COMMENTS OF CYNTHIA M. POLS
submitted in response to
THE RENTAL HOUSING COMMISSION'S NOTICE OF PROPOSED RULEMAKING CONCERNING THE RENT STABILIZATION PROGRAM

My name is Cynthia Pols. I am a District tenant who has lived in Adams Morgan in rent-controlled buildings since 1980 and am president of my tenant association (the Briarcliff Tenants Association). As a long-time officer of my tenant association (starting in 1998 when an opportunity to purchase our building arose under the District's Tenant Opportunity to Purchase Act), I have had extensive experience with, and exposure to, the District's rent control laws. I have also been active with the Council as a tenant advocate on a wide range of rent control-related matters, focusing generally on improving and strengthening the District's laws to better protect the interests of tenants and to preserve affordable housing and working on many of the issues covered by the Rental Housing Commission's (RHC) Notice of Proposed Rulemaking (NPR).

I am submitting these comments in my capacity as a tenant and a tenant advocate. I do so with a great sense of gratitude to the RHC and its staff for taking on the thankless job of sorting through the many difficult issues associated with the District's complicated and sometimes poorly written rent control laws and the patchwork of case law and existing rules. Of necessity, my comments focus primarily on problems with the NPR so I will not be offering much commentary on the many positive features of the proposed regulations. But I do want to stress that the positive features of the proposed regulations are too numerous to list. And also to note how thankful I am for the steps the RHC is taking to bring order and clarity to a confusing and tangled set of regulations that often do not provide clear guidance to either tenants or housing providers (HP) as to what the rules actually require and have been the source of seemingly endless litigation.

I have also signed onto comprehensive comments assembled by the Legal Aid Society of the District of Columbia and other legal service providers. I heartily endorse the recommendations included in those detailed comments. I am submitting these comments to focus in particular on several areas that I see as meriting extra attention—voluntary agreements, definitions, and substantial rehabilitation petitions.

Finally, I would like to stress the overarching importance of preserving the 12-month rule, which appears throughout the regulations and establishes a use-it-or-lose-it regime for all rent increases authorized by the Rental Housing Act of 1985 (RHA) and not implemented within 12 months. *See, e.g.,* §§ 4209.9 (general rule), 4205.7, 4209.45 (hardship petitions), 4210.26 (capital improvement petitions), 4211.11 (increase in services and facilities petitions), 4212.29 (substantial rehabilitation petitions), 4213.33 (VAs). This 12-month rule is absolutely essential to ensure full implementation of the Council's decision to eliminate rent ceilings in 2006 and to fully implement a regulatory regime based on the "rent charged" (*i.e.,* the rent actually paid by the tenant to secure occupancy rights). Any weakening of this clear and simple 12-month rule that would allow HPs to bank unimplemented rent increases and to later impose them on unsuspecting tenants would return District tenants to the rent ceiling regime and all of its problems and inequities and be inconsistent with the Council's legislative actions.

COMMENTS OF CYNTHIA M. POLS ON THE RHC'S PROPOSED RENT CONTROL REGULATIONS

VOLUNTARY AGREEMENTS (§ 4213)

The proposed voluntary agreement (VA) regulations represent significant improvements over the existing VA regulations, which provide tenants with limited protections, impose very few limits on HPs, and have led to the loss of thousands of affordable rental units. However, the proposed regulations include several flaws and are in need of further work. Most notably, the proposed regulations would establish a process that will have a prejudicial effect on tenants by requiring the Rent Administrator (RA) to issue a provisional order recommending approval or denial of the VA ***before*** the RA has received any feedback from tenants. This worsens the already flawed existing process by establishing a process through which tenants will learn of their right to lodge objections to a flawed VA at the very same time as they learn that the RA intends to approve the VA. In addition to discouraging tenant objections, the process would effectively shift the burden of proof from the party initiating the VA process (invariably the HP) to the tenants and fundamentally taint the process.

I have submitted detailed comments and proposed amendments to the proposed VA regulations, which are attached to these comments and spell out in detail the problems with the proposed VA regulations.

DEFINITIONS (§ 3899.2)

At least four of the definitions included in the proposed regulations deviate from the District code in significant ways and create conflicts and inconsistencies between the District's statutes and its rules. To the extent possible, the regulations' definitions should track the definitions contained in the RHA.

Rent Charged:

The Council enacted legislation following the RHC's decision in the *Fineman v. Smith Prop. Holdings Van Ness, LP*, RH-TP-16-30,842 (RHC Jan. 18, 2018) (Fineman) case, which codified and ratified the *Fineman* holding. That law—the Rent Charged Definition Clarification Amendment Act of 2018—was enacted on January 16, 2019, and took effect on March 13, 2019 (D.C. Law 22-248; 66 DCR 973). The District code now simply and clearly defines rent charged as the amount of monthly rent charged to a tenant by a housing provider for a rental unit, making the tenant's actual monthly payments to the HP the rent charged for purposes of the RHA and the basis for regulation and future rent adjustments. Yet the definition proposed in the regulations does not clearly and unambiguously track either the *Fineman* decision or the new statute.

The definition of rent charged in the proposed regulations (§ 3899.2) departs from the *Fineman* holding and the Council's ratification of that holding by defining rent charged as the "monthly rent a tenant is actually demanded to pay ***or*** does actually pay to a housing provider" (emphasis supplied). The practice challenged in the *Fineman* case and rejected by the Council was the practice of HPs demanding, upon the expiration of a lease, the payment of an amount of rent greatly in excess of the rent actually paid by the tenant at the time of the demand. These demands were typically based on the HP's claim of a right to bank or preserve prior unimplemented rent increases

(*e.g.,* the portion of a prior allowable vacancy or VA increase that the HP was not able to implement at the time the increase was authorized because it would have established an above-market rate rent for the unit) and to implement them at a time of its choosing.

The rent charged under both the *Fineman* case and the Council legislation is defined as the amount of rent the tenant is actually paying the HP. It is not some other higher amount that the HP has attempted to keep on the books by including authorized but unimplemented rent increases in filings submitted to the RA as the "rent charged" that the HP later claims it may use to increase the tenant's rent. These rent increases "demanded" by HPs in these cases have typically been well in excess of the increase permitted by the standard annual increase of general applicability and have served to strip tenants of their statutory tenancy by forcing them to negotiate new leases every year to avoid the excessive rent increases demanded by the HP based on a claim of entitlement to banked unimplemented rent increases.

I suggest modifications to the proposed regulations to fully incorporate the statutory definition of "rent charged" in place of the definition included in the proposed regulations, which describes the rent charged in the alternative, thereby implying that the term rent charged encompasses a range of possible amounts rather than the amount the tenant is actually paying.

Recommendation:

> **Rent charged** – the monthly rent charged to a tenant ~~is actually demanded to pay or does actually pay to~~ by a housing provider for a rental unit. As used in ~~chapter~~ title 42, any restriction on adjustments to the rent charged for a rental unit, including timing, tenant notice, and administrative filing requirements, shall, unless otherwise stated, include the implementation of rent surcharges, but any calculation of the amount of the lawful amount of any adjustment to the rent charged shall not include any rent surcharges applicable to the rental unit.

A related problem is that the proposed regulations do not employ the term rent charged on a consistent basis in the regulations, likely leading to confusion and conflict as the new rules are implemented. The regulations often separate the word "rent" from the word "charged" (*see, e.g.,* "the rent to be charged," "the rent that is initially charged"). Given that "rent" is also a defined term, it is important that the term "rent charged" be used in a consistent way so that HPs do not attempt to once again argue that rent charged means something other than the common-sense meaning of that term as some HPs did in the wake of the enactment of the Rent Control Reform Amendment Act of 2006 (D.C. Law 16-145; 53 DCR 4889). Those 2006 amendments expressly abolished rent ceilings but nonetheless were misconstrued by some HPs in the ensuing years as not actually having done so through a distortion of the literal meaning of the simple words "rent charged" and an attempt to re-institute rent ceilings in a slightly different form.

I suggest that the draft regulations be revised throughout to use the term "rent charged" wherever the regulations refer to the tenant's monthly obligation to actually pay rent and to eliminate all instances in which the word "rent" and the word "charged" are separated from each other by

intervening words when the intent is to use the term "rent charged." The VA section of the regulations, for example, included the following four variations on the term "rent charged":

- "rents to be charged" (§ 4213.1(a)).
- "current rent that may be charged" (§ 4213.3(a)).
- "proposed rent to be charged" (§ 4213.3(a)).
- "proposed rents to be charged" (§ 4213.11).

Similar variations appear thought the regulations and should be corrected to the extent possible in order to reduce future disputes between HPs and tenants regarding when the regulations mean "rent charged" and when they mean something else.

Rent:

The proposed regulations expand the definition of the term "rent" to include items that have not been expressly deemed to be a part of rent by Council legislation. These extra items include items like amenity and appliance fees and other workarounds that HPs have devised to circumvent rent limits by labeling them as fees. Rent is also defined to include "move in" and "move out" fees even though these extra fees have not been sanctioned by District law and represent creative ways for HPs to augment their revenue flows. I have seen amenity fees as high as $630 for a washer/dryer unit although the fee was not sanctioned by any regulatory authority, petition, or VA.

In 2017, the Council enacted the Residential Lease Clarification Amendment Act of 2016 (D.C. Law 21-210; 63 DCR 15302), which was intended to limit and bring clarity to the world of mandatory fees imposed by HPs. That law states that "[a] housing provider shall not impose on a tenant a mandatory fee for any service or facility that has not been approved pursuant to section 211 [petitions to increase services and facilities] or section 215 [VAs]" (D.C. Code § 42-3502.11a(a)). On the face of it, this law appears to outlaw most of the fees listed in RHC's proposed definition of "rent" as mandatory fees like those listed in the proposed regulations are rarely approved by orders governing increases in services and facilities or included in VAs.

In view of the conflict between § 211a(a) of the RHA and the proposed definition of rent, I strongly urge the RHC to remove these fees from the definition of rent and, if it concludes that expansion of the definition of rent is warranted to fill in the gaps in the existing system of rent regulations, it should implement the severe restrictions on mandatory fees established by the Residential Lease Clarification Amendment Act through rules that clearly define which mandatory fees are prohibited and which are permitted.

Recommendation:

> **Rent** – the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities~~, including mandatory move-in, move-out, amenity, utility, appliance, facility, service, and other fees however described, other than late fees~~.

COMMENTS OF CYNTHIA M. POLS ON THE RHC'S PROPOSED RENT CONTROL REGULATIONS

Rent Stabilization Program:

The District code defines the rent stabilization program as follows: "Rent Stabilization Program means the program and related requirements established by subchapter II of this chapter" (D.C. Code 42-3501.0s (29B)). Subchapter II, in turn, encompasses §§ 42-3502.01 – 42-3502.24. The proposed regulations include a definition of the Rent Stabilization Program that omits vital provisions, most notably the protections established for elderly tenants and tenants with disabilities established by law in 2018 (D.C. Code § 42-2502.24).

Recommendation:

> **Rent Stabilization Program** – the provisions of §§ 205(f) through 219, except § 217, and §§ 222, 222a, and 224, of the Act (D.C. Official Code §§ 42-3502.05(f) - 42-3502.19, except 42-3502.17, and §§ 42-3502.22, .22a, and .24) and all other provisions of Chapter 4235 of this title, which regulate rents and related services and facilities in rental units that it covers.

Rent Adjustment:

The RHA uses the term rent adjustment but does not establish a definition for that term. The RHC's proposed definition is generally on the mark but omits rent surcharges from the definition as rent surcharges are a type of rent adjustment but are not part of the "rent charged."

Recommendation:

> **Rent adjustment** – the legal basis under the Rent Stabilization Program for, or the specific authorization to, increase or decrease the rent charged or impose a rent surcharge for a rental unit covered by the Rent Stabilization Program.

Rent Surcharge:

The RHA defines a rent surcharge as "a charge added to the rent charged for a rental unit pursuant to a capital improvement petition, hardship petition, or a substantial rehabilitation, and not included as part of the rent charged" (§ 42-3501.03(29C)). The proposed regulations include a definition that deviates from the statutory definition in small ways but ways that nonetheless could create confusion in the future as to what is covered by the term "rent surcharge."

Recommendation:

> **Rent surcharge** – an amount of a charge added to the rent charged that, with prior administrative approval pursuant to a capital improvement, hardship, or substantial rehabilitation petition, may be charged for a rental unit on a monthly basis ~~notwithstanding~~ but is not included as part of the ~~lawfully calculated amount of~~ rent ~~otherwise~~ charged for the rental unit ~~in accordance with~~ under the Rent Stabilization Program.

COMMENTS OF CYNTHIA M. POLS ON THE RHC'S PROPOSED RENT CONTROL REGULATIONS

SUBSTANTIAL REHABILITATION PETITIONS

I would like to highlight several modifications to the substantial rehabilitation petition regulations that are needed to ensure proper treatment of tenants and to prevent excessive or inequitable rent increases.

First, the proposed regulations for capital improvement petitions (§ 4210) and substantial rehabilitation petitions (§ 4212) each include default interest rate standards. These provisions kick in when there is no loan document or other probative evidence of the HP's interest rate obligations and define the interest costs that can be passed along to tenants as part of the petition process in those instances. In the case of capital improvement petitions, this default interest rate is defined as the interest rate on 7-year Treasury notes plus 4% (§ 4210.12(b)); in the case of substantial rehabilitation petitions, the default interest rate is based on a different (and generally somewhat higher indicator)—the prime rate plus 2% (§ 4212.9(b))).

I would suggest employing the same default interest rate standard for both capital improvement and substantial rehabilitation loans and that the default interest rate standard for both petitions should be the 7-year Treasury notes plus 4% that is currently applicable to capital improvement petitions. A single standard for both petitions would also guard against HPs opting to file a substantial rehabilitation petition in order to take advantage of the opportunity to pass higher interest costs along to tenants.

Recommendation:

§ 4212.9 The interest on a loan taken to make an improvement or renovation shall mean all compensation paid by the housing provider to a lender for the use, forbearance, or detention of money used to make the improvement or renovation, in the amount of either:

(a) 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; or

(b) In the absence of any loan commitment, agreement, or other evidence of interest, the amount of interest shall be calculated at the following rate:

(1) The ~~average monthly bank prime loan~~ rate ~~established~~ for seven (7) year United States Treasury constant maturities as published by the Federal Reserve Board in Publication H-15 (519)~~, Selected Interest Rates, for the week in which~~ during

the thirty (30) days immediately preceding the filing of the substantial rehabilitation petition ~~is filed~~; plus

(2) ~~Two~~ Four percentage (~~2%~~4%) points or ~~two~~ four hundred (~~200~~400) basis points.

Second, the substantial rehabilitation regulations do not expressly permit tenants to testify as to existing physical conditions in their units and the building. Tenants should be front and center in any administrative proceeding involving a determination of whether a proposed substantial rehabilitation is in the interest of the building's tenants (D.C. Code § 42-2502.14(a)). I strongly urge modification of § 4212.12(a) to expressly grant tenants the right to testify regarding the existing physical condition of the affected rental units or the building in a substantial rehabilitation proceeding. In many cases, tenants are better positioned than "expert" witnesses to testify as to the actual condition of their units and their building. It is essential that they be granted full rights to provide testimony and that their testimony be given great weight in any evidentiary hearing as they are fully qualified to describe and explain building conditions.

Recommendation:

§ 4212.12(a) Whether a proposed substantial rehabilitation, or any specific aspect or component of the improvement or renovation, is in the interest of the tenants shall be determined by balancing the following factors:

(a) The existing physical condition of the rental units or housing accommodation, as shown by reports or testimony of D.C. housing inspectors, tenants, licensed engineers, architects and contractors, or other qualified experts;

Finally (and perhaps most important), the regulations governing establishing the rent surcharge for a substantial rehabilitation (§ 4212.15) should be revised to accurately calculate costs and equitably allocate those costs to individual tenants:

- The denominator in making baseline calculations of the total monthly costs of the improvement should be the useful life of the improvement and not the amortization period of the loan. The amortization period of a construction loan could be artificially short if a short-term loan is used to finance the improvements or if the HP or the owners of the HP finance the improvement and, if so, would greatly inflate the rent surcharge to be imposed on tenants. A 10-year loan, for example, would result in a denominator of 120 for calculating monthly costs while the denominator for a 20-year loan would be 240 and would produce a rent surcharge that is about 50% of the surcharge for improvements financed by a 10-year loan. The numbers become significantly worse from the tenant's perspective with shorter loans (a denominator of 60 for a 5-year loan would result in a monthly surcharge of about four times the size of the surcharge for an improvement financed by a 20-year loan and so on). *The Internal Revenue Service generally assigns useful lives of 20 years (240*

months) to major building improvements, making the appropriate denominator for monthly cost calculations 240 in most cases.

- The proposed regulations assign the costs of a substantial rehabilitation to tenants based on a single, average per-unit cost regardless of unit size. This per-unit formulation is required by the District code for capital improvements (§§ 42-3502.10(c)(1), (2)) but is not required for substantial rehabilitations. Because unit size within buildings can vary from small efficiencies to large two- and three-bedroom units, responsibility for the costs of improvements should be allocated among the tenants in accordance with each unit's size so that the surcharge is based on each unit's proportional share of the costs. *I suggest the use of a square foot-based formulation that calculates rent surcharges based on the unit's size in relation to the total size of the building's affected units* (*e.g.,* a 500-square foot unit in a building with 25,000 square feet of apartment rental space would pay a rent surcharge equal to 2% of the total monthly costs of the improvement).

Recommendation:

§ 4212.15 The generally permissible amount of a rent adjustment to a rental unit pursuant to a substantial rehabilitation petition shall be ~~the quotient of~~:

(a) The total cost of the improvements or renovations, as provided in § 4212.6, that are in the interest of the tenants; divided by

(b) The ~~amortization period of the loan taken to make an~~ useful life of the improvement or renovation in months, as documented by the housing provider ~~by means of the relevant portion of a bona fide loan commitment or agreement with a lender~~, or, in the absence of ~~a loan commitment or agreement~~such documentation, a period of two hundred forty (240) months; divided by

(c) The ~~number of~~ total square footage of all affected rental units in the housing accommodation to establish the per-square foot surcharge for each rental unit; multiplied by

(d) The total square footage of each affected rental unit to establish the monthly rent surcharge for each affected rental unit.

OVERVIEW OF AMENDMENTS PROPOSED BY CYNTHIA M. POLS TO THE RHC'S PROPOSED VOLUNTARY AGREEMENT REGULATIONS

This document is intended to provide an overview of the strengths of the proposed regulations governing voluntary agreements (VA) and the areas where improvements or clarifications are needed. While I have identified a number of areas for improvement, I wish to express my gratitude for the excellent work done by the Rental Housing Commission (RHC) and its staff in addressing the many thorny issues created by the existing regulations for District tenants and establishing sensible rules for regulation of VAS on a going-forward basis.

I have spelled out detailed recommendations for possible amendments to the draft VA regulations in the attached document. With the "author" button under "markup options" unclicked, the attachment is an unannotated version of my proposed VA amendments; with the "author" button clicked under markup option, the attachment becomes an annotated version of the same document that includes comments explaining the rationale for the proposed changes and providing background information.

BENEFITS AND STRENGTHS OF THE PROPOSED VOLUNTARY AGREEMENT REGULATIONS

The draft regulations improve the existing VA rules by requiring affirmative approval of all VAs:

- The draft regulations require affirmative approval of the VA by the rent administrator (RA) or the Office of Administrative Hearings (OAH) before a VA may take effect (new rules: §§ 4213.1, .30).
- This requirement would replace the problematic default approval provisions of the existing regulations, which provide for automatic approval if the RA fails to act on a VA within 45 days of its submission [provisions of existing rules (§§ 4213.13-.14) providing for default approval of VAs after 45 days (but not required by the District Code would be removed from the regulations].
- This change in the rules will ensure that the lawfulness of all VAs is properly assessed by the District government and that tenants are not subject to unlawful rent increases and other changes in living conditions.

The draft regulations establish timetables for all aspects of the VA process, bringing order, structure, and certainty to the VA process. These procedural requirements represent important process improvements but additional work is needed to ensure that each step in the VA process is properly sequenced, defined, and laid out and that VA decisions are not made prematurely:

- To initiate the VA process, the housing provider (HP) must submit a proposed VA to both the RA *and* the tenants (the draft rules also acknowledge that technically a tenant or tenant association (TA) may initiate the VA process although virtually all VAs are initiated by the HP) (new rules: §§ 4213.2, .4) [this requirement replaces an existing rule (§ 4213.3), which allows the HP to initiate the VA process by submitting a proposal to the tenants without submitting it to the RA].

- The RA must make a preliminary determination within 5 days of the VA's submission that the VA application satisfies baseline requirements and has been served on the tenants (new rule: § 4213.5).
- The draft regulations establish a 30-day period following service of the VA on tenants and the RA for the tenants and the HP to negotiate VA terms (new rule: § 4213.9) [this rule replaces, and improves upon, existing rules (§§ 4213.4-.5), which require at least 14 days for negotiations but establish no outside time limits on the negotiation period].
- The RA has the discretion to extend this "negotiation period" for as long as it wishes (new rule: § 4213.9). *This provision should be modified so that the RA may extend the negotiation period only with the consent of both the HP and either the TA or a majority of the tenants if there is no TA.*
- VA signatures may only be collected within the 60-day period after the negotiation period ends but the party seeking the VA may ask for one 30-day extension of this 60-day period, which the RA may grant for "good cause" (new rule: § 4213.15). This change represents a major improvement over the existing rules (§ 4313.10), which do not establish deadlines for either the commencement of signature collection or completion of that process, by establishing certainty and structure for tenants, who tend to feel pressured and intimidated by the VA process and will benefit greatly from the establishment of a known end point for the VA process.
- The draft regulations require the RA to issue a "provisional order" approving or disapproving the VA within 30 days of the VA's submission to the RA (new rule: § 4213.24). *This provision should be rewritten (see below in* ***ADDITONAL IMPROVEMENTS AND CLARIFICATIONS*** *for details) to eliminate the provisional order and to focus this phase of the process on obtaining feedback from the tenants.*
- The draft regulations grant tenants the right to submit objections within the 30-day period following the issuance of the provisional order (new rules: §§ 4213.25-.26) [this requirement replaces an existing rule (§ 4213.13), which states that tenants should be provided with a "reasonable opportunity" to submit comments but says nothing about when that comment period should begin and end and whether tenants should be notified of this right]. But for the tying of this notice requirement to the "provisional order" (instead of a more preliminary finding as I have recommended in the preceding paragraph), this provision represents a major improvement over the status quo in which tenants are not notified of their rights to submit objections and no time frame is established for submitting comments to the RA.
- The draft regulations require the RA to issue a final order approving the VA within 5 business days of the end of the 30-day tenant comment period if no tenant files an objection (new rule: § 4213.27). *This provision should be modified to remove the requirement for automatic approval if no tenant submits objections to ensure that unlawful VAs are disapproved even if no tenant objects; further, the deadline for a final RA determination on a VA should be 15 days as it is for transfer orders so the RA has the amount of time required to prepare a ruling.*

- The draft regulations require the RA to transfer the case record to OAH for a hearing within 15 days of the end of the 30-day tenant comment period if one or more tenants file an objection (new rule: § 4213.28) [this requirement replaces an existing rule (§ 4213.18), which establishes no deadlines for the transfer of cases to OAH and permits a hearing only if the RA finds "substantial evidence that credible grounds for disapproval are present"]. *This provision should be modified to require transfer of the case to OAH for a hearing in any case in which tenant objections are lodged or the RA finds the VA not to be in full compliance with the VA regulations.*

The draft regulations prohibit the "escrowing" of VA signatures by either the HP or the TA (new rules: §§ 4213.14, .15):

- The draft regulations prohibit the collection of tenant signatures for the VA before the conclusion of the negotiation period.
- This provision is essential to end the practice of HPs and TAs applying pressure to tenants to provide their signatures before the VA negotiations have concluded or the VA finalized and disclosed to the tenants. As is proposed in the draft regulations, VA signatures should be deemed valid only if provided after the tenant has been provided with all the documents that make up the VA and can provide informed consent to the VA.

The draft regulations require the RA to reject a VA that does not comply with the procedural requirements of the VA rules (new rule: § 4213.19):

- This requirement expands the grounds for disapproving VAs provided by the existing rules (§ 4213.19), which specify only three grounds for denial of a VA and do not specify procedural violations as a reason to disapprove a VA.
- This rule for enforcing procedural protections is essential to ensure that HPs are complying in full with the regulations' procedural requirements, which provide basic protections for all tenants and ensure that all tenants have equal and timely access to information about the VA process and the contents and impact of the VA.

The draft regulations require the disapproval of a VA authorizing "unreasonable" rent increases (new rule: § 4213.21(c)) [this rule also retains an important feature of the existing regulations, which prohibit the "inequitable treatment" of tenants (included in new rule § 4213.21(c) but also part of an existing rule (§ 4213.19(c))]:

- But the rules defining "unreasonable" rent increases are ambiguous and do not provide adequate protections for tenants (new rule: § 4213.22). *See below in* ***ADDITONAL IMPROVEMENTS AND CLARIFICATIONS*** *for details on the modifications which should be made to the rules defining "unreasonable" rent increases.*
- The rules make clear that VAs may establish lower rent increases for legacy tenants if they are senior citizens (62+) or disabled without running afoul of the prohibition

against "inequitable treatment" of tenants (new rule: § 4213.23). This is an important provision, which may enable low-income senior citizens or disabled tenants to waive their rights to be exempt from the VA and participate in the VA process.

The draft regulations authorize tenant petitions to enforce a VA (new rule: § 4213.36) [the existing regulations are silent on the enforcement question].

- This vital enforcement provision is essential to ensure that tenants have unambiguous rights to use the tenant petition process to enforce VAs.

The draft regulations require that VA-authorized rent increases be forfeited unless implemented within 12 months of final approval of the VA (new rule: 4213.22)

- This forfeiture requirement is a cross-cutting requirement that applies to all rent adjustments and is included in proposed rule § 4204.9(d).
- It, along with similar forfeiture requirements applicable to other petition-based rent increases and other rent adjustments, is essential to bring order to the administration of the rent stabilization system and ensure that HPs do not attempt to reinstitute rent ceilings and rent concession regimes under the guise of reserving VA-based rent increases and implementing them at a later date on unsuspecting tenants.

ADDITIONAL IMPROVEMENTS AND CLARIFICATIONS

The draft regulations allow the RA to provisionally approve a VA before the RA has received any feedback from the affected tenants. They do so by requiring the RA to issue a "provisional order" approving or disapproving the VA within 30 days of the VA's submission to the RA (new rule: § 4213.24). While deadlines provide important protections for tenants, the RA should not prejudge the VA by provisionally approving it before the tenants have even had the opportunity to provide feedback. During the early stages of the VA review process, the RA should do no more than provide a preliminary indication that the VA is in apparent compliance with the rules' procedural requirements and should not reach the merits of the VA before the tenants have had the chance to weigh in. This initial phase of the VA review process should primarily pertain to notifying tenants of their rights to challenge the VA and participate in the review process:

- The draft regulations permit the RA to issue a "provisional order" approving a VA before the tenants have had the opportunity to submit comments or objections (new rule: § 4213.24).
- The rules should not authorize the RA to issue an "order" that indicates likely approval of a VA before the affected tenants have had the opportunity to submit objections.
- This initial finding by the RA should be limited to whether the HP has complied with the procedural requirements of the regulations, with any ruling on the merits

of the VA deferred until the affected tenants have had the opportunity to provide comments and submit objections.

The draft regulations *s*hould be modified to remove the requirement for automatic approval if no tenant submits objections to ensure that unlawful VAs are disapproved even if no tenant objects; further, the deadline for a final RA determination on all VAs should be 15 days after the end of the tenant comment period (as the RHC proposes for transfer orders) so the RA has the time required to prepare a ruling [the draft regulations require the RA to issue a final order approving the VA within 5 business days of the end of the 30-day tenant comment period if no tenant files an objection (new rule: § 4213.27)]:

- The RA should not be constrained by the fact that no tenant submits objections and should be required to disapprove an unlawful VA even if there are no tenant objections. Such a check is necessary in cases where HPs empty buildings by, for example, paying tenants to move out.
- The deadline in cases where there is no tenant objection should be 15 days (as it is for transfer orders) so that the RA has sufficient time to prepare an approval or denial order.

The draft regulations should be modified to provide clear protections for qualified senior citizens and tenants with disabilities, who have the right under § 224(i) of the Rental Housing Act not to be subject to VA-based rent increases and the right to waive those right under § 224(c):

- The regulations should be modified so that VA negotiations cannot begin until all tenants have been notified of these rights and provided with the form for qualifying, and the RA has completed review of all applications for the exemption and notified the TA, the affected tenants, and the HP of the tenants who have qualified for the exemption.
- Tenants who qualify for the exemption (and do not waive those rights) should not be included in either the numerator or the denominator in determining whether the 70% threshold has been reached.

The draft regulations establish ambiguous standards for assessing whether proposed VA-based rent increases are "unreasonable" and do not provide sufficient clarity and certainty as to the rules for identifying unreasonable rent increases or protect against excessive rent increases (new rules: § 4213.21(c), 22) [the existing regulations do not include any rules governing whether a proposed VA-based rent increase is "unreasonable," allowing for rent increases which are not cost justified and which, in many cases, increase rents to above market rate]. The draft rules represent a major improvement over the status quo but should be modified to provide stronger and clearer protections for tenants:

- There should be a demonstrable causal relationship between the costs of VA-based repair work or renovations and the amount of the proposed rent increases.

- The RA should determine whether the repairs and renovations are reasonable in nature and costs and are necessary to ensure building habitability and functionality.
- The RA should assess the HP's past performance in repairing and maintaining the building or establishing reserve accounts in determining whether to approve the VA.
- The rate of return under the VA should be limited to a reasonable rate of return and the reasonableness of future rates of return should be assessed, based on a 20-year *pro forma* or similar documentation, at various intervals following implementation of the VA.

The draft regulations provide the RA with open-ended authority to extend the VA negotiation period (new rule: § 4213.9):

- The negotiation period should be extended only with the consent of both parties.
- In the absence of a definite end point to VA negotiations, HPs are likely to harass and intimidate tenants to continue negotiating a VA after the tenants have concluded that a VA is not in their interests or that a mutually acceptable agreement cannot be reached.

The draft regulations bar agents of the HP from signing the VA but not HP owners (new rule: § 4213.16) [this provision expands the limits of the existing rules (§ 4213.12), which bar HP employees but not agents from signing VAs]:

- The limit on eligibility to sign the VA should apply to any person with an ownership interest in the HP as well as agents and employees so that the negotiations are not compromised by participants who have a stake in advancing the interests of the HP than their fellow tenants.
- These restrictions should apply to close family members of the excluded persons to limit evasion of these restrictions by installing relatives in rental units at properties targeted for VAs.

RENTAL HOUSING COMMISSION

NOTICE OF PROPOSED RULEMAKING

4213 RENT ADJUSTMENTS BY VOLUNTARY AGREEMENT

4213.1 Seventy percent (70%) or more of the tenants of a housing accommodation, not including tenants of units exempt from the Rent Stabilization Program for any reason under § 4106 or persons or tenants who, under § 4213 or § 224 of the Act (D.C. Official Code § 42-3502.24), are not eligible to sign a voluntary agreement or are exempt from its increases in the rents charged, may enter into a voluntary agreement with the housing provider with the prior approval of the Rent Administrator or, as applicable, the final reviewing authority to:

(a) Establish the rents ~~to be~~ charged to tenants or for vacant rental units in the housing accommodation;

(b) Alter levels of related services or facilities or modify related services or facilities; or

(c) Provide for capital improvements or the performance of deferred, ordinary maintenance or repairs.

4213.2 A housing provider, a tenant, or a tenant association shall initiate an application for approval of a voluntary agreement by filing a proposed voluntary agreement with the Rent Administrator ("Proposed Voluntary Agreement").

4213.3 A Proposed Voluntary Agreement, when filed and served in accordance with §§ 4213.4 and .5, shall include:

(a) The current rent ~~that may be~~ charged, as lawfully calculated and properly filed with the Rental Accommodations Division and the proposed rent ~~to be~~ charged for each rental unit, including the proposed dollar amount and percentage of each rent adjustment;

(b) The current and proposed levels of related services or facilities and any other proposed modifications in related services or facilities;

(c) Any provisions for capital improvements or performance of deferred, ordinary maintenance or repairs, including the scope and costs of the work to be performed;

(d) All other conditions by which the tenants and housing provider agree to be bound, including any consideration or promises ~~exchanged to induce the approval of~~ provided to any party or tenant who is not a signatory such as

Commented [A1]: If exempted units or tenants are to be listed here, the list should be complete. This addition to the proposed regs would make clear that VA signatories may not include bldg. occupants who are not eligible to sign the agreement under § 4213.16 or are exempt from rent increases under § 224(i) of the RHA and have not opted out of the exemption under § 224(c).

Commented [A2]: The proposed regs improve the existing regs by requiring prior approval of VAs by the RA but this requirement should be clarified to require prior approval by "the final reviewing authority" to capture cases that are transferred to OAH for a hearing.

Commented [A3]: The proposed regs should be revised terms to use terms that are consistent with § 215(a) of the RHA, which applies VAs only to the "rent charged."

Commented [A4]: The proposed regs should be revised to reflect that the term "rent charged" applies only to actual tenants under §§ 103(29A) and (36) (definitions of "rent charged" and "tenant") of the RHA or to the "rent charged" for a vacant unit under § 213(a) of the RHA.

Commented [A5]: § 215(a)(2) of the RHA refers to "levels" of related services or facilities but the proposed regs should be revised to reflect the fact that VAs are also commonly used to modify services or facilities by replacing or improving existing systems completely (like HVAC systems) without necessarily changing the "level" of those services or facilities and that such modifications are permitted as a type of capital improvement or ordinary repair under § 215(a)(3).

Commented [A6]: This proposed reg is an important clarification of the law and should be retained. § 215 of the RHA does not address who may initiate a VA but the existing regs allow either the HP or a T to initiate the VA process. This proposed rule would end the practice allowed by the current regs (14 DCMR § 4213.3), under which HPs may initiate the VA process by distributing the proposed VA to the tenants before it is submitted to the RA. Requiring that the VA process be initiated by filling it with the RA w ... [1]

Commented [A7]: The proposed regs should be revised to say the "current rent charged" in order to properly track § 215, which applies only to adjustments to the "rent charged." Further, the "rent charged" is not a discretionary amount that may or may not be charged by the HP but rather the an ... [2]

Commented [A8]: As with the term "current rent charged," the term "proposed rent charged" should be used in order to properly track § 215 of the RHA.

Commented [A9]: The proposed regs should be revised to make clear that services and facilities may be altered in VAs in ways that do not necessarily involve changes in the "level" of services or facilities.

Commented [A10]: The proposed regs should be revised to eliminate the "induce" language as it provides a basis to argue over the purpose of "consideration or promises."

Commented [A11]: The proposed regs should be revised to make clear that a "tenant" who does not sign the VA is not a party to the VA although all tenants will be bound by its terms.

cash or move-out payments or related development or similar agreements, and copies of any written agreements to those conditions;

(e) Documentation reflecting current rents charged for comparable rental units in comparable housing accommodations in close physical proximaitey to the subject housing accommodation and subject to the Rent Stabilization Program;

(f) A list of all rental units, including vacant units, noting whether the rental unit is subject to the Rent Stabilization Program or exempt, and all tenants in the housing accommodation by name and rental unit number or identifying letter, and, for ~~covered~~ rental units covered by the Proposed Voluntary Agreement, a space for each tenant's signature and telephone number and a space for each tenant to approve or disapprove of the agreement;

(g) A list of any rental units for which the housing provider has notice that the unit is leased to and occupied by an elderly tenant or tenant with a disability (as defined in 14 DCMR § 3899.2), the name of each tenant in the unit, and the current rent charged for the unit;

(h) A timeline of any work to be performed through voluntary agreement; and

(i) A copy of D.C. Official Code § 42-3502.15 and 14 DCMR § 4213.

4213.4 ~~Prior to or s~~Simultaneously with the filing of a Proposed Voluntary Agreement with the Rent Administrator, the party initiating an application shall:

(a) Serve a copy of the Proposed Voluntary Agreement upon each tenant in the affected housing accommodation, and the housing provider if the initiating party is ~~not the housing provider~~ a tenant or a tenant association, accompanied by a letter briefly explaining the purpose of the application, stating the amount of the proposed rent adjustment for the recipient unit, if any, ~~and~~ notifying the tenant of the opportunity to contest the application provided by this section, and notifying the tenant of the right of any elderly tenant or a tenant with a disability with a qualifying income to be exempt from any increase in the rent charged under a voluntary agreement under § 224(i) of the Rental Housing Act (D.C. Official Code § 42-3502.24(i)) or to waive that right in writing under § 224(c) of the Rental Housing Act (D.C. Official Code § 42-3502.24(c)) and the procedures and standards for qualifying for such exemption.; and

(b) Transmit a copy of the Proposed Voluntary Agreement to the Office of the Tenant Advocate and the Housing Provider Ombudsman.

4213.5 Within five (5) business days of the receipt of a Proposed Voluntary Agreement, the Rent Administrator shall make a preliminary determination that the application

Commented [A12]: The proposed regs should be revised to make clear that "consideration" covers items like cash buy-outs and move-out payments (the RA and OAH have, on occasion, processed and approved VAs that omitted info about cash payments; also the regs should refer to any associated development agreements as another example of "consideration").

Commented [A13]: The proposed regs should be revised to make clear that "proximate" refers to physical proximity and require that the comparable units be subject to rent control and that the housing accommodation also be comparable (rents charged in unregulated bldgs. should not be used as comparable indicators for many reasons, including the rampant use of concessions in decontrolled bldgs. and the absence of hard publicly available data as to the rents actually charged in those bldgs).

Commented [A14]: The proposed rules should be revised to clarify that "covered" refers to rental units to be covered by the PVA.

Commented [A15]: The proposed regs should be revised to include a cross reference to the definition of ETWD.

Commented [A16]: It is confusing to say that the process is initiated by filing the PVA with the RA (as § 4213.2 does) if the HP is also allowed to circulate the PVA to the tenants before filing it with the RA. The proposed regs should be revised to delete the reference to "prior" submission of the PVA to the tenants so that it is unambiguous what the starting point of the VA process is.

Commented [A17]: The only person authorized to initiate a VA other than an HP is a T or a TA as VAs may only be entered into between the actual HP and actual tenants. The proposed regs should be revised to make this requirement express so that there is no confusion as to whether third parties (like possible building buyers) can initiate the process.

Commented [A18]: ETWD rights should be disclosed to the tenants at the front end of the VA process so all parties are aware of whether they are eligible to sign the VA.

Commented [A19]: The proposed regs should be revised to add the "business" day requirement so that VAs are not filed on the Friday of a 3-day weekend in order to limit the RA's time for preliminary review of the VA.

complies with the filing requirements of § 4213.3 and the service requirements of § 4213.4 and, if so, serve notice on the tenant of each affected rental unit, and the housing provider if the initiating party is ~~not the housing provider~~ a tenant or tenant association, in accordance with § 4213.8.

4213.6 If the Rent Administrator determines that an application for approval of a voluntary agreement was not initiated in compliance with the filing requirements of § 4213.3, the Rent Administrator, in his or her discretion, shall either:

(a) Dismiss the application without prejudice; or

(b) Grant the initiating party leave to amend the application, in which case the Proposed Voluntary Agreement shall be deemed filed on the date it is amended, provided that the amended application is served in accordance with the requirements of § 4213.4.

4213.7 If the Rent Administrator determines that an initiating party has not complied with the service requirements of § 4213.4, the Rent Administrator, in his or her discretion, shall either:

(a) Dismiss the application without prejudice; or

(b) Deem the Proposed Voluntary Agreement to be filed on the date the initiating party demonstrates compliance with the service requirements.

4213.8 A tenant of a rental unit proposed to be affected by a Proposed Voluntary Agreement, or the housing provider and each such tenant if the initiating party is ~~not the housing provider~~ a tenant or tenant association, if the application complies with the filing requirements of § 4213.3 and the service requirements of § 4213.4, shall receive from the Rent Administrator notice of the following:

(a) The filing and subject matter of the application;

(b) The negotiation, revision, and signing procedures under this section;

(c) The hearing or other administrative procedures for deciding the application; ~~and~~

(d) The tenant or housing provider's right under § 10 of the D.C. Administrative Procedure Act (D.C. Official Code § 2-509), and this section to contest or oppose the application; and~~.~~

(e) A copy of form for an elderly tenant or a tenant with a disability with a qualifying income to complete and submit to the Rent Administrator to qualify for the RHA's exemption from any increase in the rent charged

Commented [A20]: The proposed regs should be revised to apply the service requirements to all amended VAs so that Ts, etc. are properly notified.

Commented [A21]: The proposed regs should be revised to make clear that tenant-initiated VAs must also be served on all affected tenants.

Commented [A22]: The proposed regs should be revised to provide tenants with the form needed to qualify for low-income ETWD status and to provide it early in the process.

under a voluntary agreement or to waive that right in writing and a deadline for submission of the completed form to the Rent Administrator.

4213.9 The housing provider and each tenant shall have a minimum of thirty (30) days from the date ~~a Proposed Voluntary Agreement is filed and served~~ the Rent Administrator provides each qualifying elderly tenant or tenant with a disability with written notice that he or she has qualified to be exempt from any increase in the rent charged under the voluntary agreement and the tenant association and the housing provider with a list of the tenants who have both qualified for the exemption and elected not to waive the right to be exempt from any increase in the rent charged to consider the agreement and confer with other parties before any revised terms may be filed with the Rent Administrator; provided, that this time ~~may~~ shall be extended~~, within the discretion of~~ by the Rent Administrator, if any party was not properly served with a copy of the Proposed Voluntary Agreement or may be extended by the Rent Administrator if the Rent Administrator determines that such time is appropriate for further negotiations, provided that neither the housing provider nor the tenant association (or a majority of the tenants if there is no tenant association) objects to such extension ("Negotiation Period"). Housing providers and tenants are encouraged to enter into face-to-face negotiations to discuss the terms of a voluntary agreement during this time.

4213.10 At the option of either the housing provider or any tenant, ~~All~~ any notice~~s and~~ or response~~s~~ regarding a Proposed Voluntary Agreement shall be ~~in writing with a copy~~ filed with the Rent Administrator and shall include the name, street address (not including mailbox services or post office box addresses) and telephone number of the person(s) providing the notice or response.

4213.11 Any counter-proposal to a Proposed Voluntary Agreement may provide alternatives regarding ~~the~~ any or all proposed rents ~~to be~~ charged, changes in related services or facilities, provisions for capital improvements or deferred maintenance, or any other proposed conditions incident to a voluntary agreement.

4213.12 If the housing provider and tenants find there ~~are difficulties and obstacles~~ is a dispute between the parties ~~to negotiating~~ regarding a Proposed Voluntary Agreement ~~and are desirous of achieving a successful agreement,~~ the housing provider or any tenant may seek the assistance of the Conciliation Service of the Rental Accommodations Division, as established under § 503 of the Act (D.C. Official Code § 42-3505.03) and § 3913 of this title, ~~when~~ in resolving a dispute aris~~es~~ing in the course of attempting to reach an agreement on ~~the cost and terms of~~ the Proposed Voluntary Agreement.

4213.13 The Rent Administrator~~, in his or her discretion, and upon his or her own initiative or upon the request of a party,~~ may or, upon the request of a party, shall call for a meeting to discuss the terms of a Proposed Voluntary Agreement, including but not limited to the criteria for approval or disapproval of a voluntary agreement, so long

Commented [A23]: This proposed change should be retained as it represents an important improvement to the current regs, which establish a much lower minimum requirement (14 days) (14 DCMR § 14-4213.4). The 30-day period also should not start to run until the RA has processed all ETWD applications for exemption and notified each applicant of whether he or she qualifies for the exemption so there is no confusion or uncertainty as to which tenants can sign the VA and will be affected by its rent increases.

Commented [A24]: The proposed regs should be revised to make clear that extension of the 30-day period is not optional for the RA if the initiating party failed to properly serve the other party.

Commented [A25]: Under the proposed regs, the negotiation period is 30 days unless the RA authorizes more time. The proposed regs should be revised so that the RA cannot extend this 30-day time period if one of the parties wishes to end the negotiations.

Commented [A26]: The provision of the existing regs (14 DCMR § 4213.6) requiring that all communications between the parties be in writing and be submitted to the RA has not been enforced and should not be retained in its current form. Instead, the proposed regs should be revised to make submission of inter-party communications to the RA optional so that the parties can communicate directly with each other without reducing their communications to writing and sending them to the RA. Also, the proposed regs should not effectively prohibit oral communications by requiring that all communications be submitted to the RA as oral communications between TA officers or legal reps and the HP are often essential to complete VA negotiations.

Commented [A27]: The proposed regs should be revised to say "proposed rents charged" in order to track the provisions of § 215 of the RHA.

Commented [A28]: This awkward language included in the proposed regs is drawn directly from existing rules (§ 4313.9). The proposed regs should be revised to delete this unnecessary language as there should not be preconditions to requests for assistance of Conciliation Services other than the existence of a "dispute" between the parties (the only requirement of § 503 of the RHA).

Commented [A29]: The proposed regs should be revised to make a meeting with the RA mandatory if requested by either party and to preclude the RA from requiring a meeting (and interfering in negotiations) if neither party has requested a meeting with the RA.

as the Rent Administrator determines that the meeting should not be conducted as a mediation or conciliation pursuant to § 4213.12.

4213.14 After the expiration of the Negotiation Period, the initiating party may begin collecting signatures of tenants to approve or reject the Proposed Voluntary Agreement, including any modifications made during the negotiation period. If the version circulated for signatures is different from the Proposed Voluntary Agreement, the initiating party shall also file a copy with the Rent Administrator and serve the revised Proposed Voluntary Agreement in accordance with the requirements of § 4213.4 at least five (5) business days before collecting any signatures.

4213.15 A signature given to approve a Proposed Voluntary Agreement shall only be valid if it is given subsequent to and no more than sixty (60) days after the end of the Negotiation Period ("Signature Collection Period"). Before the end of the Signature Collection Period, the initiating party may request, no more than once, that the Rent Administrator extend the time, by no more than 30 days, for good cause shown.

4213.16 Agents, owners or employees of the housing provider residing in the housing accommodation, including close family members of any such person such as children, spouses, siblings, or parents, and tenants whose rent charged may not be increased under a voluntary agreement under § 224(i) of the Act and who have not waived that right under § 224(c) of the Act (D.C. Official Code §§ 42-3502.24(c), (i)) shall not be eligible to sign a voluntary agreement and shall not be considered in determining whether seventy percent (70%) of the tenants approve of the Proposed Voluntary Agreement.

4213.17 No more than three (3) business days after the end of the Signature Collection Period, the initiating party shall file with the Rent Administrator a copy of the Proposed Voluntary Agreement accompanied by all signatures that have been obtained ("Final Voluntary Agreement").

4213.18 A Final Voluntary Agreement, when filed with the Rent Administrator, shall include:

(a) All the terms and information required by § 4213.3, other than paragraph (gi);

(b) A certification that the agreement was entered into voluntarily and that no form of duress, harassment, intimidation, coercion, fraud, deceit, or misrepresentation of material fact or law was employed by any party involved in securing any signature;

(c) A certification that the agreement is complete and includes all terms and conditions by which the housing provider and or any tenant is bound, and that no further consideration or promises have been ~~exchanged for or~~

Commented [A30]: This proposed reg is a new provision and should be retained as a way for the RA to play a mediating role in VA negotiations.

Commented [A31]: This proposed reg represents an essential improvement to the existing regs, which are silent on the question of when signatures may be collected and have been construed by TA and HP attorneys as allowing for the collection of signatures before an agreement on the VA has been reached.

Commented [A32]: The proposed rules should be revised to require that, if the PVA is revised, it must be re-served and the recipients provided with at least 5 days to review the revised agreement.

Commented [A33]: This proposed reg represents an essential and badly needed change to the existing rules. If properly drafted, it should prevent the escrowing of signatures by TAs or their attorneys (or HP reps) before the VA has been finalized and will provide clear time frames for completion of the VA process. It should not be lawful for a tenant to provide a signature for the VA if its provisions are unknown or have not been disclosed to all affected parties.

Commented [A34]: Current regs only limit the ability of HP employees to sign the VA (14 DCMR § 4213.12) and do not apply to agents or owners of the HP. The proposed reg should be revised so that the new exclusion applies to self-interested HP owners as well as agents.

Commented [A35]: The proposed rules should be revised to make clear that tenants who, as a matter of law, are not subject to VA-based rent increases do not have the right to sign VAs or have their signatures be counted in determining whether the 70% threshold for approval has been reached.

Commented [A36]: The proposed regs should be revised to require that 14 DCMR § 4213.3(g) info be included in the VA. This info pertains to elderly tenants and tenants with disabilities and should definitely be included in the FVA. The info required by para. (i), on the other hand, consists of copies of the VA statute & regs, copies of which need not be provided to the RA as part of the VA.

~~offered~~ provided to ~~induce~~ any party to sign the Proposed Voluntary Agreement; and

(d) The signatures of:

(1) The housing provider;

(2) Each tenant agreeing to the terms of the voluntary agreement, which shall be not less than seventy percent (70%) of the eligible tenants; and

(3) Each tenant electing to sign to indicate his or her disapproval of the terms of the voluntary agreement;

(e) A certification that the filing party made a good faith effort to obtain the signature, whether agreeing to or disapproving of the Proposed Voluntary Agreement, of each tenant for whom a signature is not filed.

4213.19 After the filing of a Final Voluntary Agreement, the Rent Administrator shall deny, without a hearing, any application for approval of a voluntary agreement that has not complied with the requirements of §§ 4213.2-.18.

4213.20 Pursuant to § 215(c) of the Act (D.C. Official Code § 42-3502.15(c)), if a Final Voluntary Agreement is filed with the Rent Administrator that is not denied under 4213.19, and the only terms of the agreement are to adjust the rents charged for each rental unit within a housing accommodation by the same, specified percentage, except for rental units occupied by tenants whose rent charged may not be increased under ~~notwithstanding any exemption provided by~~ § 224(i) of the Act (D.C. Official Code § 42-3502.24(i)), the Rent Administrator shall issue a final order approving the voluntary agreement and serve the order upon the housing provider and each affected tenant. If the Final Voluntary Agreement contains terms to any other effect, the Rent Administrator shall proceed to review the agreement in accordance with ~~this section~~ § 4213.

4213.21 An application under ~~this section~~ § 4213 shall be denied if:

(a) All or part of any tenant's approval o~~n~~f a Final Voluntary Agreement has been induced by coercion, including duress, harassment, intimidation, fraud, deceit, or misrepresentation of material facts, of the tenant's legal rights or obligations, or of the housing provider's legal rights or obligations;

(b) The Final Voluntary Agreement contradicts the purposes of the Act as stated in § 102 of the Act (D.C. Official Code § 42-3501.02); or

(c) The Final Voluntary Agreement results in unreasonable adjustments to the rent charged for any rental unit or inequitable treatment of ~~the~~ any tenant~~s~~

Commented [A37]: This provision of the proposed regs represents a new and useful provision that should prevent side deals and undisclosed deals. However, it should be modified so that "consideration" is not limited by adding unnecessary qualifiers like "exchanged" or "induce[d]."

Commented [A38]: The proposed regs include this new and important provision that should not be removed or weakened: it requires the RA to reject any VA that is procedurally flawed, does not include any of the required provisions or certifications, or does not comply with any of the regs establishing other baseline requirements.

Commented [A39]: The exception to RA review under § 215(c) of the RHA applies to across-the-board uniform rent adjustments. This proposed reg should be modified to make clear that the across-the-board rent increases cannot apply to units occupied by low-income elderly or disabled tenants who are expressly exempt from all VA-based rent increases by § 224(i) of the RHA unless they opt into the VA. The opt-in caveat should not be included since § 215(c) prohibits review of the VA, including whether written waivers have been properly executed, etc.

Commented [A40]: The word "section" is apparently a reference to § 4213 of the regs; the proposed regs should be revised to so state.

Commented [A41]: This provision of the proposed regs generally tracks § 4213.19 of the existing regs but should be clarified to define "section" as § 4213.

Commented [A42]: This clause in the proposed regs represents a new and important addition to the regs. in that it prohibits "unreasonable" rent adjustments via VAs and should be retained and strengthened by establishing clear rules on what rent adjustments qualify as unreasonable.

or any rental units that is vacant on the last day of the Signature Collection Period.

4213.22 Pursuant to § 4213.21(c), the reasonableness of any proposed adjustments to the rent charged for a rental unit, including a rental unit that is vacant on the last day of the Signature Collection Period, in a Final Voluntary Agreement shall be determined ~~in consideration of~~ based on documented evidence regarding the following factors:

(a) The cost~~, scope, and nature~~ of any alterations in the levels of related services or facilities or other modifications to the related services or facilities in proportion to the amount of the rent adjustments and to the rents charged for comparable rental units in the housing accommodation, the reasonableness of such alterations and modifications in terms of their cost, scope, and nature, and the need for such alterations and modifications to ensure habitability and improve building functionality, performance, and energy efficiency;

(b) The housing provider's record of ~~P~~provisions~~ance~~ding, if any, for capital improvements, performance~~anceing~~ ~~of~~ deferred, ordinary maintenance or repairs, and ~~the status or establishment of~~ establishing and maintaining a~~ny~~ replacement reserve fund ~~maintained by the housing provider~~;

(c) The reasonableness of the housing provider's rate of return on the housing accommodation immediately prior to initiation of voluntary agreement negotiations and its projected rate of return at various intervals, including the conclusion of the fifth. tenth, fifteenth, and twentieth years following implementation of the voluntary agreement as evidenced by a pro forma or similar documentation;

(d) Other costs stated in the Final Voluntary Agreement; and

(e) The justification for any proposed disparities ~~between~~ among rental units in the percentage by which the rents charged will be adjusted.

4213.23 For the purposes of § 4213.22(e), reduced rent adjustments for rental units occupied by elderly tenants and tenants with disabilities, whether or not the tenants qualify for an exemption pursuant to § 224(i) of the Act (D.C. Official Code § 42-3502.24(i)) and § 4215.2 of this chapter or have previously filed an application to register for protected status under § 4215, shall not be deemed inequitable or unjustified disparities in rent adjustments.

4213.24 Within thirty (30) days of the filing of a Final Voluntary Agreement, the Rent Administrator shall issue either a final order denying the Final Voluntary Agreement under § 4213.19 or a ~~provisional order proposing~~ notice of a preliminary finding ~~that the application should~~ of apparent compliance with §§ 4213.2-.18 ~~be approved~~

Commented [A43]: The provision of the proposed regs extending the reach of VAs to "rental units" is new (historically VAs apply only to "tenants," who are defined by the RHA as existing tenants). The proposed rules should be revised so that VAs may cover vacant units but only if they are vacant at the end of the Signature Collection Period and therefore eligible for a new "rent charged" under § 213(a) of the RHA. Further, the awkward wording of the current regs prohibiting "inequitable treatment of the tenants" (§ 4213.19(c)) that has been repeated in the proposed regs should be revised so that the test applies to the singling out of a tenant or group of tenants for poor treatment in the VA (and not just to inequitable treatment of all tenants).

Commented [A44]: The proposed regs should be revised to make it clear that the HP does not have the right to adjust rents for units that become vacant in the future under the VA.

Commented [A45]: The proposed regs should be revised so that the factors to be considered in assessing the reasonableness of rent increases are clarified and tightened and their meaning readily apparent.

Commented [A46]: The proposed regs should be revised to make clear that the only relevant question under this factor is the relationship between the costs and the rent increases. The reasonableness of the repairs (i.e., their cost, scope and nature) should be addressed separately.

Commented [A47]: The proposed regs should be revised to add an item that allows for consideration of both the reasonableness and necessity of the improvement, including whether the improvement is cosmetic and not related to improving the building's systems and integrity.

Commented [A48]: Repairs and renovations financed by VA-authorized rent increases should relate to core building functionality and should not cover cosmetic improvements.

Commented [A49]: NB: This provision does not clearly get at the problem of new HPs who acquired the bldg. from a negligent past HP.

Commented [A50]: The proposed regs should be revised and tightened to specify the reasons for examining the rate of return (i.e., whether it is "reasonable").

Commented [A51]: The proposed regs should be revised to describe more clearly the rate of return test as to such basic matters as the applicable time periods to be assessed and to require assessments on the basis of long-term projections at designated intervals (and not just current rates of return or short-term rates of return) and to require the submissio ... [3]

Commented [A52]: This provision represents is a good and important addition to the existing regs that would make clear that VAs can include special protections for legacy ETWDs, who are not necessarily low income but should not be constructively evicted via large rent increases.

Commented [A53]: The proposed regs should be revised to limit the RA to notifying the Ts of their right to challenge a VA at this stage of the process. The RA should be prohibited from making a definitive ruling of any sort, including a "provisional order," as to whether the VA should be approv ... [4]

~~or denied~~ and serve it on the housing provider, the tenant of each affected rental unit, the Office of the Tenant Advocate, and the Housing Provider Ombudsman. The ~~provisional order~~ notice of a preliminary finding shall contain a statement of the tenants' and housing provider's opportunity to file exceptions and objections in accordance with § 4213.25.

4213.25 Within thirty (30) days of the issuance of a ~~provisional order~~ notice of a preliminary finding pursuant to § 4213.24, the housing provider and the tenant of any affected rental unit may file with the Rent Administrator a ~~clear and concise~~ statement of exceptions and objections to the ~~provisional order~~ preliminary finding or the Final Voluntary Agreement.

4213.26 Exceptions and objections filed pursuant to § 4213.25 may contest whether the application should be approved or denied based on the following issues:

(a) Whether the initiating party complied with all requirements of §§ 4213.2 – 4213.18 and whether any failure of compliance was remedied;

(b) Whether the application must be denied for any reason provided in § 4213.21;

(c) Whether the housing accommodation is properly registered and the housing provider has all required business licenses;

(d) Whether, pursuant to § 4216.4, substantial violations of the Housing Regulations existed on the date that the application for approval of the voluntary agreement was initiated and ~~have~~ had not ~~yet~~ been abated as of such date; or

(e) Any other violation of § 215 of the Act (D.C. Official Code § 42-3502.15) or ~~this section~~ § 4213.

4213.27 If no exceptions and objections ~~to a provisional order~~ are filed in response to a notice of a preliminary finding under § 4213.25 within thirty (30) days in accordance with § 4213.25 and the Rent Administrator finds the Final Voluntary Agreement to be in full compliance with § 4213, the Rent Administrator, within ~~five~~ fifteen (15) business days of the expiration of that time, shall ~~re~~issue ~~the~~ a ~~provisional~~ final order ~~as a final order~~ approving the Final Voluntary Agreement and serve the final order upon the housing provider and each affected tenant in the housing accommodation.

4213.28 If exceptions and objections in response to a ~~provisional order~~ notice of a preliminary finding are filed within thirty (30) days in accordance with § 4213.25 or the Rent Administrator finds the Final Voluntary Agreement not to be in full compliance with § 4123, the Rent Administrator, within fifteen (15) days of the expiration of that time, shall issue an order transferring the record of the voluntary agreement

Commented [A54]: The proposed regs should be revised to make clear the limited scope of RA review allowed during this phase of the process. Due to the one-sided nature of the submission of the application to the RA (it will be the HP's submission and the HP's representations of the VA), the record likely will not provide the RA with the information required to decide such basic questions as whether the proposed rent increases are unreasonable or inequitable. It is not appropriate for the RA to be resolving basic questions about the VA before the Ts have been provided with the opportunity to participate in the proceeding and submit evidence. Similarly, the record will likely consist primarily of HP submissions on compliance with the rules' procedural requirements so any ruling on procedural compliance should be limited and subject to rebuttal by the Ts.

Commented [A55]: This new provision of the proposed regs should be rewritten to bar the RA from ruling in any way on whether the VA is in compliance with the substantive requirements of the VA rules at this stage of the process and should be limited to notifying Ts of their rights to participate in the RA's proceeding. Similarly, a finding that the applicant has complied with the procedural requirements of the rules should not be final or dispositive as the Ts may submit comments identifying violations of the procedural requirements of §§ 4213.2-.18 that are not apparent in the HP's application.

Commented [A56]: The proposed regs should be revised so that the objections of unrepresented tenants cannot be disregarded because the RA finds them not to be "clear and concise."

Commented [A57]: The proposed regs should be revised to make clear that tenants are entitled to submit objections to the VA itself and are not be limited by whatever is included in the RA's preliminary findings, especially as the RA's review of the VA during this stage of the review should be narrowed so that it does not reach the substance of the VA.

Commented [A58]: The proposed regs should be revised to make clear that substantial housing code violations must be abated before the VA application is submitted to the RA. Inserting the word "yet" makes it seem as though the assessment of compliance may be made during the review process and that violations can be abated during the review process when in fact compliance should be required by the date of submission of the VA to the RA.

Commented [A59]: The proposed regs should be revised to require the RA to rule affirmatively on the substance of the VA even if no tenant files an objection. That is how the existing regs have been interpreted, resulting in OAH proceedings to review VAs when HPs have done things like empty bldgs. by paying all the Ts to move out before the VA is adjudicated.

Commented [A60]: The time frame established in the proposed regs for this phase of the process should be revised so it is the same as the time frame for a transfer to OAH as, under other revisions proposed in these comments, the RA would be required to issue an order explaining why it finds the VA to be in compliance with the rules.

application to the Office of Administrative Hearings for a hearing and explaining the basis for the transfer order. The Office of Administrative Hearings shall hold a hearing and render a decision on each issue raised in the exceptions and objections~~,~~ or in the Rent Administrator's transfer order or raised *sua sponte* or by a party or an intervenor during the proceeding.

4213.29 A hearing before the Office of Administrative Hearings on a ~~contested~~ voluntary agreement application, shall be conducted in accordance with 1 DCMR chapter 28 and 1 DCMR §§ 2920-2941, and the ~~initiating~~ party seeking approval of the application shall have the burden of proving its entitlement to approval of the application with regard to each ~~contested~~ issue in dispute.

4213.30 No voluntary agreement shall be deemed approved or disapproved at any time except pursuant to the issuance of a non-reviewable final order by the Rent Administrator or, if a hearing on the application is held, by the Office of Administrative Hearings.

4213.31 ~~If a voluntary agreement is approved by the Rent Administrator or the Office of Administrative Hearings, t~~The final order approving ~~the application~~ a Final Voluntary Agreement pursuant to § 4213.30 ~~shall be binding on the housing provider and all rental units in the housing accommodation and~~ shall state:

(a) The new rent charged for each rental unit;

(b) Any new levels of related services or facilities or any other modification to related services or facilities;

(c) Any provisions for capital improvements;

(d) Any provisions for the performance of deferred maintenance and repairs;

(e) Any other conditions by which the parties are bound; and

(f) The rights of the parties to appeal the final order.

4213.32 A final order of the Rent Administrator or the Office of Administrative Hearings approving or denying an application under this section may, within ten (10) business days of its issuance, be appealed to the Commission in accordance with § 3802 by any party to the case that is aggrieved by the final order. In accordance with § 3805, a housing provider shall not implement a rent adjustment authorized by a final order while an appeal of that order is pending before the Commission.

4213.33 A non-reviewable final order approving a Final Voluntary Agreement shall be binding on the housing provider and all covered rental units in the housing accommodation. A rent adjustment authorized by a non-reviewable final order approving an application under this section shall be implemented as an adjustment to the rent

Commented [A61]: The proposed regs should be revised to make clear that a party or intervenor can raise issues during the OAH proceeding that may not have been identified in the exceptions and objections. Ts will often be proceeding *pro se* and are entitled to the protections of liberal pleading rules under the *Padou* DCCA case.

Commented [A62]: The proposed regs should be revised to make clear that a VA's lawfulness must be adjudicated by the RA even if no tenant files an objection; further, room should be provided for the possible intervention in the OAH proceeding by the AG or another party (like a nonprofit whose members' interest may be damaged by approval of the VA).

Commented [A63]: The proposed regs should be revised to make clear that other parties – like the AG or a nonprofit – who may not have "contested" the VA before the RA may intervene in the OAH proceeding to represent the public interest in a case that is not contested by the Ts.

Commented [A64]: The proposed regs should be revised to make clear that a VA approved by the RA is not final until the review process has run its course.

Commented [A65]: The proposed regs should be revised to remove the references to RA and OAH approval in this subsection since those approval options are already stated in § 4213.30.

Commented [A66]: This provision of the proposed regs should be revised to remove the discussion of whether the VA is "binding" as a final order is not yet binding if it is still reviewable, which is implicit in para. (f). The binding nature of a non-reviewable VA should be stated in the regs (as is the case under the existing regs) but that statement should be moved from this subsection to § 4213.33.

Commented [A67]: This provision of the proposed regs should be revised to better reflect the ways in which services and facilities may be adjusted though VAs. While it is true that section 215(c)(2) of the RHA refers to "levels" of related S/F, VAs typically authorize changes in the nature or character of S/F rather than "levels" (e.g., replacement of a centralized boiler with unit-based heat pumps).

charged for an affected rental unit in accordance with § 4205 within twelve (12) months of the date of the order, including the exhaustion of any rights of appeal, but no earlier than twelve (12) months following any prior increase in the rent that may be charged for that rental unit. Failure to implement the adjustment within twelve (12) months will result in the adjustment being forfeited in accordance with § 4204.9(d).

4213.34 If a Final Voluntary Agreement contains any terms to alter the levels of related services or facilities or modify related services or facilities in any other way at a housing accommodation, within thirty (30) days following the date an order approving the voluntary agreement application becomes non-reviewable and final, the housing provider shall file an amendment to the Rent Stabilization Registration Form in accordance with § 4103.1.

4213.35 A tenant of an affected rental unit who receives notice of a ~~provisional order~~ preliminary finding under § 4213.24 and who fails to contest the application as provided in § 4213.25 shall not at a later date contest or challenge, by tenant petition under § 4214, a~~n~~ non-reviewable final order of the Rent Administrator or the Office of Administrative Hearings approving the voluntary agreement, except as provided in § 4214.6; provided, that (a) the tenant may challenge the implementation of the adjustment to the rent charged under § 4214.4; (b) the tenant may challenge the order approving the voluntary agreement if the housing provider did not provide any of the information or documents required by § 4213.3 or one or more signatures were collected in violation of the requirements of §§ 4213.14 and .15; and (c) any tenant of an affected rental unit who did not receive notice of the preliminary finding may challenge the order.

4213.36 If a housing provider fails to comply with any term of an approved voluntary agreement, a tenant or tenant association may file a tenant petition challenging the rent adjustment implemented or related service or facility levels or modifications provided pursuant to the voluntary agreement, in accordance with § 4214.6(g).

Commented [A68]: This provision of the proposed regs is an essential addition to the rules that would require HPs to implement rent increases approved by VAs within 12 months of the date of the final order approving the VA. It is a critical provision that is necessary to comport with the RHC's ruling in the *Fineman* case and the Council's enactment of the Rent Charged Clarifications Amendment Act of 2018, both of which make clear that there may only be a single "rent charged" for a unit, meaning that two "rents charged" may not be on the books for a unit at the same time and a rent charged increase cannot be banked for later implementation.

Commented [A69]: This provision of the proposed regs should be revised to better comport with the requirements of the RHA. Specifically, registration statements governing related services and facilities are not cast in terms of (or limited to) the "level" of such items but rather refer simply to "related services" and "related facilities" (see DC Code § 42-3502.05(f)(3)).

Commented [A70]: Existing Ts should not be forever precluded from challenging a VA as there will be cases where a T learns after the 30-day period has run its course of basic violations of the VA rules (like the withholding of documents or improperly collecting signatures).

Commented [A71]: It should be unambiguous that tenants who did not receive notice of the VA can challenge it after the 30-day challenge period. This provision is especially important for future tenants who should have broad rights to challenge the lawfulness of a VA after the fact.

Page 1: [1] Commented [A6] **Author**

This proposed reg is an important clarification of the law and should be retained. § 215 of the RHA does not address who may initiate a VA but the existing regs allow either the HP or a T to initiate the VA process. This proposed rule would end the practice allowed by the current regs (14 DCMR § 4213.3), under which HPs may initiate the VA process by distributing the proposed VA to the tenants before it is submitted to the RA. Requiring that the VA process be initiated by filling it with the RA will bring the RA into the process in its early stages and will establish clear-cut starting dates for the VA process.

Page 1: [2] Commented [A7] **Author**

The proposed regs should be revised to say the "current rent charged" in order to properly track § 215, which applies only to adjustments to the "rent charged." Further, the "rent charged" is not a discretionary amount that may or may not be charged by the HP but rather the amount actually charged under the Rent Charged Clarification Amendment Act of 2018 so the use of the word "may" is not appropriate.

Page 7: [3] Commented [A51] **Author**

The proposed regs should be revised to describe more clearly the rate of return test as to such basic matters as the applicable time periods to be assessed and to require assessments on the basis of long-term projections at designated intervals (and not just current rates of return or short-term rates of return) and to require the submission of a pro forma that it tied to the useful life of the planned improvement.

Page 7: [4] Commented [A53] **Author**

The proposed regs should be revised to limit the RA to notifying the Ts of their right to challenge a VA at this stage of the process. The RA should be prohibited from making a definitive ruling of any sort, including a "provisional order," as to whether the VA should be approved before the tenants have had a chance to submit comments and register objections.