D.C. Office of the Tenant Advocate
10/31/19 Comments on the Rental Housing Commission's Proposed Rule-making
RE: 14 D.C. Municipal Regulations Chapters 38 - 44

Chapter 38

1. **Electronic Filings and Document Access**

   We applaud the Commission's progress in the areas of electronic filing and online publication of forms, pleadings, case information, orders, and other documents. We urge the Commission to continue this progress.

   Recommendation: We have the following specific recommendations:

   a. **Sections 3800.9 & 3821.4**: We encourage the Commission to move as decisively as possible toward systematic publication of all final orders and decisions on the Commission's website, the Office of Open Government's website, and electronic databases including both Lexis and WestLaw.

   b. We recommend that the Commission provide (1) docket and daily log information in a fashion similar to D.C. Superior Court's "case online" system; and (2) a way to file pleadings and other information online (including confidential information) in a fashion similar to Superior Court's "CaseFileXpress eFiling" system.

2. **Attorney's Fees**

   Section 3825: We believe this section generally succeeds in capturing the criteria in the case-law for "lodestar" fee calculations where attorney fee-shifting is in play. The lone exception is the standard that applies to attorneys who do not charge the tenant any attorney's fees at all. Under the relevant case-law as we understand it, the matrix used by the U.S. Attorney for the District of Columbia (USADC) should apply—the "USAO Matrix" (https://www.justice.gov/usao-dc/page/file/1189846/download). We also believe that the same standard should apply to so-called "low-bono" public interest attorneys, those who charge the tenant far less than the going rate. Indeed it is our understanding that OAH has applied the matrix to fee calculations for such "low-bono" attorneys.

   Recommendation: We recommend that the Commission incorporate the "USAO Matrix" to pro bono and low bono fee-shifting cases at 3825.12(a)(2).

3. **Definitions of rent charged; rent surcharge; and Rent Stabilization**

   Section 3899 ("Rent charged"): We note that the definition for the term "rent charged" differs from the operative statutory definition as set forth in Law 22-0248, the "Rent Charged Definition Clarification Amendment Act of 2018," effective 3/13/19, and codified at D.C. Code § 42-3501.03(29A).

Section 3899 ("Rent surcharge"): We note that the definition for the term "rent surcharge" differs from the operative statutory definition as set forth in Law 21-239, the "Elderly and Tenants with Disabilities Protection Amendment Act of 2016," effective 4/7/17, and codified at D.C. Code § 42-3501.03(29C).

Regarding the definition for "rent surcharge," our concern is that it omits two key phrases that are included in the statutory definition: (1) "a charge added to the rent charged for a rental unit pursuant to a capital improvement petition, hardship petition, or a substantial rehabilitation"; and (2) "not included as part of the rent charged."

We believe that language conveys a core distinction between "rent charged" and "rent surcharge" adjustments. Namely, a rent surcharge should not be included in the amount of "rent charged" for purposes of calculating the amount of any rent increase.

While we understand that various legislative rationales are in play regarding the "surcharge" concept, our concern here is that the proposed regulatory definition may obscure this critical distinction.

Section 3899 ("Rent Stabilization Program"): This definition includes all the provisions of Title II of the Act that apply to the Rent Stabilization Program, except for -- pursuant to Law 21-239 -- section 224 ("Elderly tenants and tenants with disabilities").

Recommendation: We recommend that the Commission incorporate the operative statutory definitions for both the term "rent charged" and "rent surcharge" in the regulatory definitions of these terms. Please note the latter change relates to our recommendation below regarding section 4215.1 & 2 ("Prohibited Rent Adjustments for Elderly Tenants and Tenants with a Disability"). Additionally, we recommend that section 224 of the Act be added to the statutory provisions listed in the definition for "Rent Stabilization Program."

Chapter 39

1. Electronic filing and document access

Section 3911.3: This provision does not explicitly give persons the right to file petitions, pleadings, motions, and other documents electronically with the Rent Administrator. Rather it only implies at 3911(c) that the Rent Administrator has the discretion to permit electronic filing ("[b]y any other means that is in conformity with an order …). The right to file electronically under the regulations should apply to RAD filings as much as it does to Commission filings.

Recommendation: We strongly recommend that the Commission incorporate in 3911.3, regarding RAD filings, the explicit language in 3801.11 regarding the right to file electronically at the Commission. Furthermore, 3911.1 We recommend that the Commission consider permitting tenants, who so choose, the right to to receive via email

the Rent Administrator's service of any housing provider petition. *See, e.g.*, 1 DCMR § 2841 (OAH Rule 2841).

2. **Expansion of Scope**

Section 3908: Under this provision, the Rent Administrator may advise OAH of possible grounds to expand the scope of a proceeding to include all affected tenants in the accommodation. *See* 1 DCMR § 2929. However, there is no explicit opportunity for tenants or a tenant association to request that the Rent Administrator do so. We believe that providing such an opportunity would encourage greater use of this provision, and lead to greater administrative efficiencies and more effective enforcement of the Act.

Recommendation: We urge the Commission to consider explicitly stating that any tenant or tenant association may request the Rent Administrator to advise OAH as to any possible grounds for expanding the scope of a proceeding. Furthermore, we ask the Commission to consider permitting expansion of scope to include not just all tenants in a single accommodation, but also all accommodations within the owner's portfolio of rental properties. By way of a statutory basis for such a revision, we note that section 219 ("Judicial review") refers to "[a]ny person ***or class of persons*** aggrieved by a decision of the Commission …" (emphasis added).

3. **Temporary Representation Agreements**

Section 3918: We applaud the inclusion of 3812.4, permitting an attorney to limit the scope of his or her representation within the notice appearance itself, obviating the withdrawal requirements at 3813. We believe this will encourage more attorneys to undertake representation of tenants, thus helping to close the affordable representation gap that too many renters experience first-hand. This provision however was not included with respect to matters before the Rent Administrator.

Recommendation: We recommend that the same language in 3812.4 regarding Commission cases also be included as a paragraph within 3918 ("Appearances and Representation") regarding matters before the Rent Administrator.

4. **Arbitration**

Section 3914: Regarding the arbitration provision, we are concerned that a tenant may not fully understand the disadvantages of this alternative to a formal hearing process, and may agree to it on the basis of an "arbitration clause" in the lease. Certainly it is helpful that (1) a RAD form must be used to request the arbitration, and (2) the recommendation is not binding unless both parties sign it. Nevertheless we believe there should be further assurances that the tenant's consent is truly informed and knowing.

Section Recommendation: We recommend that the Commission consider adopting further such assurances, including: requiring production of the lease; establishing a presumption that an arbitration clause in a lease is mandatory rather than one by mutual

agreement; and requiring the Rent Administrator to conduct a "*voir dire*" to determine whether indeed there is a meaningful informed consent on the part of the tenant.

Chapter 41

1. **Biannual Renewal of the Registration/Claim of Exemption**

   Section 4109: As a general matter, the housing provider has an affirmative duty to amend the Registration/Claim of Exemption form within thirty days of any change in material information. An example is §4107.10, which requires an owner to notify RAD within thirty days of a change in the ownership of a rental unit that would invalidate the "small landlord" exemption.

   Based upon our experience and that of others, we believe that too many housing providers fail to report the loss of eligibility for an exemption, thus too many effectively units remain exempt that should be subject to rent stabilization. To help address this problem, we recommend that – at the time the license must be renewed – the Commission also require the housing provider to (a) renew the Registration/Claim of Exemption, and (b) to certify continuing eligibility for a claimed exemption. We believe that this will help ensure that all pertinent information in the Registration/Claim of Exemption Form is kept up-to-date, and, as the statute contemplates, that a unit that no longer qualifies for an exemption reverts to rent stabilization.

   Recommendation: We recommend that the Commission consider imposing an expiration date in § 4109 for any claims of exemption and require renewal with RAD at the same time as renewal of a BBL. Furthermore, for ease of reference, we recommend that the "RAD" number for any unit, whether it is rent stabilized or exempt from rent stabilization be assigned the same number as the BBL. (Currently an identical number is only used for rent stabilized units.) If the unit has an exemption, then "EX" can follow the number.

2. **Small landlord exemption**

   Section 4107.5 reflects and interprets the statutory requirement of Section 205 that, for purposes of the small landlord exemption, an "indirect interest" as well as a "direct interest" in a rental unit counts towards the maximum of number of rental units that may be "owned" in the District. We believe a clarification regarding interests in business entities is warranted.

   Recommendation: We recommend the addition of the following (italicized) language: "Notwithstanding § 4102.2, a housing provider that claims the small landlord exemption shall file a single Registration/Claim of Exemption Form that includes all rental units within the District of Columbia owned by the housing provider or in which the housing provider has an interest, directly or indirectly. *An interest in a partnership, a corporation, a limited liability company, or any other business entity that owns a rental unit constitutes an interest in that rental unit for purposes of this section.*"

3. **Exclusions from Coverage**

Section 4105.1(b) lists circumstances where a rental unit may be excluded from coverage if its primary purpose is "providing diagnostic care and treatment of disease." Our understanding is that many, if not most, entities that claim this exclusion are known as "therapeutic transitional treatment facilities."

Recommendation: We recommend that RAD Form 1 be overhauled into a "Registration/Claim of Exemption/Request for Order of Exclusion." There would be a list of potential categories for a unit to qualify as excluded – one of which should be "therapeutic transitional treatment facilities."

We also recommend that the phrase "and if that request is approved" be added at the end of section 4105.2 ("non-profit charitable application"). This would make it explicit -- as does the Act at section 205(e)(4) (D.C. Code §42-3502.05(e)(4)) -- that the "non-profit charitable organization" exclusion is subject to both an application and Rent Administrator approval.

4. **Posting and mailing of Registration/Claim of Exemption Form**

Section 4101.6 requires a Registration/Claim of Exemption Form be posted in a common area or mailed to tenants prior to, or simultaneously with, the time of filing. We believe that often-times the most effective method of tenant notification is by way of an attachment to the lease as an addendum.

Recommendation: We recommend that the Commission consider requiring this method of notice to the tenant (taking into account that it is not appropriate in the instance of an oral lease).

5. **Registration Procedures**

Section 4102.6 requires that housing providers provide certain contact information. However, more information should be required to make it easier for tenants and the D.C. Government to contact the housing provider.

Recommendation: In addition to a working US-based telephone number, we further recommend requiring the housing provider to include a valid e-mail address. Additionally, consideration should be given to language to facilitate regulatory coordination and cross-checking of owner contact information between and among relevant agencies, for example, when DCRA seeks to notify the housing provider of an emergency in his or her building.

6. **Defective Registration**

Section 4104.6 requires the housing provider to amend the Registration/Claim of Exemption Form to cure the failure to provide the housing provider's name, but not in the event of other defects.

Recommendation: We recommend that the Commission add language as follows (additional language italicized):

> "If a Registration/Claim of Exemption Form does not contain the name of the housing provider *or is considered defective pursuant to this section*, the Rent Administrator shall require that an amendment to the Registration/Claim of Exemption Form be filed within thirty (30) days that provides the identity of the housing provider."

7. **Registration and Penalties**

Section 4106.6 states that a Registration/Claim of Exemption Form *may* be rejected if the housing provider provides inaccurate information.

Recommendation: We recommend adding the following italicized language to this section, which requires rejection of a defective filing and providing for the imposition of penalties.

> "Failure to file with a Registration/Claim of Exemption Form or to later provide accurate information in accordance with the Act and this section may result in the rejection of the filing of the Registration/Claim of Exemption Form or invalidation of the claim of exemption *and/or the imposition of other penalties and sanctions under section 901 of the Act (D.C. Code § 42-3509.01)*."

8. **"Cooling Off" Period for Failure to Properly Claim and Exemption**

Section 4106.8 laudably implements D.C. Code § 42-3502.05(d), which states that the housing provider must file a proper claim of exemption and disclose it to the tenant prior to raising the rent.

It currently reads: "Prior to the execution of a lease or other rental agreement, a prospective tenant of any unit claimed to be exempt under § 205(a) of the Act (D.C. Official Code § 42-3502.05(a)) and this section shall receive from the housing provider a written notice, on a form published by the Rent Administrator in accordance with § 222(b)(1) of the Act (D.C. Official Code § 42-3502.22(b)(1)) and § 4111 of this chapter, advising the prospective tenant that rent increases for the housing accommodation are not regulated by the Rent Stabilization Program.

As provided in sections 4111.7 – 4111.9, for any rental unit that could otherwise be properly claimed as exempt but for which a tenant did not receive notice of the exempt status prior to execution of the rental agreement, the housing provider shall be deemed to have not met the registration requirements of this chapter until thirty (30) days after the tenant is provided with the required notice."

The plain language of D.C. Code § 42-3502.05(d) lends itself to being interpreted as a perpetual prohibition on raising the rent if the housing provider did not have an approved claim of exemption in place that was disclosed to the tenant prior to leasing up. A court would understandably (and reasonably) consider that an absurd result. It is thus not ultra vires for the Commission to step in and provide clarity by adding that the housing provider must not increase the rent until at least 30 days have elapsed after the tenant has been provided proper notice of the exemption. However, we question whether 30 days is an adequate "cooling off" period. Frequently, tenants are the ones that sound the alarm that the housing provider is not in compliance. In the current climate, a housing provider need only apply for an exemption number and then suddenly price out a tenant whose tenancy is month-to-month.

Recommendation: We recommend instead "… As provided in §§ 4111.7 – 4111.9, for any rental unit that could otherwise be properly claimed as exempt but for which a tenant did not receive notice of the exempt status prior to execution of the rental agreement, the housing provider shall be deemed to have not met the registration requirements of this chapter until the first day of the first calendar month that comes three-hundred and sixty-five (365) days after the tenant is provided with the required notice."

9. **Required Disclosures**

Section 4111.9 interprets the penalty provision under D.C. Code § 42-3502.22(c), which provides that "[t]he rent for any rental unit shall not be increased" for failing to provide the required disclosures. The plain language lends itself to being interpreted as a perpetual prohibition on raising the rent. A court would reasonably consider that to be an absurd result. We believe it is entirely appropriate for the Commission to provide clarity by requiring the housing provider to wait until at least 30 days have elapsed after providing disclosures before increasing the rent. However, we do question whether 30 days is adequate to serve the statutory provision's punitive purpose for the housing provider's "willful violation" or failure to timely reply to a written notice of non-compliance.

Recommendation: We recommend instead that the prohibition on any rent increase should last for a year after the housing provider's correction of the noncompliance.

Chapter 42

1. **Time Limitation on Challenging an Upon Termination of the Rent Ceiling**

Section 4200.13 & 4214.10: As the Commission is well aware, certain housing providers adopted controversial "rent concession" practices many believe effectively have performed an end-run around rent ceiling abolition. Instead of eliminating "rent ceiling" amounts that appeared as such on previous RAD filings, the term "rent charged" may have simply been substituted for the term "rent ceiling." At the same time the tenant was offered a "discounted rent" or rent concession, which in turn substituted for what should have been the "rent charged" amount (i.e., the rent the tenant was actually being

charged). By reporting to the Rent Administrator only the higher amount – which effectively became a *de facto* rent ceiling -- the housing provider was able to impose at whim virtually limitless and unregulated rent charged increases.

As the rulemaking's preamble alludes to, the *Hinman* decision and other relevant caselaw suggests that the 3-year statute of limitations should bend to a "discovery rule" – one that permits the tenant to challenge rent charged increases the illegality of which the tenant was reasonably unaware within that 3year timeframe. In other words, the Commission, as affirmed by the Court of Appeals, has ruled on multiple occasions that the statute of limitation is not a statute of repose, and may be equitably tolled under appropriate circumstances. While the relevant caselaw generally applies to unlawful rent ceiling adjustments that served as the basis for rent charged increases, nevertheless we believe the same principle may apply to recalculations of rent charged based on the initial "rent charged" amount as of August 5, 2006, and subsequent adjustments, as described above. We believe this rulemaking represents an opportunity to establish general parameters regarding equitable tolling in this regard.

Recommendation: We urge the Commission to consider establishing in this rulemaking the principle that equitable tolling can apply to tenant challenges to the rent charged upon abolition of rent ceilings, and subsequent rent charged adjustments, where the discovery rule applies to the particular circumstances of the case.

2. **Clarification re Initial Rent Charged Upon Termination of the Rent Ceiling**

Section 4201.2: Pursuant to rent ceiling abolition effective August 5, 2006, 4201.2 establishes that the rent that could have been lawfully charged on August 5, 2006, was limited to "the amount that was lawfully calculated and on file" with RAD on August 4, 2006. In fact two dollar amounts conceivably meet those criteria: the amount reported as rent actually charged on the latter date; and -- since the rent ceiling system was still in effect -- the amount reported as the "rent ceiling" for the unit on the latter date.

Recommendation: We recommend a clarifying amendment to the operative phrase so that it reads "the amount of actual rent charged that was lawfully calculated and on file…"

3. **Hardships: Factors for computing the Rent Charged before and after the rent increase**

Section 4209.6 as currently in force specifies that the Hardship Petition Form shall contain instructions for computing "[t]he rent ceiling(s) before and after the rent increase[.]" This language has been eliminated entirely from the proposed rulemaking. While the elimination of the term "rent ceiling" is of course necessary, there will likely be a continuing need to specify the "rent charged" basis upon which the rent increase must be calculated, as well as the new rent amount for each unit, should the hardship petition be approved.

Recommendation: We recommend adding a new 4209.6(e) reading: "The Rent Charged before and after the rent increase."

4. **Capital improvements: Making it Explicit that the Surcharge Must be Accounted for Separately from the Rent Charged**

Section 4210.1 classifies a capital improvement surcharge as a type of rent adjustment, which is how 210(a) of the Act reads. Nonetheless, 210(c)(3) admonishes that the capital improvement surcharge is temporary and may not be included in the computation of other rent adjustments. Unfortunately, this admonition is not sufficiently apparent on the current RAD Form 8 "Housing Provider's Notice to Tenants of Adjustment in Rent Charged" because the form fails to provide a separate space for the surcharge amount, the expiration date, and the explanation that the surcharge may not be included in the rent for the purpose of calculating a rent adjustment. Thus, wittingly or unwittingly, a housing provider could all too easily disregard these requirements, while tenant awareness is left to happenstance.

Recommendation: Section 4205.4(a)(4) should read to add the following italicized language: "The dollar amount of any other rent surcharge currently applied to the rental unit or from which the current tenant is exempt pursuant to § 224(b) or (i) of the Act (D.C. Official Code §§ 42-3502.24(b) or (i)), *all of which shall be explicitly included as a separate and distinct item from the rent charged along with an explicit disclaimer containing the surcharge's expiration date and an explanation that the surcharge may not be included in the rent for the purpose of calculating a rent adjustment;* and[.]" Additionally, Form 8 should be revised to include separate space for the surcharge amount, the expiration date, and the explanation that the surcharge may not be included in the rent for the purpose of calculating a rent adjustment.

5. **Capital improvements: Selective Implementation and Continuation of Surcharge Collection**

Section 4210.28: Currently the housing provider can continue to assess the surcharge after 96 months and continue collecting the surcharge until the entire Capital Improvement expenditure is collected. If there has been a selective implementation of the surcharge, meaning that some but not all of the tenants were assessed the surcharge, the result is that those who did receive the assessment must subsidize their fellow tenants until the complete CI expenditure is collected. This results in a grossly unfair situation, typically for longer-term tenants.

Recommendation: Section 4210.28(b), setting forth "[t]he dollar amount actually received," should be amended to also reflect any dollar amount *constructively* received due to the housing provider's selective implementation. That dollar amount should be the aggregate of the *pro rata* amounts of the surcharge for any and all units for which the housing provider chose to impose the surcharge only partially or not at all.

6. **Capital improvements: Deadline for tenant to file for exemption from the CI surcharge**

Section 4210.30 permits an elderly tenant or tenant with a disability to file for an exemption from the surcharge within 30 days of the OAH notice that the case has been opened (§ 4208.10 and 1 DCMR § 2923). This is an improvement over the 15day timeframe in the current provision (§ 4210.47(a)(l)). Our understanding, however, is that an Administrative Law Judge may order the submission of such filings at an appropriate time during the hearing.

Recommendation: We recommend that this 30 day timeframe be made subject to an OAH order that provides for a longer timeframe for tenants to submit their exemption applications.

7. **Capital improvements: Deadline for refund of an overpaid rent surcharge**

Section 4210.32: Under this provision, if a Certificate of Continuation is denied, the housing provider must pay the tenants a refund of any surcharges "demanded or received" beyond the authorized duration of the surcharges. Under section 4210.36 in the current regulations, the housing provider must do so within 60 days of the order. The proposed Section 4210.32 effectively appears to eliminate the deadline.

Recommendation: We recommend that a deadline be restored; that consideration be given to a 45 day timeframe, consistent with the requirement for the return of a security deposit under section 14 DCMR 309 .1; and that the housing provider be required to include interest with repayment.

8. **Capital improvements: Claims of exemption by tenants who become eligible after the surcharges take effect**

4210.49(c)(current regulation): Under the existing section 4210.49(c), a tenant who becomes eligible for the exemption due to changed circumstances after surcharges are imposed may still claim the exemption. Our understanding is that this right also applies to tenants who move into the building after the surcharges are imposed. It appears this right has been eliminated from the draft regulations.

Recommendation: We recommend restoration of the right of a tenant to claim the exemption upon becoming eligible after the surcharges are imposed. *:*

9. **Voluntary Agreements: Service of documents on OTA**

Section 4213.4 and 4213.27 provide for the OTA to receive a copy of the proposed VA when filed with RAD, and a copy of the RA's Provisional Order, respectively. Including the OTA in other stages of the VA process would serve any number of agency interests and general policy interests. It would allow the OTA to better fulfill its statutory mission to monitor housing provider petitions including VAs. It would trigger OTA outreach to

tenants through our rapid response program as warranted, thereby helping to ensure more regulatory compliance and a fairer process. And it would result in greater degree of tenant education about the VA process, thus giving tenants a more meaningful opportunity to participate in that process.

Recommendation: We recommend that consideration be given to providing the OTA with copies of documents pursuant to § 4213.14 (circulation of altered proposal), § 4213.20 (finalized VA), §§ 4213.6 & 4213.7 (dismissal of the VA for technical deficiencies),§ 4213.21? (denial of a VA for substantive deficiencies),§ 4213.30 (reissuance of the Provisional Order as a Final Order), and§ 4213.31 (RA's notice of transfer of contested case to OAH). In the alternative, "We recommend that consideration be given to inserting a new § 4213.5, stating that any document that the housing provider is to serve on the Rent Administrator, and any document that the Rent Administrator is to serve on either a tenants or the housing provider, should also be served on the Office of the Tenant Advocate."

10. **Voluntary Agreements: Required certifications; no coercion at time of leasing**

Section 4213.18(b): We are aware of instances in which rental applicants have been compelled, whether through a lease term or otherwise, to sign a long-pending VA as a condition of leasing. We believe this is an impermissible form of coercion, whether or not the housing provider is called out by the tenant regarding the conduct. Certainly, it is conduct that renders the term "Voluntary" meaningless.

Recommendation: We recommend adding to the "no coercion" certification requirement a further certification that in no instance was signing the VA made a condition of leasing,

11. **Voluntary Agreements: Tenant signatures & verification**

Section 4213.18(e) requires a housing provider to certify that a good faith effort was made to obtain the signature of each tenant who did not sign. We believe there may be a way to verify the housing provider's assertion.

Recommendation: We recommend that the current VA form (Form 22 page 7) be modified to include -- in addition to the "approve" and "disapprove" columns – two columns indicating possible reasons as to why tenants did not signify either their approval or disapproval of the VA. The housing provider would be required to indicate whether an attempt to contact the tenant was unsuccessful, or whether the tenant simply elected not to sign. As the Commission may recall from prior discussions, the Housing Provider Ombudsman suggested this (in joint comments on the 2016 draft rulemaking) as a way to facilitate RAD's ability to verify votes for and against the VA. Another possible approach would be a table listing all heads of household that did not vote to approve or disapprove, and a description of what attempts were made to secure a vote.

12. **Voluntary Agreements: Provisional Order and Grounds for Disapproval**

Section 4213.24 newly establishes a "Provisional Order" that the Rent Administrator must send within thirty (30) days of the filing of the final VA (with tenant signatures) to the housing provider, each tenant, the OTA, and the Housing Provider Ombudsman. In addition to alerting tenants and housing provider of the opportunity to file exceptions and objections, the Order must include a proposal as to whether the VA should be approved or denied. Thus, implicitly, exceptions and objections are to submitted to the Rent Administrator (RA) for the sole purpose of transmitting them to OAH for adjudication along with a recommendation to approve or deny the VA. Thus it appears that exceptions and objections are not intended to inform the RA's determination as to whether there any grounds for disapproval. OTA believes that the RA should take objections and exceptions into account when determining whether the VA should be approved or denied.

Recommendation: We recommend that this provision, and others as necessary, be revised so as to require the RA to consider all exceptions and objections prior to determining whether OAH should approve or deny the VA.

13. **Tenant Petitions: Challenging an exclusion or exemption**

Section 4214: The rule-making does not explicitly permit a tenant to challenge a housing provider's claim of an exemption or exclusion. Our understanding is that in practice a tenant may do so by filing a tenant petition and checking box A.

Recommendations: We recommend the following (italicized) language be added to box A: "The building where my/our Rental Unit(s) is/are located is not properly registered with the RAD *or the housing provider has improperly claimed an exclusion or exemption from rent stabilization.*"

We also recommend including a checkbox for the tenant to allege the housing provider failed to provide required disclosures under the Act, including, but not necessarily limited to, Sections 213 and 222.

14. **Prohibited Rent Adjustments for Elderly Tenants and Tenants with a Disability**

Section 4215.1 & 2: We believe these provisions could more clearly set forth the kinds of "rent charged" and "rent surcharge" adjustments to which elderly tenants and tenants with disabilities are entitled to an exemption. First as noted above, the regulatory definition at 3899 should incorporate the statutory definition's specific reference to capital improvement, hardship and substantial rehabilitation petitions. They should also be enumerated in 4215 to provide a clear indication as to each kind of adjustment that is subject to the exemption. We also believe it is unnecessary and indeed potentially confusing to deem certain "rent charged" adjustments to be "rent surcharges" for regulatory purposes.

Recommendations: We recommend that 4215.1 be amended to include reference to the three "rent surcharges" – approved capital improvement, hardship and substantial rehabilitation adjustments –subject to the exemption.

Regarding the two kinds of rent charged adjustments – related services and facilities and voluntary agreement – that are also subject to the exemption, we recommend that the leading text in 4215.2 be amended to omit the reference to being "deemed a rent surcharge." Instead the leading text at 4215.2 should simply restate the leading text in 4215.1 except with respect to dates and "the following two kinds of approved rent charged adjustments" instead of "an approved rent surcharge." We note that conforming amendments would need to be made including at 4215.3.

Chapter 43

1. **Eviction Notices for nonpayment of rent**

Section 4300.1- - .7: Under these provisions, the housing provider must provide the tenant with a thirty-day notice to cure or quit in the event of a lease violation, and they also explicitly exempts nonpayment of rent violations from this notice requirement. This may be confusing as it pertains to Public Housing or Section 8 housing, where tenants must be given a notice to correct or vacate for nonpayment of rent before an eviction case can be properly filed. *See* 14 DCMR 6404.3; *see also* HUD Multi-Family Handbook Chapter 8 Section 3: Termination of Tenancy by Owners, pg.8-15.

Recommendation: We recommend that the Commission consider including regulatory citations for Public Housing and Section 8 housing to indicate that a notice requirement does apply in certain instances to nonpayment of rent cases. Such clarification is important because Title V of the Act -- including the eviction provisions -- applies to all tenants in the District regardless of a unit's rent control status.

2. **Eviction Notices for multiple tenants**

Section 4300.1 & 4301.7: Neither of these provisions indicates whether notices to vacate generally, or notices to correct or vacate in particular, should be provided to each co-tenant on a joint lease. We note that the statute is silent on this matter.

Recommendation: We recommend that the Commission clarify this ambiguity in favor of requiring that notices to vacate be served on each tenant of a rental unit.

3. **Eviction for personal use and occupancy**

Section 4300.9 and 4300.10: This provision requires that a Notice to Vacate for personal use and occupancy must be accompanied by an affidavit setting forth a number of statutory requirements contained in sections 501(d) & (e) of the Act. It omits reference, however, to the statutory element of "good faith intention" to repossess the unit for

owner's personal use and occupancy. Note: this language was included in the May 2016 PRM.

Recommendation: We recommend the reinstatement of the statutory "good faith intention" language in this provision, including a non-exhaustive list of *prima facie* examples of bad faith.

4. **Consequences for Issuing a Defective Notice to Vacate or to Correct or Vacate**

Section 4301 and 4302 specify technical requirements for any notices to vacate, or notices to correct or vacate. However, there is no provision regarding the effective date in the event of a defect, *cf.* **4305**'s provision that a defective Registration/Claim of Exemption form may be deemed filed retroactive its original submission date so long as the defect is corrected within 30 days. Given the gravity of being displaced, there should be no similar grace period for notices.

Recommendation: We recommend adding new Sections 4301.8 and 4302.9 that read:

> "4301.8 Any defect (other than a *bona fide* scrivener's error) in a Notice to Correct or Vacate shall be deemed material and shall invalidate the notice. Submitting a corrected version shall restart the mandatory timeframes."
>
> "4302.9 Any defect (other than a *bona fide* scrivener's error) in a Notice to Vacate shall be deemed material and shall invalidate the notice. Submitting a corrected version shall restart the mandatory timeframes."

5. **501(f) Rent upon return**

Section 4302.5: This section states that if tenants are temporarily evicted based on 501(f), they have the right to return to the unit after the alterations and renovations are completed. Unlike the statute, however, it does not state that if the alterations and renovations are necessary for purposes of housing code compliance, the tenant has the right to return at the same rental rate.

Recommendation: We recommend the inclusion of language that the tenant has the right to return at the same rental rate if the alterations and renovations are necessary for purposes of housing code compliance.

6. **501(f) Emergency circumstances**

Section 4300.12 explicitly states that no 501(f) Notice to Vacate may issue unless and until the Rent Administrator has granted approval. Unfortunately, emergency circumstances, e.g., fire or flood, often make it impossible to comply with 501(f) in its entirety before the tenant is involuntarily ousted from the rental unit. Our understanding is that the position of previous Rent Administrators (*albeit* never set forth in a formal advisory opinion) is that 501(f) rights are to be applied "as is reasonable" under the circumstances, including when there is no time for the formal application & approval process or the 120 day Notice to Vacate. That position was based at least in part on the

holding of *Temple v. District of Columbia Rental Hous. Comm'n*, 536 A.2d 1024 (D.C. 1987). The OTA recently inquired with the current Rent Administrator whether this remains RAD's position.

Recommendation: We recommend that the Commission codify in the regulations the principle that 501(f) rights do apply "as is reasonable" under the circumstances, including when there is no time for the formal application & approval process or the 120 day Notice to Vacates.

7. **Retaliation**

Section 4303.1 states that "A housing provider shall not take an action against a tenant … with the intent to harm a tenant in response to the tenant's exercise of any right conferred upon the tenant by law ("retaliatory intent")." We believe that the phrase "intent to harm" may add an element of proof that the statute does not contemplate (D.C. Official Code sec. 42-3505.02(a)).

Recommendation: We recommend that the phrase be eliminated so that the provision would read a "housing provider shall not take any action against a tenant in retaliation against tenant's exercise of any right conferred upon the tenant by law."

8. **Victims of Domestic Violence**

Section 4305.8 does not specify whether or not a tenant petition is available for any unlawful demands for rent following a rightful lease termination for an intra-family offense. Similarly, the available allegations that a tenant may lodge in a tenant petition do not include violations of Section 506 where a tenant has rightfully invoked lease termination due to an intra-family offense. In addition, there does not appear to be language granting a victim of an intra-family offense, who lives in an exempt unit, the right to file a tenant petition.

Recommendations: We recommend that 4305.8 be amended to add the following sentences: "A tenant petition is available for this purpose whether or not the rental unit is subject to rent stabilization or exempt."

The tenant petition form should include an explicit checkbox alleging that the housing provider has refused to release the tenant from a lease or has demanded rent notwithstanding the tenant's rightful invocation of Section 506.

Chapter 44

1. **Relocation Assistance**

D.C. Code § 42-3507.03 (Title VII of the Act "Relocation Assistance") requires establishment of relocation amounts, followed by adjustment to the relocation amounts at least every three years, but no more than every 12 months, by rulemaking.

Recommendation: We recommend that the Commission evaluate relocation payments annually, at the same time as it calculates the increase of general applicability. For the sake of clarity, the Commission should note that the relocation payment applies whether or not the rental unit is subject to rent stabilization or exempt.

2. **Rent Administrator Coordination with DCRA**

Section 4400.3 states that the Rent Administrator shall determine if demolition is prohibited and must notify DCRA if that is the case. However, it may be possible for DCRA to issue a building permit for work on a rental accommodation that must not be legally undertaken in the absence of RAD approval. Indeed, this problem is not unique to demolitions and could arise more frequently for any renovations where a building permit is required and where the housing provider was supposed to have RAD pre-approval before ousting the tenant from the rental unit.

Recommendation: We recommend that the Commission consider any pertinent regulatory coordination issues in conjunction with all relevant officers. For example, permit applications should require the applicant to attest whether the effected space is rental housing and whether or not RAD approval has been given.