



COMMENTS ON RENTAL HOUSING COMMISSION REGULATIONS, CHS. 39-44

****Headings for most significant comments are bolded****

General

One issue that affects many of the proposed regulations is language access for limited English proficient tenants. Aside from a requirement for notices issued under section 501(f) of the Rental Housing Act, which is required by the statute, the proposed regulations do not specify that notices or other key documents must be translated into those languages specified under section 4 of the DC Language Access Act, D.C. Code § 2-1933. The Commission should review the regulations with respect to all notices served on tenants to determine which documents should be translated into other languages. At a minimum, housing providers should be required to translate many notices into Spanish.

CHAPTER 38: RENTAL HOUSING COMMISSION OPERATIONS AND PROCEDURES

3800 GENERAL OPERATING PROVISIONS

3800.9

The Commission should commit to making at least the final decisions and orders in its cases available publicly on the Commission’s website and through the Office of Open Government website with a link embedded on the Commission’s website. Especially for members of the public with mobility or similar limitations, online access to these documents is incredibly helpful.

3801 FILING OF PLEADINGS, MOTIONS AND OTHER DOCUMENTS

3801.6

The Commission should amend this section to make clear the time frame for rejection of filings by the clerk, recognizing that filings often must comply with deadlines and any amended filing would need to be filed promptly. In the alternative, the Commission should be required to provide, in its order rejecting the filing, a time frame within which the party can submit an amended filing.

3801.11

In considering lessons learned and best practices from electronic filing in D.C. Superior Court and the D.C. Court of Appeals, we have two suggestions.

First, the Commission may want to allow electronic filings to be received until midnight and still be considered timely service on the same day. This is the common modern practice, though we recognize the Office of Administrative Hearings takes a different approach.

Second, the Commission should specify that a return receipt email will be generated in response to any email to the e-filing address.

3801.14(c)

The Commission should amend this section to:

- 1) specify that filings must include the District of Columbia Bar number of the attorney who is signing, to deter the unauthorized practice of law;
- 2) require parties/attorneys to include their email addresses, if available; and
- 3) clarify what it means for a party to retain “a signed copy” of an electronic filing, i.e. does this require a manual signature.

The first two suggestions are consistent with D.C. Superior Court practice, for example. Super. Ct. Civ. 5(d)(B)(ii).

3802 INITIATION OF APPEALS

3802.2

The Commission should allow parties a limited time after the filing of a notice of appeal to file a cross-appeal. In the end, such a rule should reduce litigation, by discouraging parties from filing an appeal preemptively instead of waiting to see what the other party does.

3802.4

The Commission should require a notice of appeal to be served on both the opposing party and any representative of the party below. A representative of the party at the trial level may or may not continue as the party’s representative before the Commission, so requiring service on both is appropriate.

3802.7, 3802.8, 3802.13

We urge the Commission to consider extending the briefing deadlines by 15 days (to 30 days) and to allow an additional 20 days until the hearing before the Commission. These short extensions will result in minimal delays to resolution while ensuring that both parties have a meaningful opportunity to prepare their arguments, given the complexity of the factual and legal issues often raised in these cases, as well as the long time lapse between the filing of a notice of appeal and preparation of the record below. These time periods also are consistent with D.C. Court of Appeals practice.

We realize these time frames would put the Commission out of compliance with its statutory mandate in D.C. Code § 42-3502.16(h) to issue a decision on an appeal within 30 days of the date of filing, though we note even the current time frames in the regulations arguably do not

comply with the statute. The statutory deadline is unrealistic, and we are happy to support the Commission in seeking a statutory amendment.

3802.12

The Commission should add language allowing the appellee to file a motion for summary affirmance of the decision below. This process is used by the D.C. Court of Appeals and may help with efficient resolution of certain cases. The Court of Appeals describes summary affirmance as appropriate where the basic facts are not complicated and the ruling below rests on an issue of law that is narrow and clear-cut. *See, e.g., Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013). The moving party does not need to show any particular need for expedited relief. *See id.*

3803 SERVICE OF PLEADINGS, MOTIONS AND OTHER DOCUMENTS

3803.3(c)

The Commission should clarify the wording of this section by adding “to electronic filing” to the phrase “prior, written consent...”.

3803.7(b)

The Commission should omit the “and” before the phrase “the name of the person serving”.

3805 STAY PENDING APPEAL

3805.6

The Commission should extend the timeframe for a motion to stay being deemed denied from 10 days to 15 or 20 days to ensure adequate time for such motions to be considered on the merits.

3803 COMMISSION-INITIATED REVIEWS

General

The Commission should consider deleting this section in its entirety. We believe it is advisable for an independent, appellate like the Commission to avoid initiating its own review of decisions. It is our understanding this authority rarely has been used, and we do question its continued utility.

If this section remains in the regulations, we suggest limiting Commission-initiated reviews to two circumstances: 1) voluntary agreements, understanding that in many of these cases there may not be a party with sufficient incentive to seek review of a decision; and 2) cases where the tenant or group of tenants either did not contest a petition at the Office of Administrative Hearings or were unrepresented. We have a few additional clarifying suggestions below.

The Commission also could consider referring certain cases to legal services providers and others for review and possible representation where the tenant or landlord was unrepresented before the Office of Administrative Hearings or Rent Administrator.

3808.1

The Commission should include a standard for Commission-initiated reviews to provide clarity and ensure that this authority is not exercised for improper reasons.

3808.5

The Commission should review the wording of this section, which is confusing and appears to conflict with section 3808.3. The prior section guarantees both parties the right to present arguments in a Commission-initiated review, similar to any other appeal. We read § 3808.5 as requiring the party adversely affected by the issue under review either to a) not participate and thereby preserve all rights to relief, or b) file a statement defending the decision below and thereby waive all rights to relief. We recommend deleting this section and simply allowing both parties to participate, as contemplated by section 3808.3.

3809 PARTIES

3809.5

We do not understand why an appeal from a Rental Accommodations Division order entered without a hearing should be captioned with the Rent Administrator as the appellee, unless the proceeding below is one that essentially does not involve the other party, e.g. a rejection of an application for elderly/disability protected status not initiated by the housing provider. The other affected party, if any – be it the tenant or housing provider – should be a party with the right to participate. If Rent Administrator wishes to intervene to defend its decision, it already has the right to do so under § 3810.5.

3810 INTERVENORS

3810.1

The Commission should clarify this section by providing separately for intervenors with a specific, substantial, and personal interest in the appeal versus *amicus curiae*. The Commission could look to D.C. Court of Appeals Rule 29 for guidance on *amicus curiae*.

3810.2

The Commission should amend this section to provide more time for motions to intervene, given that intervening parties may not receive notice of a case until late in the process. The D.C. Court of Appeals allows *amicus* to file a brief and motion for leave within seven (7) days after a party brief, for example. D.C. Ct. App. R. 29(a)(6).

3810.5

Similar to our comments above on 3810.1, the Commission should clarify that when the Rent Administrator intervenes it is as an *amicus*, not a party.

3812 APPEARANCES AND REPRESENTATION

3812.3

The Commission should clarify that a motion to withdraw only has to be filed if an attorney or other representative already has entered their appearance before the Commission. The current reference to “the party” having entered an appearance might be read to require a motion to

withdraw even when the attorney or other representative has not entered any appearance before the Commission. The phrase “the party” should be replaced with “the attorney or other representative of record.”

3812.6

We have two suggestions for this section.

First, the Commission should modify the language of this section to incorporate more modern terminology - instead of physical *infirmity* or mental *incapacity* we suggest referring to physical or mental *disability*.

Second, the Commission should limit the role of non-party, non-attorney representatives, similar to the approach taken in D.C. Superior Court, i.e. limiting to powers of attorney, executors, administrators, guardians, trustees, next friends for a minor, or other parties authorized by statute to represent the interests of another. This will both prevent the unauthorized practice of law and ensure that a non-party truly is representing the best interests of the absent party. We have seen instances in which even family household members may have adverse interests to the tenant head of household, and this conflict of interest will not always be readily apparent.

We do believe the Commission can and should depart from D.C. Superior Court practice in one respect, by allowing any power of attorney to appear on a party’s behalf without the need for counsel. Authorizing a power of attorney is relatively straightforward under D.C. law and should be a minimal burden for the individual party while also ensuring the representative has been chosen via a formal and documented process to represent that party’s interests.

3812.8-.10

The Commission should replace the details in these sections with appropriate references to the D.C. Court of Appeals rules that generally govern the practice law in the District. These sections essentially re-state portions of those rules, which are subject to revision through their own thorough process. We note in that regard that Court of Appeals Rule 49 recently was expanded to allow practice by non-barred law school graduates whose applications for admission are pending, a situation not contemplated by the current Commission draft.

Should the Commission decide to keep the current approach, the Commission should amend section 3812.8(c) either to establish separate standards for the termination of a law student’s representation of a party or to apply the standards found in 3812.13. Allowing termination of a law student’s representation at any time, for any reason, and without any notice or opportunity to be heard deprives both the law student and the represented party of due process.

3813 WITHDRAWAL OF APPEARANCE

3813.4

The Commission should delete or clarify the language in 3813.4(c) requiring that a motion to withdraw state “the specific reasons for withdrawal.” An attorney who reveals either privileged client confidences or unprivileged client secrets in the course of seeking to withdraw may violate their ethical obligations. See *In re Edward Gonzales*, 773 A.2d 1026, 1030 (D.C. 2001)

(attorney had breached duty of confidentiality by revealing, in attorney's motion to withdraw, nature of client's failure to cooperate) (interpreting Virginia Disciplinary Rule 4-101).

The Commission also should eliminate the language in 3813.4(e) allowing service on "a person suitable to receive service for the party." A motion should only be served on a party or the party's designated representative of record.

3814 MOTIONS

3814.1

The Commission should clarify the provision regarding filing an oral motion in writing by stating a party should do so if the motion is not ruled on "at the time it is made" rather than using the word "immediately".

3814.9, 3814.10

The Commission should specify a particular time frame instead of using the word "promptly".

3815 CONTINUANCES, LATE FILINGS AND AMENDMENT OF PLEADINGS

3815.1

The Commission should add language indicating a party may request a continuance of a scheduled hearing on less than five days' notice based on emergency circumstances, to allow for medical emergencies and similar situations that may arise suddenly.

3815.6

The Commission should rephrase this section to make clear that an untimely filing may be struck by the clerk *sua sponte*. The phrase "on the Commission's initiative" suggests an unknown discretionary standard, and we assume that is not what is intended.

3815.7

The Commission should amend this section to allow a party to seek leave to amend for good cause shown, even if more than five days after a filing was submitted. This would be consistent with D.C. Superior Court Rule 15. *See, e.g., Bennett v. Fun & Fitness of Silver Hill, Inc.*, 434 A.2d 476, 478-79 (D.C. 1981) (outlining factors for consideration of motions to amend under the Superior Court Rules of Civil Procedure).

3817 SUBPOENAS

General

Given that the Commission operates as an appellate body reviewing proceedings below, we do not understand the role for subpoenas and suggest deleting these sections entirely.

3819 HEARINGS

3819.2

Consistent with our comments above on sections 3802.7, 3802.8, and 3802.13, we urge the Commission to extend the five-day period for a hearing to be scheduled. A short extension to 20 days will result in minimal delays to resolution while ensuring that both parties have a meaningful opportunity to prepare their arguments, given the complexity of the factual and legal issues often raised in these cases.

We realize this time frame would put the Commission out of compliance with its statutory mandate in D.C. Code § 42-3502.16(h) to issue a decision on an appeal within 30 days of the date of filing. This statutory deadline is unrealistic, and we are happy to support the Commission in seeking a statutory amendment.

3819.10

The Commission should allow intervenors more time at oral argument in certain limited circumstances, including any situation in which the real party in interest - either the tenant or housing provider - has to intervene to participate.

3820 RECORDINGS AND TRANSCRIPTS

3820.4

The Commission should allow litigants who cannot afford to purchase transcripts to obtain them without cost, similar to the process set forth in D.C. Superior Court Rule 54-II(k).

3823 RECONSIDERATION OR MODIFICATION

3823.3

The Commission should amend this section to include other grounds for reconsideration, specifically 1) correction of a clerical or similar mistake, 2) mistake, inadvertence, surprise, or excusable neglect, 3) fraud, misrepresentation, or misconduct by an opposing party, or 4) any other reason that justifies relief. These additional reasons are found in D.C. Superior Court Rule 60 and are appropriate grounds for reconsideration for an administrative appellate body.

3825 ATTORNEY'S FEES

3825.6

The Commission should delete the reference in this provision to denying a motion for attorney's fees to a prevailing tenant based on the equities, because this language is duplicative of the broader language in section 3825.8 that the Commission may deny a fee award to either party based on the equities.

3825.7

The Commission should define the phrase "frivolous, unreasonable or without foundation" based on case law, so that the prevailing standard is clear.

3825.9

The Commission should amend this section to remove the limit on the award of attorney's fees to the time of attorneys whose appearances are entered in the case. It is common practice for

attorneys who have not entered an appearance in a litigation case to work on that matter in the background, whether it be a junior attorney performing legal research or providing other support, or a supervisor of the attorney of record.

3825.11

The Commission should amend this section to remove the request that a motion for attorney's fees contain a copy of the engagement letter. We believe this provision is unnecessary and intrudes into the attorney-client relationship and privileged materials. Neither the D.C. Superior Court nor the D.C. Court of Appeals requires such information. Instead, this section should simply require - as the current regulations do - that the attorney seeking fees provided a declaration including all necessary elements of the lodestar amount. As to fees, what the proposed regulations actually focus on are "the attorney's billing practices" and "the prevailing market rates in the relevant community," not the specific fee agreement between the attorney and the client reflected in the engagement letter in this particular case.

It is also worth noting that for any attorney providing services on a pro bono basis (including a legal services attorney), information in the engagement letter is irrelevant to the question of fees.

3825.12

The Commission should amend this section to include a thirteenth factor, currently in the regulations and also highlighted by the D.C. Court of Appeals as relevant: "the results obtained, when the moving party did not prevail on all issues." *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d 170,180 (D.C. 2015).

3829 SETTLEMENTS, STIPULATIONS AND MEDIATION

3829.8

The Commission should expand the language in the final sentence of this section to make clear that a member of the Commission's staff who acts as a mediator will not disclose any information learned during mediation and will not participate in the final decision rendered.

3830 INVOLUNTARY DISMISSAL

3830.1

The Commission should further define or clarify the phrase "for any lawful reason" to make clear that such a dismissal will not be arbitrary.

3899 DEFINITIONS

General

The Commission should amend any definition in the regulations that does not track with the statutory definition of the same term. Two examples are the definitions of *rent charged* and *rent surcharge*, both of which differ in the regulations from the statute itself. Any discrepancies in the definitions may create confusion, particularly if the definitions later are interpreted and applied differently.

In particular, we are very concerned by the Commission’s additions to the definition of “rent”, namely adding “mandatory move-in, move-out, amenity, utility, appliance, facility, service, and other fees however described, other than late fees.” We understand this change is intended to implement a provision in the Residential Lease Amendment Act of 2016 requiring mandatory fees to be approved through a services and facilities petition or voluntary agreement. Instead, we recommend that the Commission work on drafting an entirely new section in the regulations to implement this legislative provision, which we believe raises a host of questions and issues and cannot be implemented appropriately simply by changing the definition of “rent”. We are concerned that any amendment to the definition of “rent” may lead to new interpretations in other areas of the Rental Housing Act, such as eviction, and could have negative, unintended consequences and create confusion.

CHAPTER 39: RENTAL ACCOMMODATIONS DIVISION

3900 RENT ADMINISTRATOR

General

The Commission should, either in Chapter 39 or later in Chapter 43, include a specific provision allowing the Rent Administrator to review notices to quit and notices to correct or vacate for basic legal sufficiency and issuing orders or opinions rejecting those that do not. While this authority is implicit in the existing regulations, and we understand some level of review already occurs, it would be helpful to create a specific review process in the regulations. The regulations also should make clear that the absence of a determination one way or the other by the Rent Administrator through this review process does not constitute a determination that the notice is legally sufficient.

3900.9

The leading phrase should be “The Rental Accommodations Division”.

3901 FILING PETITIONS AND OTHER DOCUMENTS

3901.6

The Commission should delineate the process, if any, for requesting public inspection of the daily logs.

3901.9(a)

The Commission should elaborate on what it means for a document to not be properly filed.

3908 EXPANDING THE SCOPE OF A PROCEEDING

The Commission should clarify that any expansion of the scope of any proceeding will be governed by the existing rules of the Office of Administrative Hearings, which require notice and an opportunity to be heard.

3914 ARBITRATION

The Commission should add a provision, similar to section 3829.8 above, regarding the confidentiality of the arbitration process.

3916 EX PARTE COMMUNICATIONS

3916.1(b) & 3916.2(b)

For clarity, the Commission should add back in the prior language that ex parte communications include communications about *either* the merits *or* the factual substance of a case.

3918 APPEARANCES AND REPRESENTATION

3918.5

The Commission should limit the role of non-party, non-attorney representatives, similar to the approach taken in D.C. Superior Court, i.e. limiting to powers of attorney, executors, administrators, guardians, trustees, next friends for a minor, or other parties authorized by statute to represent the interests of another. This will both prevent the unauthorized practice of law and ensure that a non-party truly is representing the best interests of the absent party. We have seen instances in which even family household members may have adverse interests to the tenant head of household, and this conflict of interest will not always be readily apparent.

We do believe the Commission can and should depart from D.C. Superior Court practice in one respect, by allowing any power of attorney to appear on a party's behalf without the need for counsel. Authorizing a power of attorney is relatively straightforward under D.C. law and should be a minimal burden for the individual party while also ensuring the representative has been chosen via a formal and documented process to represent that party's interests.

3918.7-.9

As with sections 3812.8-.10 above, the Commission should replace the details in these sections with appropriate references to the D.C. Court of Appeals rules that generally govern the practice law in the District. These sections essentially re-state portions of those rules, which are subject to revision through their own thorough process. We note in that regard that Court of Appeals Rule 49 recently was expanded to allow practice by non-barred law school graduates whose applications for admission are pending, a situation not contemplated by the current Commission draft.

Should the Commission decide to keep the current approach, the Commission should consider amending § 3918.7(c) either to establish separate standards for the termination of a law student's representation of a party or to apply the standards found in 3918.12. Allowing termination of a law student's representation at any time, for any reason, and without any notice or opportunity to be heard deprives both the law student and the represented party of due process.

3921 OFFICIAL NOTICE

3921.3

The Commission should amend this section to provide a clearer process and timeframe for contesting the Rent Administrator’s decision to take official notice of certain facts.

3924 RECONSIDERATION OR MODIFICATION OF FINAL ORDERS

3924.3(a)

Similar to section 3823.2 above, the Commission should amend this section to include other grounds for reconsideration, specifically 1) correction of a clerical or similar mistake, 2) mistake, inadvertence, surprise, or excusable neglect, 3) fraud, misrepresentation, or misconduct by an opposing party, or 4) any other reason that justifies relief. These additional reasons are found in D.C. Superior Court Rule 60 and are appropriate grounds for reconsideration for an administrative appellate body.

The Commission also should change the phrase “good reason” in 3924.3(a) to “good cause”.

CHAPTER 41: COVERAGE AND REGISTRATION

4101 REGISTRATION REQUIREMENTS OF RENTAL UNITS AND HOUSING ACCOMMODATIONS

4101.6

The Commission should supplement the service requirements in this section to ensure actual notice. When service is by posting, the landlord also should maintain a copy in any onsite rental office and/or should mail a copy to each tenant at the property. The Commission also may want to specify the requirements for posting in a multi-building complex; we recommend requiring posting in each building.

4101.8 & 4104.2

The Commission should keep in catch-all language currently in sections 4101.9 and 4104.2 that a landlord will not enjoy any of the benefits of exemption until properly registered.

4102.3

The Commission should amend this section to include a requirement for a conspicuous posting in each building of a multi-building complex.

4104 DEFECTIVE REGISTRATION

4104.2

The Commission should amend this section to address what happens if the Rent Administrator neglects to identify the defective registration. There should be a retroactive application of this rule when the tenant identifies the defective registration and that finding is later affirmed by the Rent Administrator. The Commission also may want to specify, consistent with case law, that a

tenant may challenge a housing provider's registration at any future point when the housing provider acts on it, i.e. by taking a rent adjustment.

4105 EXCLUSIONS FROM COVERAGE BY THE ACT

4105

We have two structural suggestions for this section related to how tenants should be allowed to challenge a housing provider's claim to coverage under the non-profit charitable exclusion.

First, the Commission should add a provision to make clear that a tenant may file a petition within three years of the housing provider taking a rent increase, changing related services and facilities, reducing services or facilities, or otherwise claiming any of the benefits which accrue to the housing provider of excluded units. We are particularly concerned with ensuring that tenants facing eviction by a housing provider claiming exclusion have a clear mechanism for challenging this action. Exclusion from the Act is different from exemption because it removes the unit from all of the protections of the Rental Housing Act, including those related to eviction. We have seen a number of cases over the years in which a tenant is sued for eviction without cause, based on the housing provider claiming the non-profit, charitable exclusion – sometimes justifiably, but sometimes not. Like an exemption, an exclusion should be subject to challenge whenever acted on by the housing provider. *See Smith Property Holdings Consulate, LLC v. Brady Lutsko*, RH-TP-08-29,149, 2015 D.C. Rental Housing Comm. LEXIS 35 (RHC, Mar. 10, 2015). This ensures that tenants are not barred from challenging the exclusion when factual circumstances have changed, and the housing provider no longer is eligible.

Second, the Commission should add notice provisions similar to those contained in the sections on registration of exemptions to make clear that a) housing providers must notify tenants of a non-profit exclusion claim, and b) housing providers may not take advantage of the exclusion unless and until they satisfy these notice requirements.

4105.5

The Commission should add language addressing situations in which the affected tenant lacks the decisional capacity to participate in the plan or object to it.

4106 CLAIMS OF EXEMPTION FROM RENT STABILIZATION PROGRAM

4106.6

The Commission should re-word this section, which as currently drafted suggests that failure to file or provide accurate information could result in no penalty at all. At a minimum, such a failure should render the claim to exemption defective.

4106.8

The Commission should change the allowance in this provision for a housing provider to benefit from an exemption within 30 days of disclosing it to a tenant where proper disclosure did not

occur at the time of initial leasing. This may incentivize housing providers to not disclose a unit is exempt to prospective tenants until after they have taken possession of the rental unit. We recommend that the regulation include a provision that a housing provider may not take a rental increase within the same year as the disclosure of the exemption to a current tenant where the housing provider did not make the required initial disclosure.

4106.9

The Commission should amend this section to require the filing of a Claim of Exemption Form for government-owned properties. If the federal or District government does not have to file a Registration/Claim of Exemption form, then it will be difficult for tenants or the Commission or Rent Administrator to verify that the property is exempt and the basis.

4106.13 (b) and (c) & 4106.15(b)

The Commission should clarify these sections by adding “as defined under section 4107.”

4107 SMALL LANDLORD EXEMPTION

4107.2(b)

The Commission should add “natural” before “persons” for clarity.

4107.8

The Commission should consider adding “direct or indirect” in this section for consistency.

4107.16

The Commission should add the word “may” or “shall” to the first phrase of the first sentence.

4111 DISCLOSURES TO NEW AND CURRENT TENANTS

General

The Commission should add a section making clear what penalty the housing provider may face for failing to make the required disclosures. Among other possible penalties, we recommend making clear that a failure to make a required disclosure regarding a prior rent adjustment will toll the statute of limitations for the tenant to challenge this rent adjustment. *See, e.g., United Dominion Mgmt. Co. v. District of Columbia Rental Hous. Comm'n*, 101 A.3d 426 (D.C. 2014); *Kamerow v. D.C. Rental Hous. Comm'n*, 891 A.2d 253, 258 (D.C. 2006). Similarly, the Commission could specify that a tenant who did not receive required initial disclosures has the option of voiding his or her lease.

The Commission also should add a section for an additional requirement from the statute - that the housing provider must update the compilation of information within 30 days of any change. D.C. Code § 42-3502.22(b)(2)(B).

Finally, the Commission should add language to require the housing provider to provide notice to tenants of the availability of the compilation of information other than simply stating this on the disclosure form - which current tenants have to know to ask for - for example by requiring service/posting similar to the requirements for registration forms.

4111.2

The Commission should amend the provision in (b) to include any adjustments or surcharges that have been approved but not yet implemented. Without this clarification, these adjustments/surcharges appear to fall outside the notice provisions, which is not consistent with the Council's intent in adding these disclosure requirements.

We should note that with the Commission's proposed rule that rent adjustments expire within 12 months, new tenants signing one-year leases would not face unsurprise from a lack of disclosure. However, given that the 12-month rule is proposed but not final and that some tenants sign shorter leases, we believe the rules should cover this gap in the disclosure requirements.

CHAPTER 42: RENT STABILIZATION PROGRAM

4200 GENERAL OVERVIEW**4200.2**

The Commission should amend this section to clarify that if a housing provider previously was eligible to take a rent charged increase under a petition filed before the 2006 Act, but did not do so within 12 months, the housing provider is no longer eligible to take that increase at this point.

4200.6

The Commission should amend this section to clarify that while a vacancy adjustment is an exception to the 12-month rule, it is not an exception to the rule that each increase is limited to the amount of one adjustment. The current wording might be read incorrectly to cover both.

4200.9

The Commission may want to add a detail here that is found later in section 4212.24, namely that while a tenant cannot challenge a substantial rehabilitation petition based on substantial housing code violations, the scope of rehabilitation must remedy any such violations.

4203 RENT CHARGED UPON TERMINATION OF EXEMPTION4203

The Commission should amend this section (or a prior section, if more appropriate there) to include an additional requirement found in the statute - that the housing provider include with its amended registration statement "the documentation supporting the calculation" of the new rent amount. D.C. Code § 42-3202.05(g-1)(1).

4203.3(b)

The Rental Housing Affordability Re-establishment Amendment Act of 2018 included this formula because it was the statutory formula for calculating a vacancy increase at that time. Under the Vacancy Increase Reform Amendment Act of 2018, that formula now has changed. The Commission should amend this section to include the new formula, i.e. a 10% increase for tenancies up to 10 years, and a 20% increase for tenancies over 10 years.

4204 AUTHORIZATION AND FILING OF RENT INCREASES GENERALLY

4204.12

The Commission should clarify this section or add a new section (here or elsewhere) to make clear that a housing provider cannot charge an unlawful rent simply by including it in a signed lease agreement, i.e. the rent amount in a valid lease also is subject to challenge if unlawful under the Rent Stabilization Program.

4205 NOTICE AND IMPLEMENTATION OF ADJUSTMENTS TO RENT CHARGED

4205.4

The Commission should clarify in this section that a housing provider still must file a notice of rent adjustment with the Rent Administrator even when the unit in question is vacant. This is important to ensure that future tenants can understand the basis for the current rent charged and research whether prior increases complied with the law.

Section (a)(2) appears to be missing the word “of” between “the amount” and “the rent adjustments” in the first line.

4206 RENT ADJUSTMENTS OF GENERAL APPLICABILITY

The Commission should add a section here, or in 4204 or 4205 above, to restore the requirement currently found in section 4204.10 that a housing provider must implement a rent adjustment of general applicability within 30 days of first being eligible to take the increase. The current rule ensures regularity and predictability for tenants with regard to these annual rent increases.

4207 VACANCY RENT ADJUSTMENTS

4207.7

As noted above with respect to section 4111, the Commission should amend this section (or another section) to state explicitly, consistent with case law, that the statute of limitations for challenging a vacancy rent increase will toll if the housing provider does not make the required disclosure to a new tenant.

The Commission also should include in this section or another section the definition of “substantially identical rental unit.” For an additional few years, vacancy increases implemented prior to the recent change in the law and based on substantially identical units will continue to be subject to challenge. The language in the current version of 4207.4, which is more specific than the statutory language, should be included somewhere for this purpose.

4208 RENT ADJUSTMENTS BY HOUSING PROVIDER PETITION

General

The Commission should add a new section requiring housing providers to include with service of any petition a notice that covers the rights of tenants with protected status, the application

process, and a copy of the form. The Rent Administrator could be tasked with creating such a notice.

The Commission also should consider adding a new section to state explicitly that a housing provider that attempts to collect a rent adjustment pursuant to a housing provider petition before the rent adjustment has been approved - except for conditional rent increases in the context of a hardship petition - will be deemed to have acted in bad faith and subject to the penalties that follow under the Rental Housing Act.

A housing provider that attempts to collect or collects a rent surcharge sought in a housing provider petition without the prior approval of a petition, except for any conditional rent surcharge authorized pursuant to a pending hardship petition under § 212 of the Act (D.C. Official Code § 42-3502.12) and § 4209 of this title, shall be deemed to have acted in bad faith and shall be subject to a penalty pursuant to § 42-3509.01(a) and subject to civil fines pursuant to §42-3502.08(h)(10).

4209 PETITIONS BASED ON CLAIM OF HARDSHIP

General

The Commission should include a new section to provide a clear and simple process for tenants or their representative to review the supporting documentation underlying a hardship petition at any time after the petition has been filed and prior to the expiration of time for a tenant to file objections. This documentation - which can be quite voluminous - is filed with the Rent Administrator but is not provided to the tenants directly.

To understand possible defenses to a hardship petition, it is critical for tenants - and particularly for any attorneys seeking to represent a tenant or group of tenants - to review this information. Without it, tenants have no basis to judge, for example, whether the housing provider's claimed expenses fall within the requisite 12-month period, are properly documented, are tied to the property at issue, do not fall within an excluded category, or are ordinary rather than capital or extraordinary. Tenants simply cannot put together objections without access to the underlying documentation filed by the housing provider.

In the past, tenants and their representatives were able to gain access to these documents fairly readily. In more recent years, tenants or their representatives have been required to file Freedom of Information Act requests to gain access to these documents. This causes delays and results in unnecessary and harmful redactions. In the end, this also prolongs the hearing process at the Office of Administrative Hearings, requiring pre-hearing discovery and possible supplementation of objections. A procedure for access will improve the process for both tenants and housing providers, including assisting with early negotiation and settlement.

4209.7

The Commission should amend this section to provide that once a housing provider has filed a hardship petition using a particular accounting method, it cannot use a different accounting method for a subsequent filing without requesting and receiving approval from the Rent Administrator. The Internal Revenue Service appears to use an approval process for accounting

method changes and might provide a helpful model. This will ensure that housing providers do not change their accounting methods simply to ensure a higher hardship petition increase.

4209.13

The Commission should amend this regulation to clarify, consistent with case law, that unimplemented increases of general applicability during the past three years also must be added to the maximum possible rental income calculation.

The Commission also should clarify that “*all* rental units” includes units that are used by staff or employees for office space, occupancy, or any other purpose.

4209.15

The Commission should add language to the end of this section to clarify that extraordinary expenses may only be included where they both can and are depreciated. Some extraordinary expenses have no basis for depreciation and simply should be excluded altogether, a point reflected in Commission case law.

Except as provided by § 4209.16, the operating expenses of a housing accommodation shall be the expenses required for the operation of the housing accommodation for the Reporting Period, including, but not limited to, expenses for salaries of on-site personnel, supplies, painting, maintenance and repairs, utilities, professional fees, on-site offices, and insurance; provided, that any expense that is ~~extraordinary or~~ capital in nature shall be amortized or depreciated using the straight-line method over the useful life of the expensed asset, *and any expense that is extraordinary shall be excluded unless it can and is properly depreciated using the straight-line method over the useful life of the expensed asset.*

4209.16

The Commission should add back into this list “any court judgments,” which is included in the current section 4209.8(i).

We also suggest amending section 4209.16(g) to remove the language “as evidenced by violation notices issued by the Department of Consumer and Regulatory Affairs,” which is too limiting. To cite one example, the Office of the Attorney General may initiate litigation against a housing provider without relying on DCRA notices.

Finally, the Commission should expand the list of excluded expenses to include other inappropriate expenses. We suggest adding some additional specific examples for clarity, which are based on case law and our experiences, as well as a catch-all provision to ensure that judges can use their discretion when they encounter an inappropriate expense in a hardship petition that is not on this list.

(i) Personal, non-business expenses;

(j) Attorney's fees charged for services connected with litigation or other legal work that is not related to the ordinary, normal operation and management of a rental housing business;

(k) Any other expense that is not related to the ordinary, normal operation and management of a rental housing business.

4209.17

The Commission should amend this section to require the housing provider to establish the reasonableness of a claimed management fee with clear and convincing evidence where the fee is paid to the housing provider itself or to a management company owned by the housing provider. The allowance for a management fee to be included at all presumes an independent property manager providing professional services that may warrant an additional cost of 6 percent of maximum possible rental income, an amount that can make a noticeable difference in the hardship calculation. The current allowance for a management fee, including the 6 percent cap, also assumes that whatever rate is paid is commercially reasonable and the result of an arms-length transaction, and thus fairly reflects the actual cost of managing the property. These assumptions are questionable when a property is self-managed, and a higher evidentiary showing should be required.

If the claimed management fee was a) paid to a company that is wholly or partly owned by any individual or legal entity that owns any interest in the housing accommodation, or b) paid to an individual that owns any interest in the housing accommodation, then the housing provider must establish the reasonableness of the claimed fee by clear and convincing evidence.

4209.20

The Commission should clarify the language of this section to ensure housing providers can only include amounts for vacancy losses for specific months when a vacant unit actually was offered for rent. To this end, we suggest you add the following language.

The vacancy losses for a housing accommodation shall be the total of the rents that may be charged for each vacant rental in the housing accommodation, as lawfully calculated and properly filed with the Rental Accommodations Division, during the Reporting Period; provided, that:

(a) No amount shall be included as a vacancy loss for units occupied by a housing provider or his or her employees or otherwise not offered for rent;

(b) Claimed vacancy losses shall be excluded for any period that any individual rental unit was not offered for rent;

(c) The housing provider may be required to submit additional documentation regarding any claimed vacancy losses, including proof that each such rental unit was offered for rent during the applicable reporting period; and

(d) The total amount of the vacancy losses shall not be more than six percent (6%) of the maximum possible rental income of the housing accommodation, in accordance with § 4209.13, except for good cause shown.

4209.21

The Commission should amend this section to add back in language similar to that found currently in section 4209.15, excluding uncollected rents where the housing provider uses the accrual method of accounting. Providing a deduction for amounts that are legally due but unpaid is inconsistent with the principles of accrual accounting.

Uncollected rent shall not be allowed as an expense under the accrual method of accounting.

4209.28/4209.29

The Commission should create a new section in between these sections with the language that is currently found in section 4209.18. This current section is important in clarifying expenses that housing providers cannot rely on in hardship petitions.

The Rent Administrator or the Office of Administrative Hearings shall exclude the following expenses set forth in a Hardship Petition:

- (a) Expenses, whether accrued or paid, before or after the twelve (12) months;*
- (b) Any expense prohibited in § 4209;*
- (c) Any expense which, while charged to the subject housing accommodation, was actually incurred for another housing accommodation;*
- (d) Any expense which cannot be verified by external financial documents listed in § 4209.16; and*
- (e) Any expense for which substantial evidence supports a finding that the particular expense does not reflect actual events or experiences in the housing accommodation.*

4209.31

The Commission should amend this section to require that a copy of each hardship petition properly filed be sent to the Office of the Tenant Advocate, the Housing Provider Ombudsman, and a list of tenant organizers and legal services providers who provide free technical assistance and legal representation to tenants in rent control cases. The Commission already has this type of requirement for voluntary agreements in section 4213.4(b) and should expand this notice to all housing provider petitions.

4209.32

The Commission should add language specifying the standards that the auditor must follow, the specific findings to be included in the auditor's report, and the required qualifications for the auditor, who is an independent contractor hired by the Rent Administrator.

We base these suggestions on experience having reviewed many audit reports and hardship petitions and having found a number of errors that were not caught by the auditor and had to be litigated by tenants. It is in the interests of both housing providers and tenants to catch these issues and address them early in the process to avoid the need for protracted litigation.

The Rent Administrator's audit report shall:

(1) Contain specific findings of fact and conclusions of law regarding the calculation of the amount of the rent charged adjustment, if any, to be recommended;

(2) Include specific findings of facts and conclusions of law with respect to whether the hardship petition meets the following standards:

(A) The maximum possible rental income matches the rents charged reflected in filings with the Rent Administrator and includes all increases of general applicability for the past three years, whether or not the housing provider elected to take them;

(B) The operating expenses claimed conform to the accounting method selected by the housing provider;

(C) The operating expenses claimed by the housing provider fall within the applicable 12-month period selected by the housing provider;

(D) Extraordinary expenses are not included or are appropriately amortized;

(E) Capital expenses are appropriately amortized;

(F) Personal, non-business expenses are not included;

(G) All expenses claimed relate to the housing accommodation at issue;

(H) The management fee, property taxes, depreciation expenses, vacancy losses, uncollected rents, and interest payments are properly documented; and (I) All encumbrances on the housing accommodation are included.

(3) To the extent the Rent Administrator alters amount included in the petition, the audit report must specify exactly which amount was changed and why, such that the affected tenants can understand how the Rent Administrator arrived at its decision.

The Rent Administrator shall ensure that any auditor employed to perform audits of hardship petitions, including any outside auditor, shall be a certified public accountant, have familiarity with rental housing, and have the experience and skills necessary to evaluate all of the auditing standards set forth in this section.

4209.34

The Commission should remove the word “continuously” from this section or clarify its meaning by adding a timeframe or other details. If the housing provider fails to comply with any order, even once, the Rent Administrator should be allowed to use its discretion to determine whether that refusal to comply with the agency’s ruling warrants dismissal as a sanction.

4209.35

The Commission should amend this section to require the Rent Administrator to include the following language in a prominent location in its notice to the tenants of the audit report and the proposed order, similar to the language in section 4209.31(a) included with the initial notice of the pending hardship petition:

The tenants will have the right to contest or oppose the petition, individually or through a tenant association, and the housing provider shall have the right to support or defend the petition, before the Office of Administrative Hearings.

This is important because the auditor's report and the proposed order are likely to look official and final to a lay tenant.

4209.37

As noted in our comment to section 4209.15 above, the Commission should modify this section to exclude extraordinary expenses unless they can and are depreciated:

(d) Whether any operating expense is ~~extraordinary or capital~~ in nature and should therefore be amortized or depreciated over its useful life, *or is extraordinary and should therefore be excluded unless it can and is properly depreciated over its useful life;*

The Commission also should re-word the language in this section, which appears in other sections that follow (sections 4210.32, 4211.10, 4212.21, 4212.29), focusing on the abatement of housing code violations. This term can be confusing to a lay reader and also may be interpreted in a more limited fashion than simply asking if the violations still exist. We suggest modifying that language here and below as follows:

Whether, as provided by § 4216.4, substantial violations of the Housing Regulations existed on the date the hardship petition was filed ~~and have not been abated on~~ *or exist as of the date of a hearing on the hardship petition.*

The Commission also should add back in a factor in the prior regulations that has been omitted from the revised list, as follows:

(i) The determination that the financial data represents the experience of the housing accommodation during a base period of any twelve (12) consecutive months within the fifteen (15) months preceding the date of filing of the petition.

Finally, we urge the Commission to clarify that tenants can object to the approval of a hardship petition if the petition was filed in retaliation, as defined by D.C. Code section 42-3505.02. The Commission's regulations include this consideration for services and facilities petitions already - see section 4211.6(d) - but the same defense applies to all housing provider petitions. Specifically, the Commission should add the following language to this section:

(j) Whether the housing provider's filing of the petition or proposed actions are retaliatory as defined under D.C. Code § 42-3505.02.

4209.38

The Commission should remove the language in this section allowing for a remand to the Rent Administrator for a revised audit report. We are concerned that any remand will only lead to further delays in an already-lengthy process. The Office of Administrative Hearings often performs such work itself or could employ an outside auditor to do so.

If the Commission decides to leave the remand option in the regulations, then it should amend this section to make clear that the judge can only order such a remand after an evidentiary hearing on all contested issues is held, or that such an evidentiary hearing will be held by the

Office of Administrative Hearings following remand, i.e. that the case will be referred back for a full evidentiary hearing.

4209.41

The Commission should add language to this section allowing the judge to stay or extend the time for a conditional rent increase to go into effect under section 4209.39 for other good cause. This will ensure that tenants are not forced to pay a conditional rent increase during a longer period due to delays caused by RAD or the Office of Administrative Hearings or otherwise outside their control. Specifically, we suggest the Commission add the following language.

...provided, that the Administrative Law Judge may issue an order extending the time provided by § 4209.39 if he or she determines that the housing provider is responsible for any unreasonable delay in holding a hearing *or for other good cause shown*.

4209.44

The Commission should amend this section to add language requiring a housing provider to notify tenants of their right to an immediate refund in full of any overpaid rent but noting the tenant may opt to take all or part of the refund as a rent credit instead. This will help to prevent the possibility that housing providers may pressure tenants to receive a rent credit as opposed to a check in hand. Rent credits can create innumerable problems - if a tenant disputes prior charges on their ledger or moves out early, for example - and should be discouraged.

4210 PETITIONS BASED ON CAPITAL IMPROVEMENTS

General

The Commission should add a provision to the regulations making clear that housing providers cannot avoid the 15 percent and 20 percent caps on capital improvement surcharges by stacking multiple increases. The statutory caps are meant to ensure that capital improvement petitions and resulting rent increases are relatively limited in scope and impact, and allowing housing providers to stack multiple increases at once defeats this purpose.

4210.12(a), 4210.13

The Commission should add the phrase “commercially reasonable” to these sections to ensure that housing providers who are relying on a loan commitment present an offer that is reasonable under current market circumstances.

The Commission may want to add a parenthetical or phrase to explain the term “basis points”, which may not be accessible to a lay reader.

Finally, the Commission should consider aligning the default interest rate for capital improvement petitions and substantial rehabilitation petitions. We believe the capital improvement petition rate - the 7-year Treasury note rate plus 400 basis points - provides a better marker and should be used in substantial rehabilitation petitions as well.

4210.23

The Commission should amend this section to require that a copy of each capital improvement petition properly filed be sent to the Office of the Tenant Advocate, the Housing Provider Ombudsman, and a list of tenant organizers and legal services providers who provide free technical assistance and legal representation to tenants in rent control cases. The Commission already has this type of requirement for voluntary agreements in section 4213.4(b) and should expand this notice to all housing provider petitions.

4210.24

The Commission should clarify that tenants can object to the approval of a capital improvement petition if the petition was filed in retaliation, as defined by D.C. Code section 42-3505.02. The Commission's regulations include this consideration for services and facilities petitions already - see section 4211.6(d) - but the same defense applies to all housing provider petitions. Specifically, the Commission should add the following language to this section:

(j) Whether the housing provider's filing of the petition or proposed actions are retaliatory as defined under D.C. Code § 42-3505.02.

4210.27

The Commission should add a provision here or in a separate section making clear that a housing provider cannot seek a continuation of a capital improvement petition surcharge if the reason all costs have not been recovered has been due to selective implementation of the increase on the housing provider's part. In other words, if the housing provider has used its discretion to charge the increase to some but not all tenants, and as a result has not recovered all costs, the housing provider should not be able to seek a continuation on this basis.

4210.32

The Commission should add a deadline for the Office of Administrative Hearings to issue a decision on a Certificate of Continuation to ensure a prompt decision. Tenants should not have to keep paying a surcharge if ultimately the Certificate of Continuance will be denied, especially because it can be very difficult to recover a rent refund from a housing provider after the fact.

4211 PETITIONS FOR CHANGES IN RELATED SERVICES OR FACILITIES

General

The Commission should consider amending this section to provide that a tenant who has entered a lease for the housing provider to pay for utilities can opt out of an approved services and facilities petition proposing to shift the cost of utilities to the tenants, with the approved change only going into effect when a new tenant occupies the rental unit. Whether utilities are included with the monthly rent is a key consideration for tenants when searching for housing, including because of the potential unpredictability of these costs. Providing a rent decrease may or may not effectively compensate a tenant for shifting the cost of utilities, but in any event it does not address the resulting unpredictability in the tenant's monthly housing costs.

The Commission also should address how future costs will be estimated when a services and facilities petition involves not only changing which party pays for utilities but also the type of

system used. If the housing provider currently provides electric and switches to individual natural gas units, the calculations are more complicated and could be clarified.

4211.2

The Commission should shorten the 3-year time frame allowing a housing provider to increase services or facilities before seeking a resulting rent increase; we propose a 1-year deadline instead. Tenants of course will benefit in some sense if a housing provider elects to increase related services or facilities without immediately requesting a rent adjustment. But tenants may then be caught by surprise – particularly newer tenants, who assume the particular service or facility already is included in the rent – when the housing provider files a petition seeking a rent increase.

4211.4

The Commission should add language to subsection (c) clarifying that where a tenant alleges that a housing provider has taken affirmative steps to reduce a service or facility, the tenant does not have to allege notice by the housing provider of the reduction.

4211.7

The Commission should amend this regulation to clarify that where the costs to a housing provider and the costs to a tenant of obtaining a service or facility are different and the petition proposes a reduction in services and facilities, the higher cost should be used for calculating the resulting rent decrease. To cite one example, housing providers typically are charged a lower rate by Pepco for electrical service than an individual tenant obtaining service.

4211.9

The Commission should amend this section to require that a copy of each services and facilities petition properly filed be sent to the Office of the Tenant Advocate, the Housing Provider Ombudsman, and a list of tenant organizers and legal services providers who provide free technical assistance and legal representation to tenants in rent control cases. The Commission already has this type of requirement for voluntary agreements in section 4213.4(b) and should expand this notice to all housing provider petitions.

4212 PETITIONS BASED ON SUBSTANTIAL REHABILITATION

General

The Commission should consider adding back in the requirement for a pre-filing notice from the housing provider to tenants, currently found in section 4212.7. Given that a substantial rehabilitation petition can involve not only a rent increase but also forced relocation of tenants, it is appropriate to require a separate pre-filing notice to advise tenants of the process and their rights and to ensure that tenants are able to seek technical assistance and legal representation early in the process.

4212.6

The Commission should add the phrase “commercially reasonable” in (b) and (c) before the words “interest” and “charges”.

4212.8

Similarly, the Commission should amend this section to add commercial reasonableness of cost estimates as a consideration.

4212.9(a)

As with our comments above, the Commission should amend this section to add a requirement of commercial reasonableness.

The interest payable by the housing provider at a fixed rate of interest on a loan of money used to make the improvement or renovation on that portion of a multi-purpose loan of money used to make the improvement or renovation as documented by the housing provider by means of the relevant portion of a bona fide loan commitment or agreement with a lender, or by other evidence of interest as the Administrative Law Judge may find probative, *so long as the rate presented is a commercially reasonable rate that would be charged in an arm's length transaction for a similar contemporaneous transaction in the District of Columbia*; or

Also noted above, the Commission should consider aligning the default interest rate for capital improvement petitions and substantial rehabilitation petitions. We believe the capital improvement petition rate - the 7-year Treasury note rate plus 400 basis points - provides a better marker and should be used in substantial rehabilitation petitions as well.

4212.10

As with our comments above, the Commission should amend this section to add a requirement of commercial reasonableness.

The service charges in connection with a loan taken to make an improvement or renovation shall include points, loan origination and loan processing fees, trustee's fees, escrow set up fees, loan closing fees, charges, and costs, title insurance fees, survey fees, lender's counsel fees, borrower's counsel fees, appraisal fees, environmental inspection fees, lender's inspection fees (however any of the foregoing may be designated or described), and such other charges (other than interest) required by a lender, as supported by the relevant portion of a bona fide loan commitment or agreement with a lender, or by other evidence of service charges as the Administrative Law Judge may find probative, *so long as the rate presented is a commercially reasonable rate that would be charged in an arm's length transaction for a similar contemporaneous transaction in the District of Columbia*.

4212.12

The Commission should amend subsection (a) to include testimony by tenants as relevant.

The Commission also should amend subsection "(b)" to add "and could not have been prevented by ordinary repairs". It is critical that the housing provider not benefit from the long-term disrepair of the premises.

Finally, the Commission should consider adding two more factors to this analysis - to what extent the proposed rehabilitation exceeds the minimum necessary to ensure the health, safety, and welfare of the tenants and, if relocation is proposed, whether other alternatives to relocation exist.

4212.15(b)

Consistent with our comments above, the Commission should amend this subsection to add a requirement of commercial reasonableness.

The amortization period of the loan taken to make an improvement or renovation, as documented by the housing provider by means of the relevant portion of a bona fide loan commitment or agreement with a lender, *so long as the amortization period presented is commercially reasonable rate and would be applied in an arm's length transaction for a similar contemporaneous transaction in the District of Columbia*, or, in the absence of a loan commitment or agreement, a period of two hundred forty (240) months; divided by

Alternatively, the Commission should consider requiring amortization of a defined period of time for all petitions, even if the terms of a loan commitment are different, similar to the approach taken for capital improvement petitions. If a housing provider obtains a shorter-term loan over a period of five years, for example, a much higher rent increase may be justified under the existing formula. It is our understanding that commercial real estate loans routinely are refinanced and rolled over, meaning they typically are paid back over a much longer term than might be suggested in the initial loan documents.

A better approach would be to standardize the amortization period used in the formula and tie it to depreciation schedules used by the Internal Revenue Service. Barring that, the Commission should consider making the 240-month period the default for all substantial rehabilitation petitions.

4212.16(c)(3)

The Commission should amend this section to clarify that the cost of relocation for the housing provider should not be a consideration in terms of whether the relocation is practicable.

4212.20

The Commission should amend this section to require that a copy of each substantial rehabilitation petition properly filed be sent to the Office of the Tenant Advocate, the Housing Provider Ombudsman, and a list of tenant organizers and legal services providers who provide free technical assistance and legal representation to tenants in rent control cases. The Commission already has this type of requirement for voluntary agreements in section 4213.4(b) and should expand this notice to all housing provider petitions.

4212.23

The Commission should clarify that tenants can object to the approval of a substantial rehabilitation petition if the petition was filed in retaliation, as defined by D.C. Code section 42-3505.02. The Commission's regulations include this consideration for services and facilities

petitions already - see section 4211.6(d) - but the same defense applies to all housing provider petitions. Specifically, the Commission should add the following language to this section:

(k) Whether the housing provider's filing of the petition or proposed actions are retaliatory as defined under D.C. Code § 42-3505.02.

4212.24

The Commission should amend this section to provide that any costs associated with repairing or eliminating existing housing code violations will not be included in the costs used to calculate the rent increases to tenants. While we understand the reason to exclude a housing code violation defense in the context of a substantial rehabilitation petition, tenants should not be required to pay for work required to bring the property into compliance with the housing code.

4213 RENT ADJUSTMENT BY VOLUNTARY AGREEMENT

General

The Commission should consider adding a provision allowing the Rent Administrator when reviewing a voluntary agreement to request additional information from the proposing party, with a copy of any such request and the response to be served on the other party.

4213.1

The Commission should amend this section to exclude tenants with protected status from the 70 percent calculation, unless they have opted to waive their right to the exemption, for the same reason that tenants in exempt units generally are not included. A tenant exempt from paying an approved rent increase does not face the same potential costs and incentives with respect to a proposed voluntary agreement as other tenants at the property and should not be included in the vote. This change should be coupled with clearer guidance on the application and approval timeline for tenants seeking protected status once a voluntary agreement has been proposed.

The Commission also should amend this section to clarify that only member per household may vote.

The Commission also may want to consider allowing a short time period, e.g. 10 to 14 days, for a tenant to change his or her vote after submission of the final voluntary agreement for approval.

4213.3

The Commission should amend this section to add a requirement found in existing section 4213.11(e) that a proposed Voluntary Agreement must include a statement that the agreement is voluntary and that no form of coercion was imposed by the housing provider or any tenant in securing the signatures of tenants. This serves as notice to the tenants of this potential defense and should be added back in for proposed as well as final voluntary agreements.

The Commission also should amend subsection (b) or add a new subsection requiring a proposed voluntary agreement to include a timetable for the commencement and the completion of any work to be done to the housing accommodation.

The Commission also should amend subsection (f) to require the housing provider to identify any units occupied by an employee or agent of the housing provider or by the housing provider themselves, consistent with their exclusion from the vote under section 4213.16. Consistent with our comments on section 4213.1 above, the housing provider also should be required to identify all units occupied by tenants known to have protected status and therefore exempt from paying any increase.

Finally, the Commission should consider adding to the list of required information to be disclosed with a proposed voluntary agreement to ensure that the Rent Administrator has a full picture of the proposed agreement. Voluntary agreements often are tied to sale or redevelopment of the property. We suggest adding a requirement that the housing provider submit any documents related to the sale or redevelopment of the property to include any TOPA notices, contracts of sale, development agreements, or any other related agreements negotiated by the housing provider and the tenants. Similarly, we would add a provision requiring the housing provider to affirm that all such documents have been provided already to the tenants.

4213.4

The Commission should amend this section to include a certification that the agreement was translated into any key languages through a certified translator if the housing provider knew or should have known of tenants at the property who are limited English proficient. The Commission could use the languages covered by the Language Access Act. In our experience, it is not unusual for limited English proficient tenants such as monolingual Spanish or Amharic speakers to have signed a voluntary agreement without any interpretation or translation and no evidence these tenants understood what they were signing.

The Commission also should amend this section to require that a copy of each proposed voluntary agreement also be sent to a list of tenant organizers and legal services providers who provide free technical assistance and legal representation to tenants in rent control cases.

4213.12-.13

The Commission should add a provision, similar to section 3829.8 above, regarding the confidentiality of the conciliation process.

4213.14

The Commission should add a requirement that whenever there are material changes made to a proposed voluntary agreement prior to seeking signatures, that the party proposing the voluntary agreement provide a separate notice to the tenants summarizing these material changes before any signatures are collected.

4213.16

The Commission should make clear that - in addition to agents and employees - the housing provider themselves cannot participate in the voluntary agreement vote. For small buildings in particular, it is not unusual for the housing provider to occupy a unit. The Commission also should consider including immediate family members or other relatives within this exclusion.

4213.18

Similar to our comments above with respect to a proposed voluntary agreement, the Commission should add a provision requiring the housing provider to affirm that all related documents (e.g., TOPA notices, contracts of sale, development agreements, all other agreements between the housing provider and the tenants) were provided to the tenants prior to signing the voluntary agreement and that no material terms were changed after the housing provider began collecting signatures on the voluntary agreement.

The Commission also should amend subsection (b) or add a new subsection requiring a proposed voluntary agreement to include a timetable for the commencement and the completion of any work to be done to the housing accommodation.

4213.21

The Commission should consider amending subsection (c) to further define and explain what “inequitable treatment” means in the context of a voluntary agreement, perhaps by using illustrative examples. We have seen two circumstances that raise particular concerns, and that we believe should be considered inappropriate, inequitable treatment.

First, in some instances housing providers have treated signatories and non-signatories to a voluntary agreement differently in terms of their future rent terms. At times, these consequences are buried deep in related agreements between a tenant association and a housing provider. A tenant’s vote is hardly voluntary if voting yes provides future rent benefits and voting no does not. We also have seen at least one example where 70% of tenants expressly voted to raise rents on the remaining 30% of tenants, a voluntary agreement that was approved by the Rent Administrator and only overturned after years of litigation by the tenants.

Second, an increasingly-common practice is for housing providers to have current tenants agree to rent terms that will only apply to future tenants at the property. The Commission’s proposed regulation imposing a 12-month deadline for taking approved rent increases should curb this practice significantly. Nonetheless, it would be helpful for the Commission to clarify that this type of inequitable treatment of tenants is not consistent with the Rental Housing Act and that such voluntary agreements will not be approved.

We note that section 4313.22 also has language indicating that differential treatment of tenants/units will be a factor considered in determining whether a voluntary agreement’s terms are reasonable. As we indicate below with respect to other factors, further guidance from the Commission on how differential treatment will be viewed and weighed would be helpful. The Commission may want to add a new section to this part of the regulations that provides further guidance on inequitable or differential treatment of tenants.

4313.22

The Commission should consider adding more guidance about how reasonableness will be defined.

First, for those factors already listed, it would be helpful to provide guidance about how they will be evaluated. For example, for factors (a) and (b) on costs, the housing provider should have to prove that the proposed rent increases are no higher than necessary to recover these costs within a reasonable time period and that the estimated costs are commercially reasonable. Factor (c),

the rate of return, should be an outer limit for any proposed rent increase. If the Commission is defining the rate of return consistent with the hardship petition formula, this should be made clear, and housing providers should have to demonstrate their current rate of return with the same level of documentation required for a hardship petition.

More generally, the Commission should make clear that if a voluntary agreement is serving as an alternative to or settlement of a proposed housing provider petition, then the housing provider seeking approval should have to provide all information that would have been required to file and seek approval of that petition, and that reasonableness should be measured based on whether the proposed petition and rent increase appear to be justified under the law.

Second, we suggest adding the following factors to the list:

- 1) market rents in the area for units and buildings in similar condition;
- 2) the impact of the proposed voluntary agreement on the tenants in terms of proposed financial cost, inconvenience, and other burdens on the tenants;
- 3) whether the proposed improvements can be accomplished by means other than the proposed voluntary agreement, such as improved maintenance, repair, replacement, or a more limited capital improvement.

The first factor should be weighed as an outer limit for any rent increase. The latter two factors are relevant considerations for approval of a substantial rehabilitation petition and similarly could be helpful in this context. They should be defined similarly, including incorporating our comments above.

Finally, the Commission should require - either in this section or another section - that the Rent Administrator's final order include specific findings of facts and conclusions of law as to each of the required factors in sections 4213.21 and 4213.22.

4213.24, 4213.25

The Commission should amend these sections to remove the new procedure for the Rent Administrator to issue a provisional order approving or disapproving a voluntary agreement before tenants even have a chance to file objections. Tenants should receive notice and be allowed to submit objections *before* the Rent Administrator issues even a provisional order.

4213.26

The Commission should clarify that tenants can object to the approval of a voluntary agreement if the agreement was filed in retaliation, as defined by D.C. Code section 42-3505.02. The Commission's regulations include this consideration for services and facilities petitions already - see section 4211.6(d) - but the same defense applies to all housing provider petitions, including voluntary agreements. Specifically, the Commission should add the following language to this section:

(f) Whether the housing provider's filing of the voluntary agreement or proposed actions are retaliatory as defined under D.C. Code § 42-3505.02.

4214.4(g)

The Commission should clarify the language of this subsection as follows:

An increase in the rent charged was implemented without *notice* or with less than thirty (30) days' notice of the increase to the Tenant, or the notice was otherwise not in compliance with § 4205.4; or

4214.4

The Commission should amend subsection (d) to make clear that a tenant also can challenge a rent adjustment that is not based on any permissible rent adjustment.

The Commission also should amend subsection (g) to add the word “notice” after “without” for clarity.

Finally, as indicated in our comments throughout, the Commission also should clarify that tenants can object to any adjustment in the rent charged if the adjustment was filed in retaliation, as defined by D.C. Code section 42-3505.02. Specifically, the Commission should add the following language to this section:

(i) An increase in the rent charged was retaliatory as defined under D.C. Code § 42-3505.02.

4214.6

The Commission should amend subsection (e) to account for tenants who moved in after the filing of a petition (and thus did not receive notice at the outset) but before the petition was granted. It could do so with reference to the required disclosures:

The tenant or a tenant represented by the tenant association was entitled to and did not receive lawful service or have actual notice of the pending petition or application for the rent adjustment, as required by §§ 4208, ~~or~~ 4213, or *Section 222(b)(1) of the Act (D.C. Code § 42-3502.22(b)(1))*.

The Commission also should amend this section to add another ground that is found in the current regulations at section 4214.2(c), namely that a voluntary agreement was established in violation of section 4213. This provision is important in the context of voluntary agreements, given their very nature - that a super-majority of current tenants are aligned with the housing provider in seeking approval. If the Rent Administrator does not catch procedural or substantive irregularities that render a voluntary agreement unlawful, and that are not raised at the time given the nature of such agreements, allowing a tenant to challenge this approval in the future ensures that unlawful practices will be unearthed.

4214.9(a)

The regulations should specify, either here or elsewhere, what the remedy is when the Rent Administrator determines that the Notice to Correct or Vacate or Notice to Vacate violates the requirements of the Act or the regulations. The answer to this question is not at all clear from the statute or any case law.

The Court of Appeals has held that where the Rent Administrator deems a notice to be noncompliant, and a housing provider challenges that determination, the housing provider cannot proceed with a suit for possession until the Rent Administrator makes a final determination. *See Stroud v. Steininger*, 563 A.2d 1091, 1093 (D.C. 1989). *Stroud*, however, was decided before the Rent Administrator's adjudicatory functions were transferred to the Office of Administrative Hearings. Under the current regime, a determination that a Notice does not comply with the law would presumably be issued in the form of a show-cause order, which would then proceed to a hearing at the Office of Administrative Hearings.

In this situation, *Stroud* would suggest that a housing provider may not sue on a notice for which a show-cause order has been issued until the Office of Administrative Hearings makes a final determination on the show-cause question. This would create significant delay and inefficiency for all parties. At the very least, if this is what the Commission intends, the regulations should state as much explicitly. And if not, then the regulations should explain what the process and remedy are for a Notice to Vacate that does not comply with the law.

4214.10(d)

The Commission should clarify whether, where the tenant has actual notice that the housing provider is repudiating an obligation, the statute of limitations begins to accrue on that date or on the date the obligation was due to be completed (or reasonably should have been completed). The regulation should specify that it is either "the earlier" or "the later" of those two dates. For example:

(d) For a failure to comply with any obligation under a capital improvement petition, services or facilities petition, substantial rehabilitation petition, or voluntary agreement, *(the later of)* *(or)* *(the earlier of)*:

- (1) The stated date, if any, in an approved petition or voluntary agreement by which the obligation was due or was required to be completed by the Act or this chapter;
- (2) The date by which the obligation reasonably should have been completed, if no date is otherwise stated; or
- (3) The date on which the tenant had actual notice that the housing provider repudiated the obligation.

4214.11(a)

The Commission should amend this section to allow tenants to provide proof of tenancy by means other than a rent receipt, cancelled check, or copy of a written lease. It is not uncommon, particularly in rooming houses and similar situations, for tenants to have oral leases and pay rent in cash, and for the housing provider not to provide rent receipts. We suggest adding language as follows:

Proof of tenancy by rent receipt, cancelled check, ~~or~~ copy of lease agreement, *or other documents evidencing a landlord-tenant relationship*;

4215 PROHIBITED RENT ADJUSTMENTS FOR ELDERLY TENANTS AND TENANTS WITH A DISABILITY

4215.1-.2

The Commission should amend this section to provide that the exemption for tenants with protected status applies to any petitions or voluntary agreements *approved* after October 1, 2018, when the Elderly Tenant and Tenant with a Disability Protection Amendment Act of 2016 went into effect. The statute itself states that a rent surcharge for capital improvement, hardship, and substantial rehabilitation petitions and a rent increase for a services and facilities petition “shall not be assessed against a current or future elderly tenant or tenant with a disability with a qualifying income”, and similarly that a voluntary agreement “shall not increase the rent charged to a current or future elderly tenant or tenant with a disability with a qualifying income.” D.C. Code §§ 42-3502.24(b), (i)(1). We are not clear why the regulations distinguish amongst the petition types in terms of the effective date of the new law.

4215.8

The Commission should amend this section to make clear that the re-implementation of rent surcharges is prospective only.

4215.13

The Commission should shorten the time period for a housing provider to challenge an application for protected status from 30 days to 10 or 15 days. Because tenants have only 30 days to object to a hardship petition or voluntary agreement, it is important that tenants who have not applied for protected status before receive a timely response to any challenge to their application. In the case of services and facilities petitions and voluntary agreements, where tenants can waive their protected status, the overall process timeline is even more complicated. A shorter timeline also is imperative if the Commission agrees, as suggested above, that protected status tenants should be excluded from any voluntary agreement vote.

4215.14

The Commission should clarify the language of subsection (a) to make clear that this provision refers back to the *housing provider* having submitted its challenge within 30 days of the tenant’s initial application, and not that the Rent Administrator also must decide any such challenge within that 30-day period.

4216 REQUIREMENT TO MAINTAIN SUBSTANTIAL COMPLIANCE WITH HOUSING REGULATIONS

4216.2

This subsection should make clear that “substantial compliance” also includes housing code violations that impair a tenant’s “use and enjoyment of the premises,” which is the standard in D.C. case law for determining whether a housing provider breached the implied warranty of habitability and therefore whether to award a tenant a rent abatement - and not just conditions that endanger a tenant’s health and safety.

In addition, the list of substantial violations should include mold, which is now covered under the Air Quality Amendment Act of 2014, D.C. Code §§ 8-241.01-8-241.09, and its implementing regulations at 20 DCMR § 3200, et seq. Drawing from the language of the statute, we suggest adding “*indoor mold contamination, evidencing defective surface conditions*” to the list of violations.

Finally, the Commission should add to the list a factor similar to the language in current section 4216.2, “curtailment of utility service.” Where utilities are the responsibility of the housing provider, any significant reduction or lack of utility service is a substantial violation of the housing code.

4216.4

The Commission should amend this regulation to be consistent with section 4216.1 above by providing that a housing provider petition should not be approved if it was filed at a time when the rental units or common areas were not in substantial compliance with the Housing Regulations, even if those violations subsequently are abated.

4216.5-.6

The Commission should broaden the references to DCRA to include other District agencies, i.e. replace references to DCRA with “any District government agency” and references to DCRA officials with “any District government official.” Other District agencies, including the Department of Energy & Environment, the D.C. Housing Authority, and the Department of Housing & Community Development, conduct inspections for housing conditions.

4216.7

The Commission should clarify the notice provision in subsection (c) by adding the words “actual or constructive” before notice, the prevailing standard under D.C. caselaw.

Consistent with the Residential Lease Clarification Amendment Act of 2016, the Commission also should add as a factor in this section “whether the housing provider provided proper 48 hours’ written notice prior to accessing or attempting to access the housing accommodation”.

4217 ENFORCEMENT, REMEDIES, AND PENALTIES

4217.1

The Commission should amend this section to make clear that a housing provider may be required to both issue a rent refund for past overpayments and implement a rent rollback for future rent that comes due.

CHAPTER 43: EVICTIONS, RETALIATION, AND TENANT RIGHTS

4300 GROUNDS FOR EVICTION

4300.1

The Commission should amend this section either to include the Residential Drug-Related Evictions Act, D.C. Code § 42-3601 *et seq.*, and conversion of a rental unit to a cooperative or

condominium as grounds for eviction (currently listed in section 4300.2), or should amend the lead-in text of this section to make clear that it is limited to grounds for eviction under the Rental Housing Act itself.

The Commission also should remove subsection(b)(9); closure of a building by order of the Department of Consumer Regulatory Affairs is *not* a ground for eviction, as section 4300.16 makes clear.

4300.2

The Commission should amend subsection (a) to remove the reference to DC Code § 42-3201 *et seq.*, which could be read to suggest that evictions for nonpayment of rent do not fall under the Rental Housing Act. While the provisions of § 42-3201 *et seq.* technically remain in force, they have been implicitly overruled to the extent they conflict with the Rental Housing Act and are largely a dead letter.

4300.5

The Commission should consider amending this section to require the housing provider to include an affidavit of service showing that the notice already has been served on the tenant in compliance with DC law at the time that the notice is filed with the Rent Administrator.

4301 NOTICES TO CORRECT VIOLATION OF TENANCY OR TO VACATE

4301.2

The Commission should amend the final clause in this section to include the words “*an obligation.*”

4301.4(a), (b)

The Commission should amend these subsections to be more specific about the type of factual detail that must appear in a Notice to Correct or Vacate. It is common for a landlord to serve a notice that alleges, for example, “loud and boisterous activity,” or “excessive traffic,” without any additional facts or explanation of what these allegations mean. This lack of information, which can make it difficult for tenants to understand or defend against the case, presents both practical problems and due process concerns. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978) (in order to satisfy due process, a notice must be sufficient “to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’”).

We recommend that the Commission add specific elements to the regulation that must be included, such as the date and time of any alleged incidents, names of witnesses/participants, and a factual description of each incident.

It is similarly important that a housing provider not use vague or general statements such as “clean your apartment” or “remove unauthorized guests”. We recommend that the Commission mirror the level of factual details required in 4301.4(a) above and require that the specific actions

required include enough specificity so as to allow a tenant a meaningful opportunity to cure prior to the initiation of an eviction action.

4301.5(a)

The Commission should amend this section to make it fully consistent with statutory protections against eviction for survivors of domestic violence. D.C. Code § 42-3505.01(c-1)(1) provides as follows:

It shall be a defense to an action for possession under subsections (b) or (c) of this section that the tenant is a victim, or is the parent or guardian of a minor victim, of an intrafamily offense or actions relating to an intrafamily offense, as defined in § 16-1001(8), if the Court determines that the intrafamily offense, or actions relating to the intrafamily offense, are the basis for the notice to vacate.

The draft regulation limits this statutory protection by requiring that the criminal offense be committed or threatened by “a current or former family member, intimate partner, or resident of the unit.” These are, however, not the only categories of persons who may commit intrafamily offenses, and nothing in the Intrafamily Offenses Act limits the definition of “intrafamily offense” in this way. Likewise, this statutory defense applies to any case involving a violation of the obligation of tenancy, not solely cases in which the violation “is related to a criminal offense.”

We suggest that this section be re-worded as follows:

If the violation of the obligation of tenancy set forth pursuant to § 4301.4(a) is related to an intrafamily offense as defined in D.C. Code § 16-1001(8) (which could include violence committed or threatened by a partner, relative, roommate, or other person with whom the victim has a close relationship), the tenant may not have to vacate the unit; and

4301.7

The Commission should amend this section to specify that if there are two or more tenants in the unit, each tenant must be served his or her own notice. *See Irene v. Rubio*, 142 Daily Wash. Law Rep. 1609 (July 8, 2014) (Kravitz, J.).

4302 NOTICES TO VACATE FOR OTHER REASONS

4302.1(a)

Similar to our comments above on section 4301.4(a), the Commission should amend this subsection to make clear that the notice to vacate must include a detailed description of the factual basis for eviction.

4302.2

The Commission should amend the wording of this subsection to make it clearer:

If the Notice to Vacate is served pursuant to an approved application under § 501(f) of the Act (D.C. Official Code § 42-3505.01(f) (unsafe alterations or renovations), ~~no less~~

~~than one hundred twenty (120) days; provided, that the expiration of this time shall be no earlier than the time or the date for vacating the unit set forth in the timetable approved by the Rent Administrator, whichever is later.~~

4302.3

The Commission should amend subsection (e)(1) to make it fully consistent with statutory protections against eviction for survivors of domestic violence. D.C. Code § 42-3505.01(c-1)(1) See comments for subsection 4301.5(a) above.

The Commission also should clarify in this provision as well that a section 501(c) eviction only is timely if no appeal is pending and the time for filing an appeal has expired.

4302.5

The Commission should amend this regulation to ensure that all requirements found in DC Code 42-3505.01(f) are included here as well. The Commission either could cross-reference the statute or could list out additional details in the regulation.

4303 RETALIATION

4303.1

The Commission should remove the language “with the intent to injure a tenant” from this section. This qualification is not found in the retaliation statute or case law, and it is an unnecessarily narrow description of how a retaliatory motive can be proven. For example, a landlord may act in a retaliatory manner with the intent to dissuade or discourage a tenant from exercising his or her rights, such as the right to organize with other tenants. Instead, the regulations should refer generally to “retaliatory motive” (such as in section 4303.3 and section 4303.4, where the phrase “retaliatory intent” currently is used).

To achieve clarity and more closely parallel the language of the retaliation statute, this section should be modified as follows:

A housing provider shall not take any *retaliatory* action against a tenant, ~~as provided in § 4303.2, with the intent to injure a tenant~~ in response to the tenant’s exercise of any right conferred upon the tenant by law (~~“retaliatory intent”~~).

The Commission also should consider clarifying in the regulations other types of actions by housing providers and tenants that can form the basis for a retaliation claim. For example, a tenant making a reasonable accommodation request – a relatively common scenario – is engaging in protected activity, and clarification of this point could be helpful.

4303.2

The Commission should remove, or else define, the phrases “not otherwise permitted by law” and “unlawfully.” The phrase “not otherwise permitted by law” in the statute has created considerable confusion. *See, e.g., Wahl v. Watkis*, 491 A.2d 477, 480 (D.C. 1985). In *Wahl* and other cases, courts had concluded that the retaliation statute only applies to actions by the

landlord that are not otherwise lawful – i.e., actions that are illegal anyway, regardless of the retaliatory motive.

This interpretation of the statute is, of course, backwards: the point of a retaliation defense is to block actions, such as evictions or rent increases, that the landlord *is* otherwise permitted to take under the law. The Court of Appeals, working to clear up the confusion, has repeatedly stated as much. In *Gomez v. Independence Mgmt.*, 967 A.2d 1276, 1289-91 (D.C. 2009), the Court observed that its cases subsequent to *Wahl* “have established that the retaliation defense to eviction is not limited to situations where the landlord acts illegally. In other words, a retaliatory motive may ‘taint’ an action that would otherwise be lawful.” *Gomez* followed – by nearly two decades – another case, *De Szunyogh v. William C. Smith & Co.*, 604 A.2d 1 (D.C. 1992), which stated as follows: “To clarify for the trial court and for future litigants, we now state that if a tenant alleges acts which fall under the retaliatory eviction statute . . . the statute by definition applies, and the landlord is presumed to have taken ‘an action not otherwise permitted by law’ unless it can meet its burden under the statute.” *Id.* at 4.

Given the enduring confusion engendered by the language “not otherwise permitted by law,” we suggest simply eliminating this phrase, and this concept, from the regulation. This would require changes in subsection (a) (“not otherwise permitted by law”); (b) (“unlawfully”); and (e) (“termination of a tenancy without cause” – this is an action “not otherwise permitted by law”). Alternatively, the regulations could include a subsection defining the term “not otherwise permitted by law,” such as:

For purposes of this section, “not otherwise permitted by law” includes actions that would otherwise be lawful, but are taken with a retaliatory motive.

We also suggest deleting the word “related” from section 4303.2(b)(2) as it is not clear from the wording of the regulation what “related” refers to and that phrase does not necessarily have any meaning for units not covered by the rent stabilization program. We also recommend deleting the phrase “in meeting an obligation” from section 4303.2(b)(3). This language is not in the statute, and it is conceivable that a landlord may take retaliatory action that causes a tenant undue or unavoidable inconvenience that is unrelated to meeting any legally cognizable obligation of the tenant.

4303.3

The Commission should remove the definite article “the” before “suspected violations” in section 4303.3(b) for clarity and to more closely parallel the language of the statute.

4304 TENANT RIGHTS TO ORGANIZE

4304.5

The Commission should amend this section to align it with the statute in two respects.

First, the list of remedies in this section should include “[a]n injunctive order respecting future behavior,” “liability for damages to tenants, or a tenant organization or its members,” and “suspension or revocation of the owner or agent’s business license or registration.”

Second, the wording of the regulation should be broadened to make clear that any court of competent jurisdiction may award these remedies. Jurisdiction over violations of the Right of Tenants to Organize Act does not lie exclusively with the Office of Administrative Hearings.

To the extent the Commission wants to be clear on which remedies can be awarded by the Office of Administrative Hearings versus a court, the regulation should be explicit, so as not to be misinterpreted as limiting the available remedies that a court might order.

4305 TERMINATION OF LEASE BY VICTIM OF INTRAFAMILY OFFENSE

4305.2

The Commission should amend subsection (b) to be clear about which qualified third parties are authorized to provide documentation. D.C. Code § 42-3505.07 specifically lists a law enforcement officer, a sworn officer of the DC Housing Authority Office of Public Safety, a health professional, or a domestic violence counselor.

4305.8

The Commission should clarify in this section that a “rent refund based on the amount by which the rent demanded or received by the housing provider exceeded the amount permitted by § 4305.7” would entitle a tenant to a refund of this amount even if demanded but not paid.

4306 LATE FEES

4306.3

The Commission should clarify this section by replacing “rent charged” with the phrase used in the statute, “of the full amount of rent due by a tenant.” DC Code § 42-3505.31(a). It is important to make clear that a tenant whose rent is paid in part or in whole by a subsidy provider can only be charged a late fee based on their portion of the rent.

4306.5(c)

The Commission should amend this section or add another section to make clear that housing providers cannot avoid the prohibition on charging more than one late fee for each late payment by applying timely rent payments to old rent balances. A common practice is for a housing provider to take a timely rent payment for one month and apply to an outstanding rent balance for a prior month, and then maintain that late fees are due for both months. We recommend that the Commission specify that no late fee may be charged for any month in which a tenant timely pays the full amount of rent due by the tenant for that month, regardless of how the housing provider decides to apply the payment.

4306.8

The Commission should amend this section to clarify that the housing provider is liable for these penalties whether or not the tenant paid the unlawful late fee.

Other General Suggestions

The Commission should add provisions that would cover the statutory allowance for attorney's fees found in D.C. Code § 42-3509.02. While the regulations address attorney's fees in the context of tenant petitions and housing provider petitions, they do not speak to an award of attorney's fees for other causes of action under the Rental Housing Act, e.g. for violation of the tenant right to organize, the protection against retaliation, and the limits on late fees.

The Commission also should add regulations implementing the Eviction with Dignity Act of 2018. On this issue, we recommend that the Commission seek feedback from practitioners about gaps in the statute and procedures that remain unclear, where clarifying regulations would benefit all parties involved. For example, the statute does not address the details of which procedures apply when writs are cancelled and re-issued or stayed and reinstated. It would be helpful for tenants and housing providers to have greater clarity on this and other implementation questions.