By definition, a statutory resident, who pays income tax to New York City, has a residence and is domiciled elsewhere.[29] For example, if an individual is domiciled in Florida, the individual may have a home there that the individual treats as the individual's permanent home, as evidenced, for example, by a homestead exemption for Florida property tax purposes. But the individual can also be taxed as a statutory resident of New York City for income tax purposes by spending more than 183 full or part days in New York City, either at the covered property or elsewhere, even though the individual does not treat the New York City abode as the individual's domicile. In these circumstances, it is not clear that the individual could certify that the New York City abode is the primary residence for purposes of the surcharge, even though the individual is a statutory resident; although the individual spends a majority of days in the year (i.e., more than 183 days) at the New York City abode, the individual considers the individual's non-New York City residence to be the individual's permanent home. In light of the factor specified in Section 1352 of Article 30-C (i.e., that the New York City abode was occupied by the owner for a majority of days in the year), it would seem, as a general matter, that the covered property can qualify as the owner's primary residence where the owner is a statutory resident and, in fact, occupies the New York City abode for more than 183 days during the year. If so, final regulations should clarify the point, as well as identify the circumstances, if any, under which the covered property does not so qualify.

Similarly, an individual could be a statutory resident of New York City even though the individual does not spend a majority of days during the year at a covered property in question. The legal definition of statutory residency does not rely on days at the covered property; only full or part days anywhere in New York City are required for statutory

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[29] *See* 20 N.Y.C.R.R. 105.20(d); *see also Matter of Newcomb Estate*, 192 N.Y. 238, 251 (1908).

residence for income tax purposes.[30] Consider, for example, an individual domiciled in New Jersey who commutes regularly into New York City for work and owns a covered property. The individual might spend only 60 days at the covered property but nonetheless file and pay taxes as a New York City resident because the individual spends more than 183 full or part days in New York City. The surcharge could still apply if the Department determines that the New York City property does not qualify as the primary residence of the commuter; in any event, the Department's determination (and the applicable principles underlying that determination) should be made clear in the final regulations, particularly if the individual uses the New York City property as the address on the individual's resident personal income tax return.

The types of proof that the statute and proposed regulations suggest can be used to demonstrate primary residence reflect the lack of a clear definitional standard. The Department can look to the address used on a tax return or that is used for a STAR exemption or property tax abatement—generally intended to reflect that the residence is the individual's permanent home—or whether the individual used the property for a majority of days in the year—information more relevant to the concept of statutory residency. A covered owner might be able to demonstrate primary residence through one type of proof but not the other. We urge the Department to clarify whether a covered property in such situations is subject to the surcharge.

[30] *See* Tax Law § 605(b)(1)(B).

2. Domiciled in New York City but Not a Tax Resident

The personal income tax laws contain an exception to being taxed as a New York City resident, even when the individual is domiciled in New York City. If the individual spends 450 days of a 548-day period outside of the United States and only 90 days during that period in New York City (e.g., because the individual was temporarily transferred to London for employment reasons), the individual is taxed as a nonresident during that period, even though the individual remains domiciled in New York City.[31]

Under the language of the statute, it is unclear whether such an individual would be subject to the surcharge. As of January 5, 2026, the individual would still be domiciled in New York City and the property would likely still be the individual's permanent home. But the individual would not be taxable as a New York City resident as of that date and the individual may not have spent the majority of days at the residence in the immediate preceding year or even during the surcharge period, depending on when the 548-day period begins and ends. Clarification as to whether the surcharge would apply in these circumstances (and the underlying reasoning) would be helpful.

3. Domiciled in New York City but Limited Use of the Covered Property

There are many situations where an individual who is domiciled in New York City files as a New York City resident using a covered property as the primary address but does not use the residence for a majority of days. For example, the individual might have a number of residences in various locales and not spend a majority of days in any one location. The individual might be absent from New York City for six months or more for the individual's job or for military service. Or the individual might stay elsewhere while the covered property undergoes renovations.

The proposed regulations appear to use the address on a tax return as creating a presumption that the property is a primary residence, although not in the first fiscal year of

[31] *See* Tax Law § 605(b)(1)(A). There are some additional nuances to the requirements that are not relevant to the discussion. In addition, a second exception to a domiciliary being taxed as a resident exists but would not be impacted by the Pied-a-Terre tax.

the surcharge. Information such as a property tax abatement or the address on a driver's license or voter registration can also be used to demonstrate primary residence. But if the address on such records is not dispositive, the Department may rely on whether the covered owner occupied the property for a majority of days during a calendar year.[32] The final regulations should clarify whether a property whose owner is domiciled in New York City and uses the property address on one or more New York State documents, but does not spend a majority of days at the property, would qualify for the exemption. For clarity, the final regulations also should describe the principles underlying the result reached.[33]

4. Primary Residence as of January 5th vs. During the Surcharge Period

The law aligns the surcharge period with the New York City property tax period. The fiscal year for both the surcharge and property tax runs from July 1 to June 30, with the surcharge payment for the first fiscal year payable with the second semi-annual installment of property taxes on January 1.[34]

Whereas the surcharge is forward-looking, the determination of whether the property is a primary residence is backward-looking. The determination of primary residence for the first fiscal year is made as of January 5, 2026 (prior to passage of the

[32] As discussed in the context of statutory residence, days spent at the property is not typically used to determine residency. We also note, as a matter of administration, that it will be very difficult to prove or disprove the number of days spent at the residence, as opposed to the number of days anywhere in New York City. Most records of location—cell phone; commuting records—do not show an exact location in New York City.

[33] In addition to the individual's being subject to New York City income tax as a resident, it is also possible to view the individual as using the New York City property as the individual's primary residence, for example, by treating the maintenance of important personal belongings in the property during the interim as use thereof. The adoption of this view, however, could be seen as having implications for the treatment of the opposite case – i.e., a non-domiciliary of New York City who actually resides for the majority of days in the year at a New York City property before returning to the individual's non-New York City domicile. For example, if the individual maintains important belongings in the non-New York City domicile, an even-handed approach could treat this as a negative factor in determining whether the New York City property qualifies as a primary residence in the year.

[34] Tax Law § 1354(b).

legislation), seemingly based on information for the 2025 calendar year. Moreover, while the surcharge is based on the fiscal year, proof of primary residence uses a calendar year.

This will create a disconnect between the period used for a primary residence determination and the period used to impose the tax. For example, consider a covered property that is leased to a tenant pursuant to an arm's-length lease. The tenant certifies that the tenant used the property as the tenant's primary residence as of January 5, 2026 based on the tenant's use of the property for a majority of days in 2025. The tenant's lease terminates March 1, 2026, when the tenant moves out, and after that date, no one uses the property as a primary residence. Based on the definitional period in the law, the property should still qualify for the exemption from the surcharge for the July 1, 2026 – June 30, 2027 period.

Conversely, consider the example of an individual who purchases a condo subject to the surcharge before January 5, 2026, but does not start using property until January 15, 2026, at which time the individual treats the property as the individual's primary residence, spends the majority of days there, and files as a full year resident of New York City for the 2026 and 2027 calendar years. Under the law, because this individual was not using the condo as the primary residence as of January 5, 2026, the property would not be exempt from the surcharge, even though it will be used for the entirety of the fiscal year as the primary residence of the owner.

Neither of the above examples seems to reflect a fair application of the surcharge based on the stated legislative intent to tax owners of second homes. We recognize that the taxable status date serves as a proxy and may reflect the practical challenges of making that determination prior to the due date of the surcharge. But the disconnect between the periods used to make the determination and for the imposition of the tax will result in situations where the surcharge is imposed on a property that is used as a primary residence for the surcharge's fiscal year but with no avenue for the taxpayer to request a refund. It will also result in situations where the property is determined to be exempt for the fiscal year based on the documentation that the residence was used as a primary residence for the immediate prior calendar year, even though it was no longer used as such during the surcharge period. The statute includes a six-year period for the Department to audit a primary residence certification or market assessment of the value of the residence in Phase Two of the surcharge[35] and this may offer the Department an avenue through regulation to redetermine the applicability of the surcharge based on the usage of the property during the actual surcharge period.

The January 5th taxable status date creates other complexities for implementation of the surcharge, especially in its first year. For example, suppose a purchaser bought a residence from a seller on January 15, 2026, and uses it as the primary residence. The purchaser will not be subject to the surcharge for the 2026-2027 fiscal year if the property was used as the primary residence of the seller on January 5, 2026, but will be subject to the surcharge if the property was not the primary residence of the seller on that date. In subsequent years of the surcharge, purchasers can obtain representations from sellers as to their former residency status, as well as appropriate indemnities for incorrect representations. However, for purchases (or even binding contracts signed) in the first part of 2026, purchasers will be subject to the surcharge under the law if the seller did not use the residence as a primary residence and a seller will have no obligation or incentive to cooperate with the purchaser in establishing the seller's primary residence before the sale.

B. Definition of a "Covered Owner"

A covered property is considered a primary residence if either the owner (or owners), an immediate family member (spouse, child, sibling, parent, grandparent or grandchild), or a tenant as part of an arm's-length lease uses the property as a primary residence.[36] A covered owner also includes the sole beneficiary (or beneficiaries) of a trust if the trust owns the property[37] and a majority owner of a corporation, partnership, or limited liability company if one of those entities owns the property.[38] Here, too, there is a lack of clarity around who is included and excluded from the definition of "covered owner"

[35] Tax Law § 1352(b)(2).

[36] Tax Law § 1351(m).

[37] Tax Law § 1351(d)(4).

[38] Tax Law § 1351(d)(5).

and critical differences between the language in the statute versus the proposed regulations, particularly with respect to a property owned by a trust or another entity. We also note that the statute is not clear when referring to ownership by multiple individuals or multiple sole beneficiaries of a trust whether only one of the individual owners or beneficiaries need to use the property as that owner's or beneficiary's primary residence or whether they must all use it as their primary residence. Guidance would be helpful to clarify the statute's use of the plural in these instances.

1. Trust Ownership

Under Tax Law § 1351(d)(4), where real property classified as Class One or a residential condominium dwelling unit is held, or shares of stock in a cooperative corporation are held, in trust, a "covered owner" includes "a beneficial owner or owners of such trust, provided that such beneficial owner or owners are the sole beneficiaries of such trust."[39] The "sole beneficiaries" requirement of Tax Law § 1351(d)(4) contrasts with Tax Law § 1351(d)(5), which requires the covered owners of property held through a partnership, corporation, or limited liability company to hold a majority interest. Tax Law § 1351(m) goes on to define a "primary residence," in relevant part, by reference to the use of the property as a primary residence of "one or more" of the covered owners or an immediate family member of "one or more" of the covered owners.

The foregoing provisions present a number of ambiguities and uncertainties. For example, it is unclear whether Tax Law § 1351(d)(4) is intended to draw a distinction between the "beneficial owner" of a trust and the "beneficiaries."[40] It is also unclear

[39] Tax Law § 1351(d)(4).

[40] It is common in trust law to refer to trust beneficiaries as the "beneficial owners" of trust property, in contrast to the trustees, who are considered the "legal owners." If Tax Law § 1351(d)(4) is intended to rely on that common idiom, then there is no distinction between a "beneficial owner" and a "beneficiary." If, however, no distinction is intended, then the proviso that the sole owners must also be the sole beneficiaries would be an empty tautology. We note that a similar potential tautology could be read in Tax Law § 1351(d)(5), which requires the covered owners of property held through a partnership, corporation, or limited liability company to hold a majority interest. This requirement is automatically satisfied in the case of any partner, shareholder, or member, if the requirement is intended to be met collectively by the equity

whether "beneficiaries" includes current beneficiaries, as well as remainder beneficiaries, contingent beneficiaries (for example, beneficiaries who take ownership only if a trust is not revoked or only if a power of appointment is not exercised to defeat their interests), and remote contingent beneficiaries (for example, the beneficiaries who would take only if all descendants of the grantor are deceased). Finally, it is unclear whether all beneficial owners are required to use a property as a primary residence in order to avoid the tax. The "sole beneficiaries" requirement of Tax Law § 1351(d)(4) suggests that all beneficial owners of a trust must use a property as a primary residence; however, Tax Law § 1351(m), if read literally, permits merely one of potentially very many beneficial owners or an immediate family member of that beneficial owner to use a property as a primary residence, thereby potentially vitiating any effect that the requirement that the beneficial owners be the "sole beneficiaries" would have.[41]

The final regulations should resolve the foregoing uncertainties. We note that Tax Law § 1354(e) grants broad rule-making authority, including, by Tax Law § 1354(e)(1)(A), to address the death of an owner. As trusts often terminate upon the death of a beneficiary, the Department of Finance could rely on that authority in order to rationalize the statutory rules.[42]

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owners of the entity, who by definition hold 100% of the equity interests and thus collectively satisfy the majority interest threshold.

[41] Another uncertainty, addressed elsewhere in this Letter, is whether covered ownership is possible in the case of tiered ownership structures. For example, it is common for a trust to hold a residence through a limited liability company. Without rules that would permit the beneficial owners to be treated as the owners of the residence (as opposed to beneficial owners of the membership interests in the limited liability company), the tax would be imposed, even if the beneficial owners use the residence as a primary residence. If the trust is revocable, one solution, if the Department agrees to permit some tiered ownership structures to qualify for the exemption, would be to treat revocable trusts as disregarded.

[42] Without purporting to resolve the contradictions in the statute, we note that one possible way of reconciling the "sole beneficiaries" requirement with Tax Law § 1351(m) is to require all the beneficial owners <u>or</u> their immediate family members to use the relevant property as a primary residence. In this view, for example, if the beneficial owners of a trust are considered to be a parent and that parent's children and grandchildren, the Pied-a-Terre tax would be inapplicable if the parent uses a trust-owned property as a primary residence, even if children and grandchildren did not so use the residence; this is because, while the children and grandchildren are beneficial owners and do not use the property as a primary residence, their immediate family member (i.e., the parent) does use the property as a primary residence. To take another example, a residence owned in trust for the benefit of siblings, who are considered beneficial owners, would not be

The proposed regulations state that proof that "an individual is the sole beneficiary of a trust" may be established by the trust agreement and a trustee affidavit.[43] The statute thus contemplates that more than one beneficiary of a trust may be a covered owner while the proposed regulation's proof provision is framed in singular terms and can be read to indicate that covered owner status arises only in the case in which "an individual is the sole beneficiary." We are concerned with the proposed regulation's narrowing of the statutory language and believe that final regulations should conform to the statutory language to reflect that trust-owned property with multiple current beneficiaries could qualify for the exemption. Moreover, even if the final regulations are conformed to the statutory language, the regulations should clarify whether all current beneficiaries (or their immediate family members) must use the property as their primary residence.

In addition, the proposed regulations do not indicate whether both the current beneficiaries and remainder and contingent beneficiaries are considered "beneficial owners." That uncertainty is especially problematic for trust planning because beneficial interests often change over time. We recommend that regulations reflect that only current income beneficiaries be taken into account, even though trust agreements often provide for contingent beneficiaries as well as remainder, successor, and other future interests.[44] We do not think this approach would result in circumvention of the surcharge. However, if there is residual concern, an anti-abuse rule could be included to address situations where the principal purpose for the trust structure is to avoid imposition of the tax.

It also is common for individuals to transfer assets, including title to their homes, to a revocable trust to facilitate estate administration and avoid subjecting the property to probate, among other reasons. The revocable trust acts as a substitute for a guardianship during lifetime (as trustees are typically appointed to manage the grantor's assets for the benefit of the grantor if the grantor loses capacity) and also effectively becomes a substitute

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subject to the tax, even if only one sibling is using the residence as a primary residence, as the siblings are considered immediate family members of each other.

[43] 19 R.C.N.Y. § 62-06(b)(2)(v) (proposed).

[44] For example, a requirement that all contingent beneficiaries, including a contingent beneficiary that is a charitable organization, use the property as a primary residence would make it difficult for trust-owned properties to be exempt from the Pied-a-Terre tax.

for the individual's Will following death. Generally, during the grantor's lifetime, the beneficiary of the revocable trust is the grantor. Under New York law, so long as the grantor is a beneficiary (or the trust is revocable), the trust assets are subject to the claims of the grantor's creditors. A revocable trust is treated as owned by the grantor during the grantor's lifetime.[45] Following the grantor's death, the executor of the estate and the trustee of the trust may elect to treat the trust as part of the estate for income tax purposes[46] and the trust property is includible in the grantor's gross estate.[47] We therefore believe that, for covered property held by a revocable trust, the grantor should be treated as a covered owner. In any case, final regulations or other guidance should address such common estate planning structures used to hold real property.

2. Other Entities as Property Owner(s)

The statute defines a "covered owner" to include a majority owner of a partnership, corporation, or limited liability company ("LLC") where the covered property is held by such owner.[48] The proposed regulations, however, provide a further limitation by defining "held" as owning an undivided fee interest in the property.[49] Not only does this definition seem to go beyond the plain reading of the statute, but we believe it may serve to eliminate owners from the definition of covered owner who have been and will continue to use the

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[45] *See* I.R.C. §676. Courts held that revocable trusts are treated as owned by their grantors before Congress confirmed that conclusion by statute. *See Stoddard v. Eaton*, 22 F.2d 184 (D. Conn. 1927); *Catlin v. Comm'r*, 25 B.T.A. 834 (1932); *Boynton v. Comm'r*, 11 B.T.A. 1352 (1928).

[46] I.R.C. §645.

[47] I.R.C. §2038.

[48] Tax Law § 1351(d)(5).

[49] 19 R.C.N.Y. § 62-02 (proposed).

property as a primary residence and are not engaging in the type of "gamesmanship" that the regulation purportedly is trying to discourage.[50]

In addition, by applying that definition of "held" only to corporations, partnerships, and LLCs, the proposed regulations impose a requirement that does not exist for property held by other types of entities, such as trusts, or directly by individuals. For example, consider a covered property that is owned 99 percent by an LLC (itself owned 90% by Mary, a natural person, and 10% by Carol, also a natural person) and 1 percent directly by Sam. Under the statute, Mary appears to be a covered owner, as the majority owner of the LLC. Sam is also a covered owner; the statute does not establish a minimum threshold of individual ownership to qualify as a covered owner. But under the proposed regulations, Mary would not be a covered owner, since the LLC does not own an undivided fee interest in the property, even though she owns a majority of the property through the LLC. But Sam would still be a covered owner since he has direct individual ownership, even though he owns only 1 percent of the property. We question whether that result is consistent with the statute. One option is for the regulations to set a minimum level of direct or indirect ownership in the property to be "held" by the LLC or other covered owner, so that an individual who owns a majority of the property indirectly can still qualify as a covered owner.

Neither the law nor the proposed regulations contemplate a covered property that is owned in a multi-tier structure and it is unclear whether such a property could qualify as exempt from the surcharge. For example, assume that a covered property is owned by an LLC. The LLC members are 1) John, an individual who owns 1 percent of the LLC and uses the property as the primary residence, and 2) a single member LLC that owns 99% of the property. The single member LLC is wholly owned by a trust, whose beneficial owner and sole beneficiary is John. Even though the ultimate owner of the covered property is one

[50] New York City Department of Finance, Notice of Public Hearing and Opportunity to Comment on Proposed Rules (https://rules.cityofnewyork.us/wpcontent/uploads/2026/06/Certified-Rules-Relating-to-Surcharge-on-Certain-Non-Primary-Residences.pdf), at 3 (stating that, "To prevent gamesmanship among owners of real property, [Section 62-02] would prevent individuals who hold a controlling interest in a business entity that holds only a fractional share of a property from receiving treatment as a 'covered owner' for purposes of the application of the primary residency exemption set forth in Administrative Code § 113205.").

individual who uses it as a primary residence, it is not clear under the statute that the property would be exempt from the surcharge.

The law also does not define a "majority owner" of an entity and we would recommend that final regulations do so. For example, if a property is owned by an LLC, which is owned 50-50 by Mary and John, would they each qualify as covered owners or would neither of them qualify? If Mary owns 100% of the LLC's capital but gets none of the profits or losses, would she be considered a "majority owner?" In addition to clarification of the questions above, we would recommend that the regulations clarify that where the statute requires ownership by a "natural person," that should include ownership by an entity disregarded for income tax purposes. Likewise, the ownership interests of spouses or other family members all residing in a residence should be aggregated for purposes of any ownership threshold.

3. Tenant as Covered Owner

The statute defines a covered owner to include one or more lessees so long as the lease was negotiated for a period of one year or more at arm's length.[51] The owner can submit proof that the property is the primary residence of the tenant as well as a copy of the lease to demonstrate that the property is exempt from the surcharge.[52] The proposed regulations do not specify what type of proof of a tenant's primary residence would be accepted. Noting that it could be exceedingly difficult for lessors to obtain personal information from lessees regarding their personal living arrangements, we urge the Department to accept certification by the tenant (including through a provision in the lease), unless the owner knows or has reason to know that certification is incorrect.

We recognize that there are many permutations that will come up and the Department cannot issue guidance to govern all of these situations. We also recognize that the Department aims to prevent taxpayers from engaging in aggressive planning in an attempt to avoid the surcharge. Nevertheless, taxpayers frequently hold real property in a

[51] Tax Law § 1351(m).

[52] 19 R.C.N.Y. § 62-06(b)(2)(iii) (proposed).

variety of structures for reasons that are unrelated to taxes or the surcharge (such as for estate planning reasons) and that do not reflect whether the property is used as a primary residence. Additional guidance for the most common of these arrangements, as well as some flexibility in applying the exemption where the intent of the statute is met and there is no indication of aggressive planning, would help affected taxpayers.

C. Administration Issues

1. 30-Day Period to Challenge the Initial Determination

As mentioned previously, the 30-day time period to challenge an initial determination of primary residence is exceptionally short, particularly in Year 1 of the surcharge and given the complexities of the determining primary residence by an agency that has never been tasked to make this type of determination previously. The 30-day appeal period runs from the date that the Department sends the initial determination.[53] We urge the Department to extend the period to appeal an initial determination, at least in the first year, as the process by which an owner can appeal is still not fully fleshed out and the electronic portal for filing the appeal has not yet been created.

In addition, the statute and proposed regulations state that the Department's failure to send notice of the initial determination does not prevent imposition of the surcharge.[54] We note that, if an owner does not receive notice, the statute seemingly leaves an owner with no possible appeal rights, because the filing of a judicial appeal requires an owner to have first gone through an administrative appeal of the initial determination.

[53] 19 R.C.N.Y. § 62-04(d)(1) (proposed).

[54] Tax Law 1352(a)(5); 19 R.C.N.Y. § 62-05(a)(4) (proposed).

2. Refund Provisions

The proposed regulations incorporate the rules and procedures for property tax refunds of overpayments and double payments under chapter 24.[55] The definition of an overpayment contained in 19 RCNY 24-01 might incorporate a refund claim based on an incorrect determination of primary residence, but this is not wholly clear. An overpayment is defined as "a payment that exceeds the amount of the real property taxes, water and sewer charges or assessments for which the payment was intended."[56] If a taxpayer discovers an overpayment, the taxpayer has six years after the date of the payment, or three years from a supreme court order or judgement, to file for a refund.[57] But these provisions do not expressly apply to refunds based on an incorrect determination of primary residence or covered owner status where the owner pays the surcharge amount to avoid a lien on the property. They also do not address the situation where an owner of a cooperative building incorrectly pays the surcharge on apartments that are used by covered owners as their primary residence. The Department might consider issuing regulations (or providing other guidance) to include limited circumstances in which an owner may seek a refund, apart from those already covered by the property tax laws.

3. Cooperative Property

The statute imposes the obligation on the cooperative building owners to collect and remit the surcharge amounts from owners of cooperative dwelling units, whereas the initial determination of primary residence is made with respect to the individual cooperative dwelling unit and an appeal of that determination is made by the owner of the cooperative dwelling unit.[58] As such, the failure to fully remit the surcharge could result in a lien on the

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[55] 19 R.C.N.Y. § 62-05(c) (proposed).

[56] 19 R.C.N.Y. § 24-01 (proposed).

[57] *Id.*

[58] Tax Law § 1354(c).

property. Particularly in the first year, when there may be a large number of owners of cooperative dwelling units appealing initial determinations of primary residence or issues with sending out timely notices, cooperative building owners may be caught in the middle, under a statutory obligation to remit the surcharge (subject to penalties for failing to do so) while under pressure from owners of dwelling units who believe their units are exempt but are still engaged in some sort of appeal. While a refund procedure might alleviate some of that tension, it still leaves cooperative building owners with significant liability while the parameters of the surcharge and its terms are worked out.

III. Conclusion

As noted throughout this Letter, we recognize that there will be issues that arise, particularly during the first year of the surcharge, that cannot be foreseen or easily addressed in advance by regulation or guidance. Nevertheless, we believe that additional guidance, in the form of regulations, or even, where appropriate, in the form of FAQs or a Department notice, could go a long way to clarify many open questions about the surcharge, particularly as to the definition of "primary residence." We believe that a 30-day period to appeal an initial determination is too short a window in the first year of the tax, as many owners may not immediately receive notice of the initial determination and may be ill-prepared to respond quickly with the information that is required for a timely appeal. We believe that additional guidance with examples to address common situations as laid out in this Letter, along with a longer time period to appeal an initial determination, will go a long way in reducing taxpayer confusion and unnecessary appeals.

Respectfully submitted,

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