

# ATTACHMENT C

## FAIR EMPLOYMENT & HOUSING COUNCIL Fair Housing Regulations

### INITIAL STATEMENT OF REASONS

#### CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 7. Discrimination in Housing

As it relates to housing, the FEHA prohibits harassment and discrimination because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information, or any basis prohibited by section 51 of the Civil Code.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed regulation and the reason it is necessary are described below. The problem that a particular proposed regulation addresses and the intended benefits are outlined under each subdivision, as applicable.

These proposed regulations comply with Government Code section 12955.6, Construction with other laws, which provides: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.) [collectively “FHA”] or state law relating to fair employment and housing as it existed prior to the effective date of this section. Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”

Further, to the extent the cases are consistent with underlying state law pursuant to Gov. Code 12955.6 and Government Code section 12926.1(a), the regulations take into consideration cases interpreting FHA, the

Rehabilitation Act, and the Americans with Disabilities Act. *Sisemore v. Master Financial, Inc.* 151 Cal.App.4th 1386, 1420 (2007) (“[c]ourts often look to cases construing the FHA, ... when interpreting FEHA”) (“*Sisemore*”); *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* 121 Cal.App.4th 1578, 1591 (2004) (“Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA.” (“*Auburn Woods I.*”))

## **Subchapter 7. Discrimination in Housing**

### **Article 1. General Matters**

#### **§ 12005. Definitions.**

The purpose of this section is to give meaning to terms used throughout the “Discrimination in Housing” subchapter of the FEHA regulations.

#### **§ 12005, subd. (a).**

The Council proposes to add the definition of “adverse action” as an action that harms or has a negative effect on an aggrieved person. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The term is not defined in FEHA, and is subject to misinterpretation. Because there are a wide variety of types of adverse actions that can occur in many different situations, the definition provides subsections that specify examples of adverse actions that can occur in common contexts. These cover rental/leasing, the application of a criminal history information policy, sales and other residential real estate transactions, and financial assistance.

Because California courts look to cases interpreting the Fair Housing Act (FHA) to rule on FEHA matters, and because FEHA must be consistent with Government Code 12955.6 (“Construction with other laws”), the list of adverse actions includes examples taken from case law and related statutes.

#### **§ 12005, subd. (b).**

The Council proposes to add the definition of “aggrieved person.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition

mid-sentence, and to prevent misunderstanding of the scope of the statute. The Council proposes to define aggrieved person as a person who believes they have been injured by a discriminatory housing practice or believes that they will be injured by a discriminatory housing practice, because individuals falling into both of these categories can file a claim under the relevant provisions of the FEHA, and includes persons who claim to have been injured by a discriminatory housing practice and have filed a judicial action or administrative claim. This definition clarifies the meaning of aggrieved person in Government code section 12927, subd. (g) to clarify that a person does not have to have already filed a claim to be considered an aggrieved person.

**§ 12005, subd. (c).**

The Council proposes to add the definition of “arrest.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Because the term “arrest” can have many meanings in different contexts, the Council proposes to define it specifically in relationship to “criminal history information” as defined in section 12005, subd. (j), and “criminal conviction” as defined in section 12005, subd. (i).

**§ 12005, subd. (d).**

The Council proposes to add the definition of “assistance animal.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Defining assistance animals is necessary because prohibitions on discrimination based on disability, as well as legal obligations to provide reasonable accommodations to people with disabilities, include specific provisions related to assistance animals.

The U.S. Dept. of Justice has issued guidance on service animals under the Americans with Disabilities Act (ADA), and the U.S. Housing and Urban Development Dept. has issued guidance on this topic relating to service animals and support animals. None of these encompass related California statutes, so a clear definition is required. As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in relevant federal guidance to the FHA and the ADA. See specifically 28 C.F.R. section 36.302(c); *Joint Statement of the Department of Housing and Urban Development and the Department of*

*Justice on “Reasonable Accommodations Under the Fair Housing Act,”* May 17, 2004 (*HUD/DOJ Reasonable Accommodations Under the Fair Housing Act*), available at <http://www.justice.gov/crt/about/hce> or [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf); HUD FHEO Notice: FHEO-2013-01, April 25, 2013, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, April 25, 2013, (FHEO Notice), available at [https://www.hud.gov/sites/documents/SERVANIMALS\\_NTCFHEO2013-01.PDF](https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF); 24 C.F.R. 5.303 and HUD Final Rule, *Pet Ownership for the Elderly and Persons with Disabilities*; 73 FR 63834.01, 2008 Westlaw 469049 (October 27, 2008) (provisions allowing pets in public housing); DOJ Revised Requirements on Service Animals, July 12, 2011, (*DOJ Service Animal Requirements*), available at [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm); and DOJ guidance document *Frequently Asked Questions about Service Animals and the ADA*, July 20, 2015, (*DOJ FAQ on Service Animals*), which can be found at [https://www.ada.gov/regs2010/service\\_animal\\_qa.pdf](https://www.ada.gov/regs2010/service_animal_qa.pdf).

The term “assistance animals” encompasses different types of assistance animals, so the addition of definitions for those specific types is also necessary. Therefore, this includes definitions for “service animal” and “support animal,” the two main types of assistance animals. Similarly, the term “service animals” includes various subcategories, include “guide dog,” “signal dog,” “service dog,” and “service animals in training.” It is necessary to provide definitions for these terms to ensure consistency with other related California statutes (Civil Code 54.1 *et seq.*)

It is also necessary to provide a definition for “miniature horses,” (a subcategory of “service animal”), since that term is defined and included under the ADA.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in relevant federal guidance to the FHA, specifically, 28 C.F.R. 36.302(c), reasonable accommodations for service animals, and in particular 28 C.F.R. 36.302(c)(9), miniature horses; [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm). Pursuant to Government Code 12926.1, the ADA provides a floor of protection, and California law is intended to provide additional protections. Therefore the regulations include miniature horses in the definitions of service animals.

**§ 12005, subd. (e).**

The Council proposes to add the definition of “building.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. It prevents confusion as to the exact nature of the term “building” by ensuring that the term encompasses the entire structure or facility as well as portions thereof.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, the definition of “building” in 24 C.F.R. 100.201.

**§ 12005, subd. (f).**

The Council proposes to add the definition of “business establishment.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law. Defining business establishment is necessary because section 12955.8(b) of the Act regarding liability for discriminatory effect explicitly provides two distinct standards for justifying practices that have a discriminatory effect, one for a business establishment as defined under Civil Code section 51, and one for cases that do not involve a business establishment. Under the proposed definition, business establishments include persons engaged in the operation of a business covered by section 51 of the Civil Code, insofar as the business is related to dwellings, housing opportunities, financial assistance, land use, or residential real estate-related activities. Section 51 of the Civil Code uses the term “business establishment,” but does not fully define the term. The Council intends to define “business establishment” to have the same meaning as in section 51 of the Civil Code as is explicitly required by section 12955.8(b)(2) of the FEHA. This definition provides guidance to the public about which types of entities are subject to which standard for justifying practices that have a discriminatory effect. The examples are derived from cases interpreting “business establishment” under Civil Code section 51.

**§ 12005, subd. (g).**

The Council proposes to add the definition of “common use areas” as rooms, spaces, or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. The definition also provides numerous specific examples. This definition is necessary to elaborate upon and clarify a term that is used throughout the

proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. It prevents confusion as to the exact nature of the term “common use areas,” and thus provides guidance regarding the broad meaning of this phrase.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. Accordingly, the definition is consistent with and expands upon the definition of “common use areas” under the FHA. See 24 C.F.R. section 100.201.

**§ 12005, subd. (h).**

The Council proposes to add the definition of “complainant” as a person who files a complaint with the department alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces. This addition is necessary to clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. It makes explicit that it refers to complainants under FEHA and other laws governed by the department.

**§ 12005, subd. (i).**

The Council proposes to add the definition of “criminal conviction.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. The Council proposes to define criminal conviction specifically in relation to “criminal history information” as defined in section 12005, subd. (j), and “arrest” as defined in section 12005, subd. (c). The purpose of this clarification is because Article 25 of the proposed regulations limits the lawful use of criminal history information to certain criminal convictions. In addition, the definition further clarifies that certain criminal determinations are explicitly excluded by section 12269. This definition provides guidance regarding what constitutes a criminal conviction that can be lawfully used as part of a criminal history information practice.

**§ 12005, subd. (j).**

The Council proposes to add the definition of “criminal history information.” This addition is necessary to elaborate upon and clarify a term that is used

throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Article 25 of the proposed regulations limits the lawful use of criminal history information. Without further guidance, the term is subject to misinterpretation, particularly since it is a technical term. This proposed definition clarifies what constitutes criminal history information for purposes of Article 25.

**§ 12005, subd. (k).**

The Council proposes to add the definition of “department” to provide a shorthand for referring to the Department of Fair Employment and Housing, which is necessary because the department is referred to throughout the proposed regulations. The definition is consistent with Government Code 12925(b).

**§ 12005, subd. (l).**

The Council proposes to add the definition of “directly related conviction.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation, particularly since it is a technical term not in every-day use. Article 25 of the proposed regulations limits the lawful use of criminal history information to certain criminal convictions as defined by section 12005(i). Article 25 also provides the liability standards and burdens of proof regarding the use of criminal history information in housing decisions. In particular, under section 12266, a respondent defending a criminal history information practice must demonstrate that its practice only concerns criminal history information regarding directly related convictions. This definition specifies the meaning of a directly related conviction as a criminal conviction has a direct and specific negative bearing on the identified interest or purpose supporting the practice. It also provides guidance on how to apply the definition, including limiting the information that a practice must encompass to information provided in criminal history information. Specifically, the definition provides that a practice should consider the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred as provided in criminal history information, and additional relevant information as provided in criminal history information. The two required factors (nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred) are drawn from a number of sources, including *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8<sup>th</sup> Cir. 1975), citing *Butts v. Nichols*, 381 F.Supp. 573, 580-81

(S.D.la.1974) (from the Title VII context). Additional relevant information could include an expungement of a conviction because a practice could provide that a conviction that has been expunged is not a directly related conviction since the fact of expungement could be interpreted to mean that such a conviction does not have a direct and specific negative bearing on the identified interest or purpose supporting the practice.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. Accordingly, the factors (nature and severity of the crime and amount of time that has passed) are also consistent with the *U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 2016).

**§ 12005, subd. (m).**

The Council proposes to add the definition of “discriminatory housing practice” as an act that is unlawful under federal or state fair housing law, including housing-related violations of the Fair Employment and Housing Act, the Fair Housing Act, the Unruh Civil Rights Act, the Ralph Civil Rights Act, the Disabled Persons Act, and the Americans with Disabilities Act. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. Through this definition, the Council provides guidance regarding the broad scope of statutes designating actions as unlawful housing practices which are covered by these regulations. As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, in particular, the definition is consistent with and expands upon the term as it is used in 24 C.F.R. 110.20.

**§ 12005, subd. (n).**

The Council proposes to add the definition of “dwelling unit” as a single unit of a housing accommodation for a family or one or more individuals. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the definition of “dwelling unit” under the FHA. 24 C.F.R. 100.201. This definition of “housing accommodation” or “dwelling” in section 12005(p) incorporates this definition to demonstrate how the terms are related.

**§ 12005, subd. (o).**

The Council proposes to add the definition of “financial assistance” as the making or purchasing of loans, grants or the provision of other financial assistance relating to a wide array of housing-related transactions and activities. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The term is subject to a wide variety of interpretations. As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the definition of “financial assistance” as it is used in FHA. See 24 C.F.R. section 100.115. The Council proposes to flesh out this term using a list of non-exclusive housing-related transactions and activities in which financial assistance may be involved and by articulating three sets of examples of financial assistance, consistent with Government Code section 12927(h).

**§ 12005, subd. (p).**

The Council proposes to add the definition of “housing accommodation” or “dwelling.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide definitions mid-sentence. These terms are often the subject of confusion, because while they are similar, they are used in an overlapping but slightly different manner in federal and state law. Through this definition the Council provides guidance regarding the broad scope of types of buildings, structures and vacant land which these regulations cover and makes it clear that “housing accommodations” include “dwellings.”

While section 12927, subd. (d) of the Act provides a brief definition of “housing accommodation,” for the sake of clarity and thoroughness this definition enumerates in a non-exhaustive manner the vast array of what

may constitute a “housing accommodation” or “dwelling” for purposes of the Act. It incorporates any dwelling unit as defined in section 12005(n), a wide variety of specific types of housing accommodations, and vacant land that is offered for sale or lease for the construction of any housing accommodation.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, in particular, the proposed definition covers all dwellings as defined in and covered by the federal Fair Housing Act in 24 CFR 100.20.

**§ 12005, subd. (q).**

The Council proposes to add the definition of “housing opportunity.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition elaborates on section 12921, subdivision (b) of the Act and clarifies the broad scope of housing opportunity to include all aspects of housing, including obtaining, using or enjoying a dwelling, residential real estate-related transactions, financial assistance, development and land use and other housing related privileges, services and facilities, including infrastructure or governmental services. This elaboration is necessary to provide guidance regarding the broad application of the Act and to provide clarity regarding a term that can be ambiguous in common usage.

**§ 12005, subd. (r).**

The Council proposes to add the definition of “include” or “including” as meaning includes, but not limited to or including, but is not limited to. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition clarifies that this term is always non-exclusive and that any list of items following it are intended to be illustrative but not exhaustive.

**§ 12005, subd. (s).**

The Council proposes to add the definition of “legitimate” as meaning a justification is genuine and not false or pretextual. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed

regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, this definition parallels the equivalent definition in HUD regulations which reflects the intent of Government Code section 12955.8(b). HUD states: “A legally sufficient justification exists where the challenged practice... [i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent...or defendant.” 24 CFR 100.500(b)(1)(i). HUD further states: “The word ‘legitimate,’ used in its ordinary meaning, is intended to ensure that a justification is genuine and not false.” *HUD’s Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule (HUD Discriminatory Effects Standard Final Rule)*, Federal Register, Vol. 78, No. 32, Friday, February 15, 2013, Rules and Regulations, p. 11470.

**§ 12005, subd. (t).**

The Council proposes to add the definition of “nondiscriminatory” as meaning that the justification for a challenged practice does not itself discriminate based on a protected basis. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, this definition parallels the equivalent definition in HUD regulations under the Fair Housing Act, which reflects the intent of Government Code section 12955.8(b). HUD states: “A legally sufficient justification exists where the challenged practice... [i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent...or defendant.” 24 CFR 100.500(b)(1)(i). HUD further states: “...[T]he word ‘nondiscriminatory’ is intended to ensure that the justification for the challenged practice does not itself discriminate based upon a protected characteristic.” *HUD Discriminatory Effects Standard Final Rule, supra* at 11470.

**§ 12005, subd. (u).**

The Council proposes to add the definition of “owner” as any person having

any legal or equitable right of ownership, governance, possession or the right to rent or lease housing accommodations. This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide a definition mid-sentence. The term, although in common usage, is subject to misinterpretation absent a clear definition.

Owners are a subset of persons, as defined in section 12005(v). The proposed definition elaborates on section 12927, subdivision (e) of the Act by providing a non-exhaustive, illustrative list to clarify the broad scope of persons who can be considered owners for purposes of the Act if they meet the definition. Subsections of the definition specifically identify lessee, sublessee, assignee, managing agent, real estate broker or salesperson because of the possibility that each of them can have a legal or equitable right of ownership, governance, possession or the right to rent or lease housing accommodations. It also includes trustee, trustee in bankruptcy proceedings, receiver, or fiduciary because they can meet the definition in certain circumstances. Because the phrase “housing provider” is often used in statutes, regulations and government programs as well as colloquially in the housing industry, it is explicitly included to clarify that it often refers to persons coming under the definition of owner. Subsections (u)(4) and (u)(5) name various governmental entities that may also constitute owners in some contexts. In addition, a subsection identifies governing bodies of common interest developments because these entities are the governing bodies of residential properties and it is necessary to clarify that they fall within the definition of owner. This elaboration of the term is necessary to provide guidance regarding the broad application of the Act.

**§ 12005, subd. (v).**

The Council proposes to add the definition of “person.” This addition is necessary to elaborate upon a term that is used throughout the proposed regulations and enables the Council to succinctly state rules rather than provide a definition mid-sentence. While the term is in common usage, it is necessary to define it for purposes of the Act to ensure that is interpreted correctly.

The proposed definition elaborates on the definitions of “person” contained in Government Code sections 12925, subd. (d) and 12927, subd. (f) and the specification of actors and entities in Government Code section 12955 who are liable for unlawful housing practices by providing a non-exhaustive, illustrative list to clarify the broad scope of individuals and entities that are subject to the FEHA. It clarifies that owner as defined in

section 12005(u) is a subset of persons. It specifies community associations, condominiums, planned developments, and other common interest developments, including those defined in the Davis-Stirling Common Interest Development Act (Civil Code section 4000, et seq.) to clarify that those entities are subject to the FEHA. It specifies that the state and the entire range of political subdivisions, agencies, districts and other political entities are subject to the Act. Finally, the definition clarifies that any entity that has the power to make housing unavailable or infeasible through its practices will constitute a person under the FEHA and that the definition shall be interpreted broadly. Sometimes a person will be named as a respondent in a complaint. However, some persons, for example, group homes and nonprofit affordable housing developers, can also be complainants when they are subjected to a discriminatory housing practice by another person. This elaboration of the term is necessary to provide guidance regarding the broad application of the FEHA.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. In particular, this definition is consistent with and expands upon the term “person” as it is used in the FHA. Section 3602(d) of Title 42 of the United States Code, 24 C.F.R. 100.20.

**§ 12005, subd. (w).**

The Council proposes to add the definition of “practice.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. To clarify the broad scope of practices subject to the Act, the definition specifies that a practice may be written or unwritten or singular or multiple, and that, as provided in Government Code section 12955.8, subd. (a) and (b), a failure to act may constitute a practice. The proposed definition encompasses all of the practices specified in Government Code section 12955 as well as relevant Civil Code sections pertaining to common interest development governing documents. This elaboration of the term is necessary to provide guidance regarding the broad application of the Act.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. In particular, this definition parallels the equivalent definition in HUD regulations, which reflects the intent of Section 12955.8(b), U.S.

Department of Housing and Urban Development's (HUD) usage of "practice" in its regulations beginning at 24 C.F.R. § 100.1.

**§ 12005, subd. (x).**

The Council proposes to add the definition of "premises." This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition clarifies the meaning of premises by specifying which spaces, parts, components, or elements of a building can be considered premises. As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the term "premises" as it is used in FHA. 24 C.F.R. 100.201.

**§ 12005, subd. (y).**

The Council proposes to add the definition of "Private Land Use Practices" as including all non-governmental practices in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities. This addition is necessary to elaborate upon and clarify a term that is used extensively in the proposed regulations and which is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The definition is necessary to implement the distinction drawn in Government Code section 12955, subd. (l) between public and private land use practices. The definition specifically includes restrictive covenants as a private land use practice, as set out in Government Code sections 12955, subd. (l), 12956.1, and 12956.2. A non-exhaustive list of specific practices are identified as examples for clarification. Consistent with Government Code section 12955, subd. (k), the definition includes a catchall subsection that includes other actions that make housing unavailable.

**§ 12005, subd. (z).**

The Council proposes to add the definition of "protected bases" or "protected classes." This definition is intended to encompass all individuals protected by FEHA. This addition is necessary because it would otherwise be cumbersome to always reference the lengthy list of bases covered by fair housing law. Because those characteristics are often referred to colloquially and in case law as "protected bases" or "protected classes," it is more efficient to codify the terms rather than repeatedly restate all of the characteristics. The definition also encompasses, pursuant to Government

Code sections 12926(o) and 12955(m) “a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.”

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the bases covered by the FHA. 24 C.F.R. 100.5 and 100.201.

**§ 12005, subd. (aa).**

The Council proposes to add the definition of “Public Land Use Practices” as including all practices by governmental entities, as those entities are defined in section 12005, subds. (u)(4) – (5) and (v)(5) in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities. This addition is necessary to elaborate upon and clarify a term that is used extensively in the regulations and which is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-stream. The definition is necessary to implement the distinction drawn in Government Code section 12955, subd. (l) between public and private land use practices. A non-exhaustive list of specific practices are identified as examples for clarification, including generally familiar land use practices, references to statutes authorizing such practices, practices relating to municipal infrastructure or services in connection with housing opportunities and practices in connection with housing-related programs. The definition specifically includes restrictive covenants as a public land use practice, as set out in Government Code sections 12955, subd. (l), 12956.1 and 12956.2. This elaboration of the term is necessary to provide guidance regarding the broad application of the Act.

**§ 12005, subd. (bb).**

The Council proposes to add the definition of “public use areas.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition clarifies the meaning of public use areas by specifying that rooms or spaces of a building that are made available to the general public constitute public use areas regardless of whether the building is privately or publicly owned.

As required by Government Code section 12955.6, the proposed definition

is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the term “public use areas” as it is used in FHA. 24 C.F.R. 100.201.

**§ 12005, subd. (cc).**

The Council proposes to add the definition of “residential real estate” as all real property, whether improved or unimproved, that includes or is planned to include dwellings, or is zoned or otherwise designated or available for the construction or placement of dwellings. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition is necessary to provide guidance regarding the broad application of the Act to real property upon which a dwelling currently exists, is planned or is available.

The proposed definition is consistent with “residential real estate-related transaction” as defined in Government code section 12927, subd. (h).

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the term “residential real estate” as it is used in FHA. 24 C.F.R. 100.110 *et seq.*

**§ 12005, subd. (dd).**

The Council proposes to add the definition of “residential real estate-related transaction.” This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition is intended to elaborate on and implement the definition of “residential real estate-related transaction” contained in Government code section 12927, subd. (h).

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, the definition is consistent with and expands upon the term “residential real estate-related transaction” as it is used in FHA. 24 C.F.R. 100.110 *et seq.*

**§ 12005, subd. (ee).**

The Council proposes to add the definition of “respondent” as a person alleged to have committed a practice made unlawful by a law the department enforces and against whom a complaint has been filed with the department or against whom a civil action has been filed. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. It is derived from the department’s definition of “respondent” in its procedural regulations – 2 CCR 10001(r). The term lacks a clear understanding in non-legal usage.

**§ 12005, subd. (ff).**

The Council proposes to add the definition of “substantial interest” as meaning a core interest of the organization that has a direct relationship to the function of that organization. This addition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law and enables the Council to state rules succinctly rather than provide a definition mid-sentence. The term lacks a clear understanding in non-legal usage.

As required by Government Code section 12955.6, the proposed definition is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in in the FHA. In particular, this definition parallels the equivalent definition in HUD regulations which reflects the intent of Government Code section 12955.8(b): “A legally sufficient justification exists where the challenged practice...[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent...or defendant.” 24 CFR 100.500(b)(1)(i). HUD further states: “A ‘substantial interest’ is a core interest of the organization that has a direct relationship to the function of that organization.” *HUD Discriminatory Effects Standard Final Rule, supra* at 11470.

**§ 12010, Liability for Discriminatory Housing Practices.**

The purpose of this section is set forth the two main types of liability for discriminatory housing practices – direct and vicarious – and when each can be invoked under FEHA. The section is necessary to clarify the operation of traditional principles of direct and vicarious liability in the FEHA context.

Tort principles of direct and vicarious liability generally apply to housing

discrimination. See e.g. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Generally, liability under FEHA is not limited to specifying one type of respondent or defendant to a particular discriminatory housing practice. Rather, under FEHA, like the FHA, numerous respondents and defendants may be liable for a particular discriminatory housing practice under distinct bases of liability. See, e.g. *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

FEHA prohibits a wide range of discriminatory housing practices as defined in Section 12005(m). It applies broadly to a wide assortment of potential respondents and defendants (including broad definitions of “owners” in Section 12005(u) and “persons” in Section 12005(v)) engaged in an a variety of transactions related to housing, including residential real estate-related transactions (as defined in Section 12005(dd), financial assistance (as defined in Section 12005(o)), and public and private land use practices (as defined in Sections 12005(aa) and (y) respectively).

**§ 12010, subd. (a).**

The Council proposes to add this subdivision defining the scope of direct liability under FEHA. This subdivision is necessary to clarify the operation of traditional principles of direct liability in the FEHA context. The Council proposes to use a liability formulation that is based on general principles of California law, e.g. Cal. Civ. Code Division. 3, Part. 4, Title 9, Chapter 1. Subdivision (a)(1) outlines the various ways in which a person can be directly liable for discriminatory conduct: (A) Due to their own discriminatory conduct; (B) Due to their own failure to take prompt action to correct discriminatory conduct of their employees and agents, as specified; and, (C) Due to their own failure to take prompt action to correct certain conduct by third parties (other than agents and employees) in specified circumstances. Subdivision (a)(2) establishes parameters for taking corrective action. Subdivision (a)(3) establishes parameters for when an agent or employee is directly liable for their own actions.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.7, Liability for Discriminatory Housing Practices. See HUD’s *Final Rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act (HUD Final Rule Harassment)*, 81 Fed.Reg. 63054, 63064, 63066 – 63072, 63074 (Sept. 14, 2016.) Because the federal rule is clear and accurately reflects California law, the Council proposes to use language that maintains consistency between the parallel

federal Fair Housing Act (FHA) and the FEHA, except in those instances where California law provides greater rights and remedies or where the Council believes greater clarification is needed.

The proposed language differs from the federal rule to provide greater clarity and to be consistent with other relevant California law, including by:

- 1) adding additional examples in subdivision (a)(1)(B);
- 2) making modifications to reflect California law in section (a)(1)(C);
- 3) making modifications to reflect California law in section (a)(2); and,
- 4) adding subdivision (a)(3).

Explanations for these modifications are below.

Subdivision (a)(1)(A) provides that a person can be directly liable due to their own discriminatory conduct, e.g. when an owner refuses to rent to a person based upon race. *See, e.g. Dept. of Fair Empl. & Hous. v. DeSantis* (May 7, 2002) No. 02-12, FEHC Precedential Decs., 2002 WL 1313078 at \*16 (Cal.F.E.H.C.); *U.S. v. Big D Enterprises, Inc.*, 184 F.3d 924, 930–931 (8th Cir. 1999). This subdivision is consistent with other California liability rules regarding property owners outside of the discrimination context. Cal. Civ. Code § 1714(a). This subdivision is parallel to 24 C.F.R. section 100.7(a)(1)(i). Since the federal provision accurately reflects California law, no change is required.

Subdivision (a)(1)(B) provides that a person can be directly liable for discriminatory conduct due to their own failure to take prompt action to correct discriminatory conduct of their employees and agents, for example, when the agent of an owner of an apartment complex discriminates and the owner knew or should have known about those discriminatory acts but fails to take action. *See, e.g. U.S. v. Balistreri*, 981 F.2d 916, 930 (7th Cir. 1992). This rule is necessary because employers are in the best position to select, train, oversee and assure the correct behavior of their employees and agents. This subdivision is parallel to 24 C.F.R. section 100.7(a)(1)(ii). Since the federal provision accurately reflects California law, no change is required, but the subdivision has been modified for clarity to provide more examples of situations where a person knew or should have known of the discriminatory conduct.

Subdivision (a)(1)(C) provides that a person can be directly liable for discriminatory conduct due to their own failure to take prompt action to correct certain conduct by third parties (other than agents and employees) in specified circumstances. For example, if an owner fails to take corrective action when a tenant sexually harasses another tenant after the

harassment was reported to the owner. *See, e.g. Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Reeves v. Carrollsburg Condominium Unit Owners Ass'n*, 1997 WL 1877201, \*7–8 (D.D.C. 1997).

This subdivision is parallel to 24 C.F.R. section 100.7(a)(1)(iii). Since the federal provision accurately reflects California law, no change is required, but the subdivision has been modified to specify more clearly that the power to take action against third parties derives from the legal authority or responsibility that the person may have in response to those third parties, and provides examples of sources that provide such authority, responsibility, or power. This language provides greater clarity but no less protection to individuals covered by FEHA than the federal regulation.

Subdivision (a)(2) provides that actions to end discriminatory practices cannot include actions that penalize or harm the aggrieved person, such as evictions. For example, a landlord who learns that a resident manager is discriminating by harassing a tenant cannot correct the discrimination by evicting the tenant who complains of the harassment. This provision is parallel to 24 C.F.R. section 100.7(a)(2) which accurately reflects California law, so no change is required. However, the Council proposes to add a provision providing that a discriminatory housing practice can be raised as an affirmative defense to an unlawful detainer action. This clarification is necessary because in some cases unlawful detainer courts have not allowed defendants in unlawful detainer actions to raise this defense. This appears to be a misconception arising from the language in Government Code 12955(f) which prohibits delays arising from claims of retaliation. Raising a defense of discriminatory conduct (including retaliation) in an unlawful detainer is appropriate. The mere fact that a defense is raised and must be addressed during the litigation of the matter does not constitute an unwarranted delay.

This is consistent with California law and current eviction practice. *See, e.g.*, the Judicial Council of California's approved form for answers in unlawful detainers (UD-105) which provides an option for defendants as follows: "Affirmative Defenses...By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or the laws of the United States or California." (at 3.f.) This provision is also consistent with the FEHA's prohibition of eviction as a retaliatory action under Government Code 12955(f).

The Council proposes to add subdivision (a)(3) to clarify that employees

and agents remain directly liable for their *own* discriminatory practices (i.e. practices covered by subdivision(a)(1)(A)), regardless of whether their employer or principal knew of the discriminatory housing practice or failed to take appropriate corrective action. This subdivision is necessary to prevent confusion about the scope of liability of agents and employees and implements California law. For example, if a resident manager discriminates, that person may be found directly liable for his or her actions, even if the person is also an agent and the principal is also found liable. This is a necessary companion to the rule in subdivision (a)(1)(B), that provides guidance as to when an employer or principal can be held liable for the acts of their employee or agent. While this provision is not found in the federal regulation, it is consistent with federal case law. See, e.g. *U.S. v. Balistreri*, 981 F.2d 916, 927 (7th Cir. 1992).

**§ 12010, subd. (b).**

The Council proposes to add this subdivision defining the scope of vicarious liability under FEHA. This subdivision is necessary to clarify the operation of traditional principles of vicarious liability in the FEHA context, and to clarify that in specific situations whichever law, California or federal, provides greater protection shall apply. For example, when the agent of an owner of an apartment complex discriminates within the scope of their authority, the owner may be found liable. See, e.g. *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1061 (E.D. Cal. 1998); *U.S. v. Balistreri*, 981 F.2d 916, 930 (7th Cir. 1992). The Council proposes to use a liability formulation that is based on general principles of California law, see e.g. Cal. Civ. Code Division. 3, Part. 4, Title 9, Chapter 1 and California case law, e.g. *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 208-209 (1991); *Chew v. Hybl*, 1997 WL 33644581, \*12 (N.D. Cal. 1997); *Beliveau v. Caras*, 873 F. Supp. 1393, 1399 –1400 (C.D. Cal. 1995). However, the proposed subsection also specifies that where such principles are inconsistent with interpretations and applications of agency rules under the FHA, the federal interpretations shall apply, so long as they provide greater protection. This is because, while based in California law, FEHA must provide at least the same level of protection to individuals covered by FEHA as the equivalent FHA provisions. Government Code 12955.6.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically the parallel federal regulations at 24 C.F.R. 100.7(b); HUD's *Final Rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*,

81 Fed.Reg. 63054, 63072-63073 (Sept. 14, 2016), and HUD's November 17, 2008, memorandum with the subject "Questions and Answers on Sexual Harassment under the Fair Housing Act" (*HUD FAQ Sexual Harassment*), Questions 3, 4, and 5 (<https://www.hud.gov/sites/documents/QANDASEXUALHARASSMENT.PDF>)." Therefore the Council proposes to use language that maintains consistency between the parallel FHA and the FEHA.

However, the Council proposes to add some additional clarity, consistent with California law, to clarify the phrase "consistent with agency law" that is used in the federal regulation. To that end, subdivisions (b)(1) and (b)(2) have been added. These subsections specify that whether liability exists in a particular situation for a discriminatory housing practice is consistent with agency law is a question of fact. See, e.g. *Violette v. Shoup*, 16 Cal. App. 4th 611, 620 (1993); *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1139–1141 (C.D. Cal. 2001); *U.S. v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992); *Marya v. Slakey*, 190 F. Supp. 2d 95, 103 (D. Mass. 2001). These subsections also set parameters that ensure that that vicarious liability can be found, based on the facts, despite certain factors that might in the context of other laws prevent a finding of vicarious liability. "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment." See, e.g. *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 209 (1991). See also *Chew v. Hybl*, 1997 WL 33644581, \*12 (N.D. Cal. 1997); *Beliveau v. Caras*, 873 F. Supp. 1393, 1399–1400 (C.D. Cal. 1995). These subdivisions ensure that the minimum standards of the FHA continue to apply.

## **Article 7. Discriminatory Effect**

### **§ 12060. Practices with a Discriminatory Effect.**

The purpose of this section is to provide greater clarity to the public as to when practices are unlawful based on their discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). This section is necessary to provide clarity to the public about the scope and basis of discriminatory effect under Government Code section 12955.8, subd. (b), particularly in light of some differences between FEHA, the federal Fair Housing Act, and recent federal case law. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

Additional referenced sections provide background for the proposed

regulation. Government Code sections 12920 and 12921 set out the overall public policies and purposes of FEHA in regard to housing as a civil right, providing context for the definitions. Government Code sections 12926 and 12927 provide additional context for the meaning of a variety of terms, including “discrimination,” and “person” as they are used in this section and further defined in proposed section 12005. Government Code section 12955 identifies specific unlawful practices that might have a discriminatory effect.

Article 7 utilizes definitions of “Business establishment” at proposed section 12005, subd. (f), “Legitimate” at proposed section 12005, subd. (s), “Nondiscriminatory” at section 12005(t), and “Substantial” at section 12005, subd. (ff).

Government Code section 12955.8(b) sets out very specific standards for establishing when practices are unlawful based on their discriminatory effect. It is addressed specifically to unlawful practices in the context of housing discrimination. (“For purposes of this article, in connection with unlawful practices:....”) It establishes similar but separate standards for businesses and nonbusiness entities regarding discriminatory effect, it provides a reference for the definition of businesses in this context, and it specifically establishes burdens of proof in regards to discriminatory effect. It also provides specific direction as to the consideration of less restrictive alternatives. See prior California interpretations and the legislative history of Government Code Section 12955.8. *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99, 1988 WL 242651; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm). Thus, the Council proposes regulations that follow the statutory directives, by providing different subdivisions for businesses, non-business entities, and less restrictive alternatives, and that are consistent with prior California interpretations of these provisions.

Pursuant to Government Code 12955.6, the proposed section differs from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA. Specifically, Government Code section 12955.8 subd. (b) provides much greater specificity and in some ways greater rights and remedies for aggrieved persons than the federal law, specifically 24 C.F.R. section 100.500. See *HUD’s Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard*

(*HUD Discriminatory Effects Standard Final Rule*), 78 Fed. Register 11460 (Feb. 15, 2013). Accordingly, the proposed regulations provide considerably more specificity than the federal regulations. *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al*, 135 S.Ct. 2507, 2550 (2015) (Dissent) confirms that states can enact their own fair housing laws, including laws creating disparate impact liability, and referencing 42 U.S.C. § 3615 (recognizing local authority).

**§ 12060, subd. (a).**

The Council proposes to add this subdivision setting out the general rule that, pursuant to Government Code section 12955.8, subd. (b), liability may be established based on discriminatory effect absent a legally sufficient justification, even if the practice was not motivated by a discriminatory intent. This subdivision is necessary to provide clarity to the public about the scope and basis of discriminatory effect under Government Code section 12955.8, subd. (b), particularly in light of some differences between FEHA, the FHA and recent federal case law. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, subdivision (a) is parallel to 24 C.F.R. section 100.500. Since the federal provision accurately reflects California law, no significant change is required, only minor modifications for clarity and to include all protected bases under California law, which has broader coverage in many areas than the federal law. See, e.g., definition of “protected class” under proposed section 12005(z). The federal regulation is fully consistent with Government Code section 12955.8, subd. (b), including making it explicit that discriminatory effect is sufficient to establish liability even in the absence of discriminatory intent.

**§ 12060, subd. (b).**

The Council proposes to add this subdivision describing the different types of discriminatory effect, pursuant to Government Code section 12955.8, subd. (b). This subdivision is necessary to provide clarity to the public about the scope of discriminatory effect under Government Code section 12955.8, subd. (b), including to make explicit that discriminatory effect can be based on a practice that creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a protected class

and that discriminatory effect may exist even if only a single person suffers harm from the practice. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, proposed subdivision (b) is parallel to 24 C.F.R. section 100.500. Since the federal provision accurately reflects California law, no change is required, but the subdivision has been modified for clarity to include all protected bases under California law, which has broader coverage in many areas than the federal law. See, e.g., definition of “protected class” under proposed section 12005(z).

Proposed subdivision (a) also includes language parallel to 24 C.F.R. section 100.500 that includes a practice which “creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a protected class.” While this language is not explicit in Government Code section 12955.8, subd. (b), it is necessary to ensure that FEHA provides rights and remedies at least as protective as FHA pursuant to Government Code section 12955.6. See e.g. *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.*, 135 S.Ct. 2507, 2522-23 (2015); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Keith v. Volpe*, 618 F. Supp. 1132, 1150-1151 (C.D. Cal. 1985) (“In addition, there is a second type of racially discriminatory effect that a facially neutral decision about housing can produce. This is “the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.” *Arlington Heights*, 558 F.2d at 1290.”)

Subdivision (b) also makes explicit that while a practice has discriminatory effect when it has disparate impact on a group of individuals based on membership in a protected class, liability may exist even if only a single person who is a member of a protected class has actually suffered an injury from the practice.

### **§ 12061. Burdens of Proof in Discriminatory Effect Cases.**

The purpose of this section is to provide greater clarity as to the burdens of

proof that apply in determining whether housing practices are determined to be unlawful based on their discriminatory effect under FEHA, in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA provides greater protection than the FHA.

The proposed section sets out both the complainant's burden (subdivision (a)) and the respondent's burden (subdivision (b)). Subdivision (c) clarifies that the opposing party may rebut whether the party with the burden of proof in either subdivision (a) or (b) has met its burden. Finally, subdivision (d) provides guidance regarding the types of evidence that may be relevant in establishing or rebutting the existence of a discriminatory effect. The language in the proposed rule reflects the specific terms of section 12955.8, subd. (b).

The subsection is supported by prior California interpretations and the legislative history of Government Code Section 12955.8. *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99, 1988 WL 242651; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm).

Pursuant to Government Code 12955.6, the proposed section differs from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA. Specifically, it differs from the parallel federal law at 24 C.F.R. section 100.500(c) regarding burdens of proof. See *HUD Discriminatory Effects Standard Final Rule*, *supra* at 11473.

Because of the much greater specificity of the Government Code section 12955.8, compared to the federal common law development of the doctrine, the proposed regulations provide considerably more specificity and greater rights and remedies for aggrieved persons than the federal law. *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.*, 135 S.Ct. 2507, 2550 (2015) (Dissent) confirms that states can enact their own fair housing laws, including laws creating disparate impact liability, and referencing 42 U.S.C. § 3615 (recognizing local authority).

This proposed section is parallel to 24 C.F.R. section 100.500(c)(1) and (c)(2). Since those federal provisions accurately reflect California law, no significant change is required, only minor modifications to specifically reflect the California law. However, as discussed below, California law is different than federal law in regards to legally sufficient justification, providing greater protection, and therefore 24 C.F.R. section 100.500(c)(3) is not replicated here. See the discussion in proposed section 12062 for more explanation of the differences between federal and California law on legally sufficient justification.

**§ 12061, subd. (a).**

The Council proposes to add this subdivision identifying the complainant's burden of proof. This section is necessary to provide greater clarity in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute.

In particular, subdivision (a) of this section establishes that the complainant has the initial burden of proving that a challenged practice caused or predictably will cause a discriminatory effect. This is consistent with Government Code section 12955.8, subd. (b), but states the rule with additional clarity. Such clarity is necessary to assist the public and also to maintain consistency between the federal FHA and the FEHA, which both provide that plaintiff/complainant shall bear the initial burden of proof in a case involving discriminatory effect.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, this proposed subdivision is parallel to 24 C.F.R. section 100.500(c)(1). Since the federal provision accurately reflects California law, no change is required.

**§ 12061, subd. (b).**

The Council proposes to add this subdivision identifying the respondent's burden of proof. This subdivision is necessary to provide clarity about general scope of the respondent's burden of proof in rebutting a claim of disparate effect, referred to as a "legally sufficient justification," and how this burden fits into the burden-shifting framework. The subdivision refers the parties to section 12062 for more detail on the components of that

defense.

This subdivision is necessary to provide clarity to the public because the California statute is more specific and is different from FHA in ways that provide greater protection to individuals covered by FEHA. Pursuant to Government Code 12955.6, the proposed section differs from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA. Specifically, this proposed subdivision is consistent with federal law generally in that the respondent or respondent has the burden of proving that the challenged practice meets statutory requirements, but it provides more specifics that differ for business establishments and non-business establishments, as required by the explicit language of Government Code section 12955, subd. (b).

**§ 12061, subd. (c).**

The Council proposes to add this subdivision to provide clarity about the burden-shifting framework. The subsection clarifies that the opposing party may rebut whether the party with the burden of proof in either subdivision (a) or (b) has met its burden. This subdivision is necessary to provide clarity as to the general rule. The proposed section provides rights and remedies that are equal to or greater than those provided by the relevant federal guidance. While the federal regulations do not state this rule, it is consistent with both California and federal case law. *HUD Discriminatory Effects Standard Final Rule, supra* at 11472 (“Moreover, a respondent or respondent may avoid liability by rebutting the charging party’s or complainant’s proof of discriminatory effect.” (citing *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977))).

**§ 12061, subd. (d).**

The Council proposes to add this subdivision regarding the types of evidence that may be relevant in establishing or rebutting the existence of a discriminatory effect. This subdivision is necessary to provide clarity as to the range and types of evidence that might be relevant in a discriminatory effect case. The subsection provides clarity by enumerating a non-exhaustive list of types of evidence that may be relevant. The list is consistent with FHA law and is derived from both state and federal cases and federal guidance. See, e.g. *Sisemore v. Master Financial*, 151 Cal.App. 4th 1386, 1421 (Cal. Ct. App. 2017); *Dept. Fair Empl. & Hous. v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19, FEHC Precedential Decs. 1988–89, 1988 WL 242651, \*13 (“...[D]ifferences in the rates at which a protected group and others will be excluded, inferred from the known difference in some neutral characteristic of two groups, is a widely

accepted means of demonstrating adverse impact.”); *Keith v. Volpe*, 858 F.2d 467, 479 - 482 (9th Cir. 1988) (various types of evidence); U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (*HUD Guidance on FHA and Use of Criminal Records*), 3 - 4 (Apr. 2016); Joint Policy Statement on Discrimination in Lending, 59 FR 18,266, 18269 - 18270 (Apr. 15, 1994; *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *HUD Discriminatory Effects Standard Final Rule, supra*.

### **§ 12062. Legally Sufficient Justification.**

The purpose of this section is to provide greater clarity as to the components of the defense of legally sufficient justification that must be proved by different types of respondents in order to defeat a claim of discriminatory effect, what evidence is required, and that the determination of whether an interest or purpose is sufficient is a case-specific inquiry. This section is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the FHA.

### **§ 12062, subd. (a).**

The Council proposes to add this subdivision to specify the prongs necessary for a business establishment to establish that its actions had a legally sufficient justification and therefore did not create liability for a discriminatory effect. This proposed subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the FHA.

Pursuant to Government Code 12955.6, the proposed subdivisions 12062 (a) and (b) differ from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA. Specifically, FEHA recognizes that non-business establishments (e.g. public entities) have different purposes than business establishments, and that their burden for establishing a legally sufficient justification should reflect that difference. Federal regulations and case law also recognize this difference. *HUD Discriminatory Effects Standard Final Rule, supra* at 11470 - 11471.

However, FEHA is more explicit, creating a similar test but one that takes into account the different purposes. In particular, Government Code Section 12955.8, subd. (b) establishes comparable, but different, standards for the burden of showing a legally sufficient justification for business establishments compared to non-business establishments. Proposed section 12062, subd. (a) therefore identifies the elements, based on the specific language of Government Code 12955.8, subd. (b), by which a business establishment can establish a legally sufficient justification. Similarly, proposed section 12062, subd. (b) identifies the elements, based on the specific language of Government Code 12955.8, subd. (b), by which a non-business establishment, such as a public entity, can establish a legally sufficient justification. The parallel federal law at 24 C.F.R. section 100.500 is different. 24 C.F.R. section 100.500(b) applies one standard to all types of respondents, including both public and private entities, because the definition of “discriminatory housing practice” under the FHA makes no distinction between these entities. *HUD Discriminatory Effects Standard Final Rule, supra* at 11470 -11470. *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al*, 135 S.Ct. 2507, 2522-2523 (2015) (recognizing distinct types of defendants and concurring with HUD). See 42 U.S.C. 3602(f) (defining “discriminatory housing practice” as “an act that is unlawful under Section 804, 805, 806, or 818,” none of which distinguish between public and private entities. See also *Nat’l Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F.Supp. 2d 46, 59-60 & n.7 (D.D.C. 2002) (same). Pursuant to Government Code 12955.6, because Government Code 12955.8 specifically distinguishes between the burdens of proof by different types of respondents, and because those provisions provide greater protection to individuals protected by the FEHA, they are set out in proposed section 12062.

Subdivisions (a)(1)-(2) articulate specific standards for business establishments based upon Government Code section 12955.8, subd. (b) that are consistent with state and federal law.

Subdivision (a)(3) articulates an additional element, as set forth in Government Code section 12955.8, subd. (b)(1), which applies both to business entities and other persons.

Pursuant to Government Code 12955.6, the proposed subdivisions 12062 (a)(3) and (b)(4) differ from the FHA and implementing regulations on the issue of which party carries the burden of proof on the existence of less restrictive alternatives because the federal law provides fewer rights and

remedies than FEHA. Specifically, Government Code section 12955.8, subd. (b)(1) sets out a different allocation of the burden of proof on less restrictive alternatives than 24 CFR 100.500(c)(3). 24 CFR 100.500(c)(3) places that burden on a plaintiff or complainant. Proposed subdivisions 12062, subd. (a)(3) and 12062, subd. (b)(4) are based on Government Code 12955.8, subd. (b)(1): “Any determination of a violation pursuant to this subdivision shall consider whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect.” This provision does not explicitly place the burden of proof for establishing a less restrictive alternative on complainants or respondents. However, for purposes of clarity and to implement the statute, the regulation specifies which party carries the burden of proof on this element.

California precedent and substantial evidence in the legislative history demonstrate that both the former Fair Employment and Housing Commission and the California legislature considered that this burden was most appropriately placed on the respondent. *See, e.g. DFEH v. Merribrook Apts.*, (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99, 1988 WL 242651, a FEHC Precedential Decision, held: “A housing practice that has adverse impact on children and households with children, therefore, will be found lawful only if we determine that the practice is necessary to serve a compelling and well-established public purpose and that there is available no reasonable alternative means of serving the same need with less discriminatory impact. **Respondents have plainly not met this standard here.**” (Id. at 15, emphasis added.) Importantly, the legislative history of 12955.8 cited *Merribrook* with approval. Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm). The last substantive legislative analysis before the bill was enacted states: “The nature of a respondent's burden of justification has been phrased in different ways by the courts. ...However, the cases generally have required a respondent/defendant to prove that no less discriminatory practice or policy exists.” Senate Comte Analysis 5/5/93 29593 bytes; BILL ANALYSIS, SENATE COMMITTEE ON JUDICIARY, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for Hearing date: August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm).) The same bill analysis cites *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d

Cir.) aff'd per curiam, 109 S.Ct. 276 (1988) and *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977). Both of these courts placed the burden on defendant. (The only other case cited in this regard is *Betsy v. Turtle Creek Assoc.*, 736 F.2d 983 (4th Cir. 1974) which did not reach the allocation of burden issue.) The legislative history also cites *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99, 1988 WL 242651 with approval. Pursuant to Government Code 12955.6, the proposed subdivisions differ from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA.

Further, a respondent is in a better position to bear this burden because of its greater knowledge of, and access to, information concerning the respondent's interests, what alternative policies are available, and whether an alternative could equally or better serve their interests while having less discriminatory effects. This placement of the burden does not require a respondent to "prove a negative." Rather, this allocation of the burden only requires the respondent to identify what policy options it considered and how and why it decided to select the policy it chose as the least discriminatory alternative.

While the proposed regulation's placement of this burden on the respondent is different than the burden on this issue set out in 24 C.F.R. section 100.500(c)(3), the proposed subdivisions will provide greater protection of the rights of members of protected classes than the federal law, as required by Government Code 12955.6.

**§ 12062, subd. (b).**

The Council proposes to add this subdivision to specify the specific elements necessary for a person other than a business establishment to establish that its actions had a legally sufficient justification and therefore did not create liability for a discriminatory effect. This proposed subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the FHA.

Government Code section 12955.8, subd. (b) sets out standards articulated in proposed section 12062 subd, (b)(1), (2) and (4) which apply both to business establishments and to non-business establishments. Reflecting the language in Government Code section 12955.8, subd. (b), the

standards in section 12062(a) that apply to business establishments use “business interest” while the standards in section 12062(b) that apply to non-business establishments use “purpose.”

Subdivision (b)(3) articulates an additional element explicitly set forth in Government Code section 12955.8, subd. (b)(1) that only applies to a person other than a business establishment.: “The identified purpose is sufficiently compelling to override the discriminatory effect.” The proposed subdivision is necessary to provide guidance to the public because section 12955.8, subd. (b) sets out a distinct additional criteria for non-business establishments to establish that its actions had a legally sufficient justification, because non-business entities, particularly government entities, operate for reasons other than business profit.

Pursuant to Government Code 12955.6, the proposed section differs from the FHA and implementing regulations because the federal law provides fewer rights and remedies than FEHA. Specifically, subdivision (b)(3) articulates an additional element that is not included in *HUD Discriminatory Effects Standard Final Rule, supra*; 24 C.F.R. Part 100.500. Because this element requires non-business establishments to meet an additional element--demonstrating the importance of their purposes against the amount of discriminatory effect they cause—not required of business establishments, the proposed regulations provide rights and remedies that meet or exceed the federal standards, as required by Government Code 12955.6.

**§ 12062, subd. (c).**

The Council proposes to add this subdivision to make explicit in this context the general rule of law that the defense of a legally sufficient justification must have an evidentiary support. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955.8, subd. (b). This proposed subdivision is necessary to prevent any misunderstanding about the necessary evidentiary basis for this defense. This subdivision is consistent with the comparable FHA provisions. *HUD Discriminatory Effects Standard Final Rule, supra* at 11463; 24 C.F.R. Part 100.500(b)(2).

**§ 12062, subd. (d).**

The Council proposes to add this subdivision to emphasize that the court’s determination regarding Section 12062(a)(1) and (b)(1) requires a case-specific, fact-based inquiry. There are no interests that are *per se* substantial, legitimate, and nondiscriminatory. This proposed subdivision is

necessary to prevent any misunderstanding about the necessary evidentiary basis for this defense. This provision is consistent with the comparable FHA provisions. *HUD Discriminatory Effects Standard Final Rule, supra* at 11471.

### **§ 12063. Relationship of Legally Sufficient Justification to Intentional Violations.**

The purpose of this section is to provide greater clarity as to the relationship between the defense of legally sufficient justification and a claim of intentional violations, in order to assist the public in the interpretation and implementation of Government Code section 12955.8. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The rule that demonstrating a practice is supported by a legally sufficient justification under a discriminatory effect analysis may not be used as a defense against a claim of intentional discrimination is supported in California law. *See, e.g. Johnson v. Macy*, 145 F.Supp.3d 907, 917 (2015). As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in 24 C.F.R. section 100.500(d) and relevant federal case law.

## **Article 11. Financial Assistance Practices**

### **§ 12100. Financial Practices with Discriminatory Effect.**

The purpose of this section is to provide greater clarity as to specified practices involving financial assistance that may give rise to a claim of discriminatory effect. This is necessary in order to assist the public in the interpretation and implementation of the relationship among various sections of FEHA. “Financial assistance” is defined in proposed section 12005, subd. (o).

Government Code sections 12927, subd. (c)(1), 12955, subds. (a) and (e), 12955.7, and 12955.8, subd. (b) are all applicable to proposed section 12100. Section 12927 subd. (c)(1) describes unlawful practices that may involve financial assistance. Government Code section 12955, subd. (e) explicitly makes discrimination in the provision of financial assistance unlawful. Government Code sections 12955, subd. (a) and 12957 address harassment. Government Code section 19955.8, subd. (b) addresses discriminatory effect. Further clarity is necessary to ensure compliance

with the law and to prevent misconstruction of provisions in the various statutory provisions and proposed regulations as they relate to each other.

Proposed section 12100 makes explicit various types of conduct related to financial assistance that could give rise to a claim of discriminatory effect, such as the provision of financing in a manner that has a discriminatory effect on protected classes consistent with the provisions of proposed Article 7, as more specifically addressed in that Article. Similarly, the proposed section addresses practices involving the provision of financial assistance which could involve unlawful harassment, as more specifically addressed in proposed section 12120.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions) (includes financial assistance). See *HUD Final Rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act (HUD Final Rule Harassment)*, 81 Fed.Reg. 63054 (Sept. 14, 2016); and *HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standards (HUD Discriminatory Effects Standard Final Rule)*, 78 Fed. Register 11460; *Id.* at 11461 – 62 (implementing the Federal Housing Enterprises Financial Safety and Soundness Act (FHEFSSA, 24 C.F.R. 81.42 (2012); *Id.* at 11464 (structure of revised regulations), *Id.* at 11475 (consistency with Equal Credit Opportunity Act), and *Id.* at 11478-79 (Feb. 15, 2013).

**§ 12100, subd. (a).**

Proposed subdivision 12100, subd. (a) is necessary to provide guidance regarding the range of discriminatory practices that involve financial assistance that could give rise to a discriminatory effect claim in accord with Article 12 of the proposed regulations. A non-exhaustive set of practices are identified in proposed section 12100, subd. (a)(1) through (a)(8). The proposed subdivision incorporates discriminatory conduct from Government Code section 12927, subd. (c)(1) as well as Government Code section 12955, subd. (e). For example, proposed section 12100, subd. (a)(4) addresses the imposition of different terms or conditions on the availability of financial assistance in a manner that results in a discriminatory effect on members of one or more protected classes. See Government Code section 12955, subd. (e).

Proposed subdivisions 12100, subds. (a)(7) and (8) also specifically address claims involving financial assistance that may sound in harassment, to further clarify the relationship with proposed section 12120.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions) (includes financial assistance). See *HUD Discriminatory Effects Standard Final Rule, supra*, and *HUD Final Rule Harassment, supra*.

**§ 12100, subd. (b).**

Proposed section 12100 relates only to conduct that may give rise to a discriminatory effect allegation. Therefore proposed subdivision (b) is necessary to make explicit the relationship of section 12100 to possible intentional discrimination claims involving financial assistance.

As required by Government Code section 12955.6, proposed section 12100 is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions) (includes financial assistance). See *HUD Discriminatory Effects Standard Final Rule, supra*, and *HUD Final Rule Harassment, supra*. The parallel federal regulations cover both intentional discrimination and discriminatory effect. Proposed subdivision 12100 only covers discriminatory effect, and does not yet address intentional discrimination practices. Therefore subdivision 12100(b) is necessary to correct any misinterpretation that practices involving discriminatory intent are not covered by FEHA, and also to establish that in some instances, based on the facts, covered conduct may give rise to both a discriminatory effect claim and a discriminatory intent claim.

**Article 12. Harassment and Retaliation**

**§ 12120. Harassment.**

The purpose of this subdivision is to proscribe harassment in accord with Government Code sections 12927(c)(1) and 12955(a) and (f), to describe

two main types of harassment, and to provide examples of what constitutes harassment. This subdivision is necessary to implement the various statutory provisions and to provide clarity in light of the different statutory provisions involved.

The definition of “discrimination” in Government Code section 12927(c)(1) explicitly includes harassment in connection with housing accommodations. Government Code section 12955(a) makes it unlawful to harass any individual covered by the Act because they are a member of a protected class. Government Code section 12955(f) makes it unlawful to harass any individual for retaliatory purposes, as further described in proposed section 12130. But FEHA does not define the term “harassment” as used in these statutory provisions, and the term has broad general usage without specific parameters. Therefore, specific guidance is necessary to clarify the term “harass.” By establishing standards for evaluating claims of quid pro quo and hostile environment harassment, the rule provides guidance to persons providing housing, housing related services, and housing opportunities so that they can ensure that their properties or businesses are free of unlawful harassment. It also provides clarity to persons who have potential claims of harassment, and their representatives, regarding how to assess potential claims of illegal harassment under FEHA.

Proposed section 12120 is necessary to ensure consistency among Government Code sections 12927(c)(1), 12955(a) and (f), 12955.7 (which prohibits coercion, intimidation, threats, or interference with rights protected under FEHA); and Government Code section 12948 (which makes it an unlawful practice under FEHA for a person to deny or to aid, incite, or conspire in the denial of the rights created by Sections 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code).

Proposed section 12120 only addresses quid pro quo and hostile environment harassment, and does not address conduct generally referred to as harassment that may, for different reasons, violate Government Code sections 12927, 12955 or other provisions of FEHA, including Government Code sections 12948 and 12955.7. These other sections address conduct that could be considered harassment, in addition to quid pro quo and hostile environment harassment, and which could constitute retaliation, coercion, intimidation, threats, discrimination, or interference because of a protected characteristic. Similarly, conduct that constitutes quid pro quo and hostile environment harassment could violate more than one provision of FEHA. Proposed section 12120 applies broadly to all transactions, settings, and actions covered by the FEHA housing provisions.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 CFR 100.600, *Quid pro quo and hostile environment harassment*. See *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act Final Rule (HUD Final Rule Harassment)*, 81 Fed.Reg. 63054, 63066 – 63073, Sept. 14, 2016).

In addition, courts have held that when analyzing elements and analysis for sexual harassment claims under the FEHA and California Civil Code section 51.9, one can consider the analysis of similar claims under the FHA and under Title VII. See, e.g. *Brown v. Smith*, 55 Cal.App.4th 767, 780–84 (Ct.App.1997) (analyzing the FEHA); *Salisbury v. Hickman* (E.D. Cal. 2013) 974 F.Supp.2d 1282, 1293–1294. While analysis of case law under Title VII and the FEHA’s employment regulations is useful, it is not dispositive. One’s home is or should be a place of privacy, security, and refuge, and that harassment that occurs in connection with housing can be far more intrusive, violative and threatening than harassment in the more public environment of one’s work place. Further, the U.S. Supreme Court has recognized that individuals have heightened expectations of privacy within the home. See, e.g. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (“[w]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”) In order to accomplish these goals, some of the harassment standards in this proposed regulation may vary from similar regulations in the employment context in order to provide more protection to individuals covered by the FEHA in the housing context. See, e.g. *Salisbury v. Hickman*, *supra* at 1292 (“Courts have recognized that harassment in one’s own home is particularly egregious and is a factor that must be considered in determining the seriousness of the alleged harassment.”) *Salisbury* cites to *Quigley*, 598 F.3d 938 (8th Cir.2010) at 946: “We emphasize that Winter subjected Quigley to these unwanted interactions in her own home, a place where Quigley was entitled to feel safe and secure and not flee, *which makes Winter’s conduct even more egregious.*” (Emphasis added.) See also *HUD Final Rule Harassment*, *supra* at 63056 *et seq.*, Section II, Background.

**§ 12120, subd. (a).**

The purpose of this subdivision is to provide guidance regarding two types of harassment, quid pro quo harassment and hostile environment

harassment. The proposed subdivision is necessary due to the complexity of these concepts, which are both encompassed by the single word “harass” in subsections 12927 and 12955(a) and (f) of the Government Code. The proposed subdivision clarifies the differences between the two types of harassment, and provides additional guidance as to the elements and circumstances that will give rise to liability under each type. The same conduct may violate one or more of these provisions.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.600 and Final Harassment Rule at 63066 - 63073.

**§ 12120, subd. (a)(1).**

The proposed subdivision is necessary to provide guidance as to the meaning and scope of “quid pro quo harassment.” The term “quid pro quo harassment” has no meaning in non-legal usage, but is derived from both state and federal case law under FEHA and FHA.

The subdivision makes explicit that an unwelcome request or demand may constitute quid pro quo harassment even if an individual acquiesces because individuals may acquiesce with unlawful demands for many reasons, including due to fear of harm or adverse consequences if they do not acquiesce. “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 68. While *Meritor* was an employment case, the principle is equally, if not more, relevant in housing cases.

In addition, there are circumstances where individuals other than those who have been the target of harassment also may have a claim for harassment. For example, if a person regularly or routinely confers housing benefits based upon the granting of sexual favors, such conduct may constitute quid pro quo harassment or hostile environment harassment against others who do not welcome such conduct under the Act, regardless of whether any objectionable conduct is directed at them and regardless of whether the individuals who received favorable treatment willingly granted the sexual favors. Such “favoritism,” depending on the facts, may adversely impact other individuals protected by FEHA. See, e.g., EEOC Policy Guidance No. N-915.048, Employer Liability under Title VII for Sexual Favoritism

(Jan. 12, 1990), and *HUD Final Rule Harassment, supra*.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA at 24 C.F.R. section 100.600(a)(1). The proposed subdivision includes a slightly more expansive list of covered conduct than 24 C.F.R. section 100.600(a)(1), to more accurately reflect the scope of FEHA.

**§ 12120, subd. (a)(2).**

The term “hostile environment harassment” has no meaning in non-legal usage, but is derived from both state and federal case law under FHA and FEHA. Therefore it is necessary to provide clarity as to the meaning and scope of hostile environment harassment, including factors to be considered in a “totality of the circumstances” analysis used to determine the existence of such harassment. Among other things, the subdivision is intended to clarify that since not every individual disagreement or mistaken remark constitutes hostile environment harassment, it is necessary to set out parameters for what conduct does constitute such harassment. The term “hostile environment harassment” applies to a broad range of activities.

The factor of “location” in subdivision (a)(2)(A)(i) requires consideration of the heightened rights for privacy and freedom warranted in one’s home. *Frisby v. Schultz, supra*; and Final Harassment Rule at 63063.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA at 24 C.F.R. section 100.600(a)(2) and *HUD Final Rule Harassment, supra*. The proposed subdivision includes a slightly more expansive list of covered conduct than 24 C.F.R. section 100.600(a)(2), to more accurately reflect the scope of FEHA. This subdivision also provides greater and more explicit protection to protective classes than section 100.600(a)(2), because it specifies that hostile environment harassment can include any adverse action, a broad term defined in proposed section 12005(a) of these regulations, so long as the adverse action is sufficiently severe or pervasive or otherwise violative of Article 12 of these proposed regulations. Among other things, adverse action could include bullying, social isolation and neglect, and preferential treatment. See, Final Harassment Rule at 63061-62.

Subdivision 12120(a)(2)(A)(ii) provides that “neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists or existed,” but that evidence of such harm may be relevant. As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the in the FHA at 24 C.F.R. section 100.600(a)(2)(i)(B) and HUD Final Rule Harassment at 63720-01. “Evidence of such harm is but one of many factors to be considered in the totality of circumstances. However, the severity of psychological or physical harm may be considered in determining the proper amount of any damages to which an aggrieved person may be entitled.” *Id.*

Subdivision 12120(a)(2)(A)(iii) establishes a reasonable person standard for determining whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment. As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. HUD noted in the Final Harassment Rule at 63720-01, and cases cited therein in footnote 22, that “[i]t is well recognized that claims of hostile environment harassment should be evaluated from the perspective of a reasonable person in the aggrieved person's position.”

**§ 12120, subd. (b).**

The Council proposes to include this subdivision regarding the relationship between an affirmative defenses to an employer’s vicarious liability for hostile environment harassment by a supervisor under Title VII and FEHA. This subdivision is necessary to clarify that the federal Title VII affirmative defense to vicarious liability by a supervisor is not available under California housing law.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.600(a)(2)(ii) and Final Harassment Rule. While analysis of case law under Title VII and FEHA’s employment regulations is useful, housing and the sanctity of the

home require a different analysis than employment law in many circumstances, especially issues of harassment. See, e.g. *Frisby v. Schultz*, *supra*, and Final Rule at 63063-64.

Proposed subdivision (b) is also consistent with California employment regulations.

**§ 12120, subd. (c).**

The Council proposes to add a non-exhaustive list of examples of types of conduct that may constitute harassment. This list is necessary to clarify and provide guidance to the public about conduct constituting harassment under this section.

Subdivision (c)(3) provides a requirement that consideration of whether signage constitutes visual harassment must be evaluated in the context of those instances where the legislature has identified some visual conduct to be protected in the housing context. This subdivision is necessary to make the proposed subdivision consistent with other California statutes that are not in conflict with FEHA. Civil Code section 1940.4 specifically protects designated political signs placed by tenants, subject to certain restrictions. Civil Code section 4710 protects noncommercial signs in units in common interest developments, subject to certain conditions, except as required for the protection of public health or safety or if the posting or display would violate a local, state, or federal law. Note that Civil Code section 4710 does not protect signs that would otherwise violate FEHA or the FHA.

Proposed subdivision (c)(7) incorporates into the definition of harassment actions revealing private information to a third party without an individual's consent, unless such disclosure is required by law or is permitted in the context of proposed section 12176(b)(relating to gathering information necessary to determine whether to grant or deny a reasonable accommodation request by a person with a disability.)

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA at 24 C.F.R. section 100.600(b) and Final Harassment Rule. The proposed subdivision expands on the types of conduct identified in the 24 C.F.R section 100.600(b) ("written, verbal, or other conduct, and does not require physical contact,") and provides additional examples. The first four examples – verbal harassment, physical harassment, visual forms of harassment and unwelcome sexual conduct – also parallel FEHA's

employment regulations regarding harassment (Cal. Code Regs., tit. 2, § 11019) but provide additional clarification appropriate to the housing context.

**§ 12120, subd. (d).**

The Council proposes to add this subsection relating the number of incidents of harassment to what is required to prove a discriminatory housing practice. This subsection is necessary to clarify that, consistent with case law and with federal law, a single incident of harassment can constitute either hostile environment harassment (if sufficiently severe) or quid pro quo harassment.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA at 24 C.F.R. section 100.600(c) and Final Harassment Rule. For clarity, the subdivision has been modified to more accurately reflect the broader scope of FEHA in regard to protected classes.

**§ 12120, subd. (e).**

The Council proposes to add this subsection defining the persons protected from harassment under the Act. This subsection is necessary to clarify the scope of conduct that is protected. Pursuant to Government Code section 19255(m), this includes conduct based not just on an individual's membership in a protected class, but also on a perception that the individual is a member of a protected class or on their provision of aid or encouragement to an individual exercising the rights protected by FEHA.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, the *HUD Final Rule Harassment*, supra, and federal law.

**§ 12120, subd. (f).**

The Council proposes to add this subsection regarding the relationship between this section and rights protected under the First Amendment to the United States Constitution. This subsection is necessary, particularly in instances of verbal or visual harassment under subdivision (c)(1) and (3), because First Amendment issues may be relevant in certain circumstances related to verbal or visual harassment. The proposed regulations acknowledge that consideration. However, not all speech is protected,

particularly acts of coercion, intimidation, or threats of bodily harm, which could be a component of conduct constituting harassment. See Government Code section 12955.7, Coercion, intimidation, threats, or interference with rights.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA and Final Harassment Rule. The Supreme Court has stated that “true threats” have no First Amendment Protection. See Final Harassment Rule at 63060, citing to *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

### **§ 12130. Retaliation.**

The purpose of this section is to describe the scope and standards for claims of retaliation under FEHA. This is necessary to clarify and implement two inter-related provisions of FEHA, Government Code sections 12955.7 and 12955, subd. (f).

Government Code section 12955.7, Coercion, intimidation, threats, or interference with rights, provides: “It shall be unlawful to coerce, intimidate, threaten, *or interfere with* any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section 12955 or 12955.1.” (emphasis added). Retaliation is a type of “interference,” as explained further below.

Government Code section 12955, subd. (f) provides in a more specific context: “[it shall be unlawful for] any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner’s dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.”

These two overlapping statutory provisions must be interpreted in a manner that best accomplishes the aim of both provisions: to protect individuals covered by FEHA in exercising their fair housing rights from conduct by

others that deters or punishes the exercise of those rights. Therefore, proposed section 12130, Retaliation, is broadly framed to address retaliation that may occur in either context. This includes prohibiting retaliation both by owners, pursuant to Government Code 12955, subd. (f), and persons (including owners), as addressed in Government Code section 12955.7. It also covers retaliation under any provision of FEHA, thus addressing retaliation for acts “under this part” pursuant to section 12955(f) and retaliation for exercising rights “granted or protected by Section 12955 or 12955.1,” pursuant to section 12955.7.

Proposed section 12130 applies broadly to a wide assortment of potential respondents and defendants, including broad “owners” in Section 12005, subd. (u) and “persons” in Section 12005, subd. (v). *See, e.g. Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), *certiorari denied*, 122 S.Ct. 1607 (2002) (independent fair housing services provider had standing under FEHA to bring retaliation claim against city). It also applies broadly to all activity covered by FEHA, including residential real estate-related transactions (as defined in Section 12005, subd. (dd)), financial assistance (as defined in Section 12005, subd. (o)), and public and private land use practices (as defined in Sections 12005(aa) and (y) respectively). *See, e.g. United States v. Hayward*, 36 F.3d 832, 835 (9th Cir.1994) (“[I]nterference, in particular, has been broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws.”) (Internal citations omitted). Proposed section 12130 protects all “aggrieved persons” (as defined in Section 12005, subd. (b)), and covers all “adverse actions” (as defined in Section 12005, subd. (a)). Broad protections against retaliation are necessary to fully implement Government Code sections 12955, subd. (f) and 12955.7.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided at 42 U.S.C. section 3617, Interference, coercion, or intimidation, and 24 C.F.R. section 100.400. Section 3617 provides: “It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the FHA].” The language in section 3617 is directly parallel to Government Code section 12955.7, which was added by the California legislature in to bring FEHA into substantial compliance with the FHA, including with section 3617. Stats.1993, c. 1277 (A.B.2244), § 6. The HUD regulation implementing

section 3617, 24 C.F.R subsection 100.400(c)(5), which includes retaliatory conduct as a type of conduct covered by section 3617 was added in 1989, so this interpretation was in effect when the California Legislature adopted A.B. 2244 in 1993. Therefore, this subdivision provides rights and remedies at least as great as those provided in Section 3617 and 24 C.F.R. subsection 100.400(c)(5).

For all of the reasons stated herein, including the text and legislative history of the provision, retaliation is included within the ambit of the obligations of Government Code section 12955.7, and this subdivision is necessary to provide consistency between Government Code sections 12955.7 and 12955.

**§ 12130, subd. (a).**

The Council proposes to state the general rule prohibiting retaliation in a succinct manner. This is necessary to provide context for the additional clarification in the following subsections. As discussed above, the proposed rule has broad application, and relies on the definitions of “persons” in Section 12005, subd. (v) (which incorporates “owners”); “aggrieved persons” (as defined in Section 12005, subd. (b)); “adverse actions” (as defined in Section 12005, subd. (a)); “protected activity” (as defined below in Section 12130, subd. (c)); and “purpose” (as defined below in Section 12130, subd. (e)).

**§ 12130, subd. (b).**

This subdivision is necessary to clarify an issue that is often misunderstood and to make explicit that a person can raise a retaliation claim even if they do not have a separate discrimination claim. The language of Government Code sections 12955, subd. (f) and 12955.7 does not require that an individual have an underlying discrimination claim. Government Code section 12955, subd. (f) provides that retaliation can be asserted by a person “who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part.” None of these actions require the person to have a separate claim of discrimination. Similarly, Government Code section 12955.7 covers actions taken on account of the person “having exercised or enjoyed, or ...aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected...” Nothing in these statutes requires the aggrieved person to also have a claim of discrimination under other provisions of FEHA.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided at 42 U.S.C. section 3617, Interference, coercion, or intimidation, and 24 C.F.R. section 100.400.

**§ 12130, subd. (c).**

The Council proposes to add the definition of “protected activity.” This addition is necessary to clarify a term used in the general prohibition on retaliation. The subdivision draws from a variety of sources, including actions specifically mentioned in Government Code sections 12955, subd. (f) and 12955.7, to provide examples of a wide range of activities that are protected under the statute from retaliation. The term “protected activity” is to be interpreted broadly and consistently with other fair housing laws. As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided at 42 U.S.C. section 3617 and 24 C.F.R. sections 100.400(c)(5) and (c)(6), and California and federal case law. See *Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001)(aiding or encouraging tenants in the exercise of their fair housing rights); *Idaho Aids Found., Inc. v. Idaho Hous. & Fin. Ass’n*, 422 F. Supp. 2d 1193, 1204 (D. Idaho 2006)(same); *McColm v. San Francisco Hous. Auth.*, No. C 06-07378 CW, 2009 WL 2901596, at \*7–8 (N.D. Cal. Sept. 4, 2009)(filing lawsuits based upon alleged violation of fair housing rights).

**§ 12130, subd. (d).**

In order to provide clarity to participants in legal and administrative proceedings, this subdivision summarizes the burdens of the respective parties in establishing or rebutting a claims of retaliation. This subdivision is necessary to provide consistency when claims are being considered by courts or the department. The three elements of the aggrieved party’s *prima facie* case are: 1) engagement in a protected activity, as defined in subsection (c); 2) subjection to an adverse action, as defined in proposed Section 12005, subd. (a); and, (3) a causal link between the protected activity and the adverse action. The burden then shifts to the respondent or defendant to offer a legitimate non-discriminatory reason for the adverse action. If the respondent or defendant meets its burden, the aggrieved party then has the burden to demonstrate that the proffered reason is pretextual. These elements are drawn from the language of the statute and case law. Specifically, the leading case in applying FEHA’s claim of

retaliation to housing is *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir.2001). Walker articulates the following standard: “To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action; and (3) a causal link exists between the protected activity and the adverse action.... If a plaintiff has presented a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision... If the defendant articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive.” (*internal citations omitted*). (*Id.* at 1128).

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided at 42 U.S.C. section 3617 and 24 C.F.R. sections 100.400(c)(5) and (c)(6), including the federal case law described in the preceding subdivision.

**§ 12130, subd. (e).**

The Council proposes to add a definition of “purpose.” This definition is necessary: (1) to reconcile the “dominant purpose” language in Government Code section 12955, subd. (f) and the “on account of” language in Government Code 12955.7, as both have been interpreted in the case law; (2) to harmonize the proposed subdivision with the usage of “dominant purpose” in Fair Employment & Housing Commission Precedential cases; and (3) to abide by the requirement of Government Code 12955.6 that “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations.”

First, the proposed subsection is necessary to resolve differences in terminology relating to causation between Government Code section 12955, subd. (f) and Government Code section 12955.7, and to arrive at a definition of purpose that is consistent with both of these overlapping statutory sections. The term “dominant purpose” was part of the original adoption of section 12955. Stats.1980, c. 992, § 4. The term is not defined in the Act. In contrast, Government Code section 12955.7 uses the term “on account of” to describe the necessary causation. The California legislature added Government Code section 12955.7 in order to bring FEHA into substantial compliance with the FHA, including with 42 U.S.C.

section 3617. Stats.1993, c. 1277 (A.B.2244), § 6. Specifically, Government Code section 12955.7 was added by AB 2244 in order to make FEHA consistent with 42 U.S.C. section 3617 and 24 C.F.R. 100.400, which also use the term “on account of.” Both Government Code section 12955, subd. (f) and Government Code section 12955.7 could apply to the same facts under numerous situations which could cause confusion as to whether one or two causation standards apply. In order to avoid confusion and to harmonize the meaning of “purpose” as between the two FEHA provisions, the Council defines a single meaning of “purpose” for both Government Code section 12955, subd. (f) and Government Code section 12955.7 in the proposed section 12130, subd. (e).

Second, the proposed subdivision is necessary to harmonize a single meaning of “purpose” with the usage of “dominant purpose” in Fair Employment & Housing Commission Precedential cases. These cases use the term “dominant purpose” from Government Code section 12955, subd. (f), but they have used the term in a manner similar to the term “on account of” as it is used in Government Code section 12955.7. Therefore, the Council has included in its proposed definition in the proposed section 12130, subd. (e) the operative language explaining the “dominant purpose” term from Fair Employment & Housing Commission Precedential cases that use the term. The leading case, *DFEH v. Atlantic North Apartments, et al.* (1983) FEHC Precedential Dec. No. 83-12 (1983 WL 36461), explained “dominant purpose” as follows: “The requisite inference of causality may be established by evidence which indicates that the timing of the adverse action in relation to the owner's notification of the protected activity is such that we can infer retaliatory motivation...or may be established by the non-existence of another plausible purpose for the owner's inimical actions.” (internal citations omitted) (*Id.* at 3). In other words, in explaining the meaning of “dominant purpose,” *DFEH v. Atlantic North Apartments* did not articulate a heightened standard of required proof, but instead offered examples of types of evidence that could prove causation under the standard. Later cases followed *Atlantic North Apartments*' use of the term. See, e.g. *DFEH v. McWay Family Trust* (1996) FEHC Precedential Dec. No. 96-07 (1996 WL 774922) (citing *DFEH v. Atlantic North Apartments* for meaning of “dominant purpose” and applying that case's definition); *DFEH v. O'Neill*, (2008) FEHC Precedential Dec. No. 08-08 (2008 WL 5869851) (citing *McWay*). In light of these cases, the Council's proposed definition clarifies the causation standard by non-exhaustively illustrating some types of evidence that could prove causation under the proposed subdivision, including the timing of the adverse action and the non-existence of another

plausible purpose.

Third, it is necessary to abide by the requirement of Government Code 12955.6 that “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 . . . .” Therefore, the term “dominant purpose” used in Government Code section 12955, subd. (f) cannot be interpreted to afford the classes protected under the FEHA fewer rights or remedies than under the FEHA and its implementing regulations. Without clarification, the term “dominant purpose” might be interpreted to require a heightened level of proof by a complainant regarding the degree of causation between the protected activity and the adverse action. However, the federal cases applying the parallel provision in FHA do not require such proof. In particular, the phrasing of the causation requirement in *Walker* (“a causal link exists between the protected activity and the adverse action”)(emphasis added) does not modify the required causal link with any heightened standard. Nor do the cases applying the causation requirement require any heightened proof. See, e.g. *Walker v. City of Lakewood*, 272 F.3d 1114, 1130 (9th Cir. 2001); *Idaho Aids Found., Inc. v. Idaho Hous. & Fin. Ass’n*, 422 F. Supp. 2d 1193, 1204 (D. Idaho 2006); *McColm v. San Francisco Hous. Auth.*, No. C 06-07378 CW, 2009 WL 2901596, at \*7–8 (N.D. Cal. Sept. 4, 2009). If the Council were to define “dominant purpose” as a heightened standard this would violate Government Code 12955.6 because by making it more difficult for complainants to prove their *prima facie* case under FEHA than under FHA, it would afford the classes protected under the Act fewer rights or remedies than under FHA and its implementing regulations. Therefore, in proposed section 12130, subd. (e), the Council proposes the following definition of “purpose”: “Purpose’ means that retaliation formed some part of the basis for the respondent’s action even if it was not the sole motivating factor. The purpose must be more than a remote or trivial factor.” This definition does not require a heightened level of proof of causation. And, to ensure that FEHA abides by the requirement of Government Code 12955.6, the proposed subdivision explicitly clarifies that “For purposes of section 12955(f) of the Act, ‘dominant purpose’ shall have the same meaning as purpose under this subsection.”

**§ 12130, subd. (f).**

Subdivision (f) is necessary is to provide clarity regarding the statutory language in Government Code section 12955, subd. (f) of the Government Code which states that nothing in the retaliation section is “intended to cause or permit the delay of an unlawful detainer action,” and to reconcile it

with the statutory language in Government Code section 12955.7, which contains no such language. Without this clarification, confusion could be created when interpreting the application of both Government Code sections 12955, subd. (f) and 12955.7 to the same set of facts in eviction actions.

Some lower courts have misinterpreted the unlawful detainer language in section 12955, subd. (f) to prohibit plaintiffs from raising retaliation as an affirmative defense. Raising an affirmative defense in an unlawful detainer does not in itself constitute an undue delay, because the Code of Civil Procedure explicitly establishes that affirmative defenses *can* be raised in unlawful detainers (unlike counterclaims), and courts routinely consider affirmative defenses during the course of resolving those actions. In fact, the Judicial Council of California's approved form for answers in unlawful detainers (UD-105) includes an option for tenants to choose which provides "Affirmative Defenses...Plaintiff served defendant with the notice to quit or filed the complaint to retaliate against defendant." (at 3(e)). Therefore, raising an affirmative defense of retaliation in good faith in an unlawful detainer does not in itself constitute an undue delay. The proposed subdivision is thus necessary to provide guidance to participants in unlawful detainer actions, making it explicit that retaliation can be raised as an affirmative defense. The proposed subdivision does not speak to the merits of any affirmative defense of retaliation raised in an unlawful detainer, which is left to the court. And trial courts, including unlawful detainer courts, retain general authority to prevent delay where warranted by particular conduct other than raising and litigating a claim of retaliation.

In addition, it is necessary to abide by the requirement of Government Code 12955.6 that "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.). In other words, the language concerning unlawful detainers used in Government Code section 12955, subd. (f) cannot be interpreted to afford the classes protected under the Act fewer rights or remedies than under the FHA and its implementing regulations. Without clarification, the language regarding unlawful detainer actions in Government Code section 12955, subd. (f) might be construed as limiting the application of Government code section 12955.7 in unlawful detainer actions. This would result in fewer remedies than provided in FHA under 42 U.S.C. section 3617 and 42 C.F.R. section 100.400, which parallel Government Code section 12955.7. In order to prevent this unlawful interpretation under Government Code section 12955.6, and to

ensure that Government Code section 12955.7 is interpreted in a manner that is fully consistent with these federal provisions as intended by the legislation that created the section, the proposed subdivision (f) makes it explicit that retaliation can be raised as a defense in unlawful detainer actions.

There are separate statutory and common law provisions relating to retaliation in unlawful detainer actions and other contexts (see, e.g., Civ. Code section 1942.5). Proposed subdivision (f) solely addresses retaliation as it arises under proposed section 12130. Nothing in this subdivision precludes raising claims of retaliation under multiple theories in unlawful detainer actions, as retaliation under this proposed subdivision is independent of and in addition to any other state statutory or common law basis for retaliation.

## **Article 14. Residential Real Estate-Related Practices**

### **§ 12155. Residential Real Estate-Related Practices with Discriminatory Effect.**

The purpose of this section is to provide greater clarity as to specified practices relating to residential real estate-related transactions that may give rise to a claim of discriminatory effect. This is necessary in order to assist the public in the interpretation and implementation of the relationship among various sections of FEHA. “Residential real estate” and “residential real estate-related transactions” are defined in proposed section 12005 subdivisions (cc) and (dd), respectively.

Government Code sections 12927, subd. (c)(1), 12955, subds. (a) and (i), 12955.7, and 12955.8, subd. (b) all are relevant to the proposed section. Government Code section 12955, subd. (i) explicitly makes discrimination in the provision of residential real estate unlawful. Government Code section 12927, subd. (c)(1) describes other unlawful practices that may involve residential real estate. Government Code section 12955.8, subd. (b) addresses discriminatory effect. Government Code sections 12955, sub. (a) and 12957 address harassment. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the various statutory provisions and proposed regulations as they relate to each other.

Proposed section 12155 makes explicit various types of conduct related to residential real estate-transactions that that could give rise to a claim of discriminatory effect consistent with the provisions of proposed Article 7, as

more specifically addressed in that Article. Similarly, the proposed section addresses practices involving residential real-estate related transactions which could involve unlawful harassment, as more specifically addressed in proposed section 12120.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions). See *HUD Final Rule Harassment, supra*, and *HUD Discriminatory Effects Standard Final Rule, supra*.

**§ 12155, subd. (a).**

Proposed subdivision 12155, subd. (a) is necessary to provide guidance regarding the range of discriminatory practices involving residential real estate-related transactions that could give rise to a discriminatory effect claim in accord with Article 12 of the proposed regulations. A non-exhaustive set of practices are identified in proposed subdivision (a)(1) through (a)(7). The proposed subdivision incorporates discriminatory conduct from Government Code sections 12927, subd. (c)(1) and 12955, subd. (i). The subdivision includes a non-exhaustive list of specific practices that could give rise to a discriminatory effect claim in accord with Article 12 of the proposed regulations. For example, subdivision (a)(2) concerns the establishment of terms and conditions of a residential real estate-related transaction that have a discriminatory effect on members of one or more protected classes, See Government Code section 12955, subd. (i)

Proposed section 12155, subd. (a)(6) and (a)(7), also specifically address claims involving residential real estate-related transactions that may sound in harassment, to further clarify the relationship with proposed section 12120.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions). See *HUD Discriminatory Effects Standard Final Rule, supra*, and *HUD Final Rule Harassment, supra*.

**§ 12155, subd. (b).**

Proposed section 12155, subd. (a) relates only to conduct that that may give rise to a discriminatory effect allegation. Therefore, proposed subdivision (b) is necessary to make explicit the relationship of section 12155 to possible intentional discrimination claims involving residential real estate-related transactions.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 24 C.F.R. section 100.500 (Discriminatory effect prohibited), and 24 C.F.R. Parts B (Discriminatory housing practices) and C (Discrimination in residential real estate-related transactions). See *HUD Discriminatory Effects Standard Final Rule, supra*, and *HUD Final Rule Harassment, supra*. The parallel federal regulations cover both intentional discrimination and discriminatory effect. Proposed section 12155 differs from the federal regulations in that it only covers discriminatory effect, and does not yet address intentional discrimination practices. Therefore subdivision 12155(b) is necessary to correct any misinterpretation that practices involving discriminatory intent are not covered by FEHA, and also to establish that in some instances, based on the facts, covered conduct may give rise to both a discriminatory effect claim and a discriminatory intent claim.

**Article 15. Discrimination in Land Use Practices**

**§ 12161. Discrimination in Land Use Practices and Housing Programs Prohibited.**

The purpose of this section is to identify specific actions that have been identified in FEHA, including in Government Code section 12955, subd. (l) and Government Code section 12927, subd. (c)(1) and in case law, as discriminatory practices in land use and housing programs. This section is necessary to provide clarity to the public about when claims may arise under FEHA regarding land use and housing programs. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute. In addition, providing detailed examples is necessary to ensure consistency with a variety of state statutory and common law provisions and with federal law where that law accurately reflects parallel California law.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and

remedies that are equal to or greater than those provided in the FHA, specifically, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act (HUD/DOJ Joint Statement Land Use Laws and Practices)* (Nov. 10, 2016); Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, *Group Homes, Local Land Use, and the Fair Housing Act*, August 18, 1999 (*DOJ/HUD Statement on Group Homes, Local Land Use and the Fair Housing Act and Related Q&A*), and Related Questions and Answers (*HUD/DOJ Updated Related Q&A re Group Homes, Local Land Use*), Updated August 6, 2015, <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>;; Chapter 1277, Statutes of 1993, Sec. 18 (Legislative Intent Language on 12955); H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24, reprinted in 1988 U.S. Code Cong. & Admin News at 2173, 2185 (Legislative Intent language on FHA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

This section provides greater specificity in some areas due to the more detailed language in Government Code section 12955, subd. (l) and related California statutes, for example, Civil Code sections 53 and 782 et seq., Government Code sections 12956.1 and 12956.2 (regarding restrictive covenants), Government Code 65008 (regarding other discriminatory land use practices), and California Attorney General Guidance on reasonable accommodations in land use practices. Letter to All California Mayors from the Office of the Attorney General, Bill Lockyer, A.G., re: “Adoption of a Reasonable Accommodation Procedure,” May 15, 2001, [ag.ca.gov/civilrights/pdf/reasonab\\_1.pdf](http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf).

**§ 12161, subd. (a).**

The Council proposes to add this subdivision to specify practices relating to regulation of land use ownership and land use benefits that may give rise to a claim of discriminatory intent under Government Code section 12955.8, subd. (a) or a claim of discriminatory effect under Government Code sections 12955.8, subd. (b) as implemented by Article 7. This section is necessary to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l), which prohibits discriminatory housing practices through public or private land use practices. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12161, subd. (a)(1).**

The Council proposes to add this subdivision to specify practices relating to regulation denying, restricting, conditioning, adversely impacting or rendering infeasible the enjoyment of residential uses, landownership, tenancies and other land use benefits that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA. This proposed subdivision is necessary to provide greater clarity in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). See, e.g. *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1147 (9th Cir. 2013) (reviewing city ordinance “which had the practical effect of prohibiting new group homes from opening in most residential zones” ); *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 713–714 (9th Cir. 2009) (holding that Section 3604(b) applies to discrimination in the “terms, condition or privileges of the sale or rental of a dwelling” and that the use of word “privileges” “implicates continuing rights such as the privilege of quiet enjoyment of the dwelling.”) Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. See *DOJ/HUD Statement on Group Homes, Local Land Use and the Fair Housing Act and Related Q&A, supra*.

**§ 12161, subd. (a)(2).**

The Council proposes to add this subdivision to specify practices relating to land use decisions and authorizations making housing opportunities unavailable or denying dwellings that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). See, e.g. *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1147 (9th Cir. 2013) (reviewing city ordinance “which had the practical effect of prohibiting new group homes from opening in most residential zones”). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12161, subd. (a)(3).**

The Council proposes to add this subdivision to specify practices relating to land use decisions and authorizations imposing different requirements than generally imposed that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of

Government Code section 12955, subd. (l). See, e.g. *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 945 (9th Cir. 1996). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

See DOJ/HUD Statement on Group Homes, Local Land Use and the Fair Housing Act and Related Q&A.

**§ 12161, subd. (a)(4).**

The Council proposes to add this subdivision to specify practices relating to the provision of governmental infrastructure, facilities or services, such as water, sewer, garbage collection, code enforcement, or other municipal infrastructure or services, in connection with residential uses that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA.

This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). Government Code section 12927, subd. (c)(1) (defining “discrimination” as including “provision of inferior terms, conditions, privileges, facilities, or services in connection with those housing accommodations). See, e.g. *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690 (9<sup>th</sup> Cir. 2009) (applying FHA and FEHA to municipality’s infrastructure decisions). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. In addition, providing detailed examples is necessary to ensure consistency with a variety of state statutory and common law provisions (e.g. Government Code section 65008, e.g. *Keith v. Volpe*, 858 F.2d 467, 485 (9th Cir.1988) (considering claim under Government Code section 65008). As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically *Keith v. Volpe*, 858 F.2d 467, 482-484 (9th Cir.1988) (considering FHA claims).

**§ 12161, subd. (a)(5).**

The Council proposes to add this subdivision to specify practices that deny, restrict, condition, adversely impact, or render infeasible the use of privileges, services or facilities relating to residential uses that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA.

This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (I). See, e.g. *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 713–714 (9th Cir. 2009). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, Discrimination in Terms, Conditions and Privileges and in Services and Facilities, 24 C.F.R. § 100.65.

**§ 12161, subd. (a)(6).**

The Council proposes to add this subdivision to specify that the use of, approval of, or implementation of restrictive covenants, including provisions in governing documents of common interest developments may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (I). The proposed subdivision clarifies that these practices are unlawful regardless of whether accompanied by a statement that the restrictive covenant is repealed or void. The proposed subdivision is consistent with numerous California statutes regarding restrictive covenants, including Government Code section 12955, subd. (I), Civil Code sections 53 and 782 et seq., and Government Code sections 12956.1 and 12956.2. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *Broadmoor San Clemente Homeowners Assn. v. Nelson*, 25 Cal. App. 4th 1, 9 (1994).

**§ 12161, subd. (a)(7).**

The Council proposes to add this subdivision regarding the adoption, operation or implementation of housing-related programs that may give rise to a claim of discriminatory intent or a claim of discriminatory effect under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955,

subd. (l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12161, subd. (a)(8).**

The Council proposes to add this subdivision that the failure of public or private land use practices to make reasonable accommodations to ordinances, rules, policies, practices or services, when required by law, may give rise to a discriminatory land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l) and Government Code section 12927, subd. (c)(1) (defining “discrimination” as including the refusal to permit reasonable accommodations). It is also necessary to ensure consistency with proposed sections 12176 - 12180 and 12185. See *also* California Attorney General’s Guidance on reasonable accommodations in land use practices, Letter to All California Mayors from the Office of the Attorney General, Bill Lockyer, A.G., re: “Adoption of a Reasonable Accommodation Procedure,” May 15, 2001, [ag.ca.gov/civilrights/pdf/reasonab\\_1.pdf](http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf). The proposed regulation includes two specific examples of such practices to provide further guidance. It also clarifies that other existing statutory and regulatory provisions, both federal and state, regarding provisions of reasonable accommodations to people with disabilities, apply to Public Land Use Practices. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *DOJ/HUD Statement on Group Homes, Local Land Use and the Fair Housing Act and Related Q&A, supra*; Chapter 1277, Statutes of 1993, Sec. 18 (Legislative Intent Language on 12955); H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24, reprinted in 1988 U.S. Code Cong. & Admin News at 2173, 2185 (Legislative Intent language on FHA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

**§ 12161, subd. (a)(9).**

The Council proposes to add this subdivision that the failure of a governmental body to provide reasonable modifications to housing programs or dwellings, when required by law, may give rise to a

discriminatory land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l) and Government Code section 12927, subd. (c)(1) (defining “discrimination” as including the refusal to permit reasonable modifications). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12161, subd. (a)(10).**

The Council proposes to add this subdivision regarding public or private land use practices that result in the location of toxic, polluting, and/or hazardous land uses in a manner that negatively affect housing opportunities may give rise to a discriminatory land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). This subdivision is consistent with other state law, including Government Code section 65008. *See, e.g. Keith v. Volpe*, 858 F.2d 467, 485 (9th Cir.1988). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12161, subd. (a)(11).**

The Council proposes to add this subdivision public or private land use practices based on an individual’s or individuals’ ability to speak, read or understand the English language may give rise to a discriminatory land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). This subdivision is consistent with Civil Code sections 1940.05, 1940.2, and 1940.3, as recently amended by AB 291 (2017) and AB 299 (2017). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. Nothing in this section shall be interpreted to expand the obligation to provide translations of certain contracts and agreements as set forth in Civil Code section 1632 or section 1632.5.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, HUD’s Office of General Counsel, *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency* (Sept. 15, 2016), available at:

<https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf> (Accessed Mar. 28, 2017).

**§ 12161, subd. (b).**

The Council proposes to add this subdivision explaining a particular circumstance that on a case-specific analysis may give rise to a discriminatory land use practice under FEHA, that is where a public or private land use practice reflects acquiescence to the bias, prejudices or stereotypes of the public members of the public, or organizational members, intentional discrimination may be shown even if officials or decision-makers themselves do not hold such bias, prejudice or stereotypes because public bias or prejudice may be attributed to decision-makers and constitute intentional discrimination. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD/DOJ Joint Statement Land Use Laws and Practices*, *supra* at 3; *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504, (9th Cir. 2016) *cert. denied* 137 S.Ct. 295 (2016).

**§ 12161, subd. (c).**

The Council proposes to add this subdivision to specify that an application or implementation of a facially neutral practice may violate FEHA if done in a manner that intentionally discriminates on the basis of membership in a protected class or in a manner that has a discriminatory effect based on membership in a protected class. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l) and Government Code 12955.8. It is also necessary to ensure consistency with article 7 of the proposed regulations, specifically proposed section 12063. Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA,

specifically, HUD/DOJ Joint Statement Land Use Laws and Practices, *supra*.

**§ 12162. Specific Practices Related to Land Use Practices.**

The purpose of this section is to delineate with more specificity certain land use practices that are unlawful, where the nature of those practices and evolving case law might create confusion in the absence of such specificity. This section is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public.

**§ 12162, subd. (a).**

The Council proposes to add this subdivision regarding when a governmental body's adoption of certain ordinances or practices related to nuisances may constitute a discriminatory public land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). The proposed section is consistent with other California statutes including Government Code section 53165, Code of Civil Procedure section 1161.3, and Civil Code section 1940.3. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

Typically these practices are ordinances, sometimes named "nuisance" or "crime-free housing" ordinances, which define "nuisance" broadly and require landlords to take adverse action (e.g. institute eviction) against tenants whose actions meet these definitions. These ordinances may violate Government Code sections 12955.8, subd. (a) and 12955, subd. (l) by intentional discrimination, for example, if they are enacted for discriminatory reasons or if they are selectively enforced in a discriminatory manner. These ordinances may also violate Government Code sections 12955.8, subd. (b) and 12955, subd. (l) by their discriminatory effects on persons protected by the Act. In both cases, the ordinances violate FEHA by restricting the availability of housing or otherwise denying housing opportunities to members of a protected classes, e.g. race, national origin or sex. When an ordinance directs a private landlord to discriminate, the ordinance constitutes a violation of fair housing law. See, e.g. *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, \*1, 13–15 (N.D. Cal. 2011).

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA,

specifically, HUD Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (*HUD Guidance on Local Nuisance and Crime-Free Housing Ordinances*) (Sept. 13, 2016).

**§ 12162, subd. (b).**

The Council proposes to add this subdivision regarding when a public or private land use practice that requires persons to use specified criminal history records in their business establishment prohibits persons from renting or engaging in transactions covered by FEHA on the basis of specified criminal convictions, or mandates initiation of eviction proceedings against tenants and occupants arrested, suspected or convicted of crimes may constitute a discriminatory public land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). Article 24 provides guidance regarding lawful and unlawful uses of criminal history information. This section clarifies that a public or private land use practice that requires other persons to use criminal history information in violation of Article 24, e.g. using or considering information prohibited by Article 24 or requiring persons to take adverse actions against persons protected by the Act based upon unlawful uses of criminal history information, is itself an unlawful practice. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, \*1, 13–15 (N.D. Cal. 2011).

**§ 12162, subd. (c).**

The Council proposes to add this subdivision to emphasize that practices requiring persons to take actions against individuals based upon their calls to emergency services or visits to the property by emergency services may constitute a discriminatory public land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

These practices are sometimes a component of practices identified in Section 12162, subd. (a), and they are potentially unlawful for the same reasons explained in that section. However, they deserve particular attention because not only do they potentially violate fair housing law, they also may have a chilling effect upon tenants' exercise of their First Amendment right to petition the government because they penalize them for doing so by using their constitutionally protected activity as a basis for adverse action. The right to petition the government for redress of grievances is "one of the most precious of the liberties safeguarded by the Bill of Rights" (*BE&K Constr. Co. v. NLRB*, 536 US 516, 524 (2002) (internal quotation marks and citation omitted). See, e.g. *Victor Valley Family Resource Center v. City of Hesperia*, 2016 WL 7507764 (U.S. District Court, Central District Cal 2016).

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on Local Nuisance and Crime-Free Housing Ordinances*, *supra*.

**§ 12162, subd. (d).**

The Council proposes to add this subdivision regarding when a public or private land use practice requires persons to take actions against individuals based on information related to immigration status or legal residency or otherwise related to enforcement of laws related to immigration may constitute a discriminatory public land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). The proposed section is consistent with Civil Code Sections 1940.05, 1940.2, and 1940.3, as recently amended by AB 291 (2017) and AB 299 (2017). Activities required by federal law or court order are explicitly exempted from this provision. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, \*1, 13–15 (N.D. Cal. 2011).

**§ 12162, subd. (e).**

The Council proposes to add this subdivision when a public or private land use practice that violates Article 24 or requires other persons to violate Article 24 may constitute a discriminatory public land use practice under FEHA. This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *Waterhouse v. City of Am. Canyon*, 2011 U.S. Dist. LEXIS 60065, \*1, 13–15 (N.D. Cal. 2011).

## **Article 18. Disability**

### **§ 12176. Reasonable Accommodations.**

The purpose of this proposed section is to implement the sections of FEHA prohibiting discrimination against people with disabilities, including Government Code sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, in regards to reasonable accommodations. Discrimination in housing includes a “refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations are necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.” California Government Code 12927(c)(1); *Auburn Woods I* at 1591 (“substantial evidence supported the FEHC determination that Auburn Woods discriminated [under FEHA] by refusing a reasonable accommodation for the Elebriaris' disabilities.”) Therefore, the specific purpose of Section 12176 is to set out standards for requesting, considering, and providing reasonable accommodations. The section is necessary to address significant confusion among the public about these provisions.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), and f(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the

equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the relevant *Joint Statement of the Department of Housing and Urban Development and the Department of Justice on "Reasonable Accommodations Under the Fair Housing Act,"* (HUD/DOJ Statement on Reasonable Accommodations) May 17, 2004, available at <http://www.justice.gov/crt/about/hce> or [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf).

**§ 12176, subd. (a).**

Because the provision of reasonable accommodations is often misunderstood, and is the source of many DFEH complaints and FEHA litigation, this proposed subdivision is necessary to establish the general right to and standards for a reasonable accommodation, as well as the general standards for denial of a reasonable accommodation request. Subdivision (a) establishes that a reasonable accommodation is a request for a change, exception, adjustment or modification to a rule, policy, practice or service that may be necessary for an individual with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use areas, or an equal opportunity to obtain, use or enjoy a housing opportunity or housing service. This is necessary to ensure that individuals with disabilities have equal opportunities in housing. Since rules, policies, practices and services may have a different effect on individuals with disabilities, treating individuals with disabilities exactly the same as others may in fact deny them an equal opportunity. See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 1 and 6.

Because the interaction of the various reasonable accommodation requirements is often misunderstood, subdivisions (a)(1) – (a)(6) are also necessary to provide a “road map” to the public as to the application of the various provisions in this section and in sections 12170-12180, all of which implement different components of the reasonable accommodation requirement set out generally in section 12176.

**§ 12176, subd. (b).**

This proposed subdivision is necessary to protect the privacy rights of individuals with disabilities, particularly as to their medical conditions and records.

This proposed subdivision is also necessary pursuant to Government Code section 12955.6, because FEHA must provide at least the same level of protection to individuals covered by FEHA as the FHA and its implementing regulations. 24 C.F.R. section 100.202(c) prohibits inquiries about an individual's disability or perceived disabilities, or about the nature or severity of their disabilities. However, 24 C.F.R section 100.204 requires consideration of requests for accommodation, establishing a limited exception to the prohibition on inquiries once a request has been made. Therefore, inquiries into the nature of a disability or the need for an accommodation must be strictly limited to inquiries or disclosures directly related to the consideration of the request for an accommodation and the implementation of any accommodation, and the information must be kept confidential. See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

**§ 12176, subd. (c).**

The proposed subdivision (c) is necessary to establish the primary requirements for making and considering a request for a reasonable accommodation.

**§ 12176, subd. (c)(1).**

The proposed subdivision (c)(1) is necessary to establish that there must be a request for an accommodation in order to trigger the reasonable accommodation process. However, as further explained in proposed subdivisions (c)(2)-(6), such requests can take a variety of forms.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions, Questions 12 - 14.

**§ 12176, subd. (c)(2).**

The proposed subdivision (c)(2) is necessary to establish that the request can be made by persons acting on behalf of the individual with the disability, not just the individuals themselves. This provision is intended to be broadly interpreted, giving the individual with the disability the option to choose how to make the request. This provides flexibility to individuals with disabilities protected by FEHA, including those individuals whose disabilities make it difficult or uncomfortable for them to make the request; those who have concerns about how their request will be perceived and who wish support for making the request; or those who have communication difficulties. It also includes individuals without disabilities who wish to make requests on behalf of family members or household members with disabilities, including minor children, or guests.

See HUD/DOJ Statement on Reasonable Accommodations, *supra*, at Questions 12-14.

**§ 12176, subd. (c)(3).**

The proposed subdivision (c)(3) is necessary to establish that no formula or specific terminology are needed to make a request for reasonable accommodations, and to elaborate on the variety of ways in which a request can be made. The proposed subdivision is also necessary to establish that the request can be made at any time.

See HUD/DOJ Statement on Reasonable Accommodations, *supra*, at Questions 12 -14.

**§ 12176, subd. (c)(4).**

The proposed subdivision (c)(4) is necessary to establish that individuals with disabilities may make multiple requests, each of which must be considered separately under these regulations. This is necessary because circumstances relating to requests for accommodation can change over time for a wide variety of reasons, including that the nature or symptoms of the individual's disability or disabilities has changed, the individual has obtained new assistive devices or a new assistance animal, the individual has obtained additional documentation or relevant information relating to the need for the accommodation, the individual has obtained assistance or information to better understand the legal requirement or procedures for obtaining the accommodation, or the individual now has obtained assistance in requesting and explaining more effectively the need for the requested accommodation./

See HUD/DOJ Statement on Reasonable Accommodations, *supra*.

**§ 12176, subd. (c)(5).**

The proposed subdivision (c)(5) is necessary to establish that while persons obligated to consider requests are allowed to adopt procedures and written forms to be used for requesting and considering reasonable accommodations, those procedures and forms must be optional. An individual with a disability cannot be required to use those forms. This is important for a variety of reasons, including that individuals may have a disability that makes it difficult for them to comply with the procedures or use the forms, and that the need for an accommodation may arise at a time when using a form or following a specific procedure is not practical. The proposed subdivision also proscribes forms and procedures seeking

information that is not permissible under other sections of the proposed regulations.

*See HUD/DOJ Statement on Reasonable Accommodations, supra, at Questions 12-14.*

**§ 12176, subd. (c)(6).**

The proposed subdivision (c)(6) is necessary to establish that requests for assistance in completing forms or following procedures due to a disability, or requests for alternative methods of communication during the reasonable accommodation process due to a disability, are treated the same as all other requests for reasonable accommodations.

*See HUD/DOJ Statement on Reasonable Accommodations, supra, at Questions 6 and 12-14.*

**§ 12176, subd. (c)(7)(A) and (c)(7)(B).**

The proposed subdivision (c)(7) is necessary to resolve confusion that has arisen about how requests for reasonable accommodations are treated in relationship to unlawful detainer actions.

Subdivision (c)(7)(a) is necessary to clarify that a tenant may raise an alleged failure to provide a reasonable accommodation in an unlawful detainer action. This clarification is necessary because in some cases unlawful detainer courts have not allowed defendants in unlawful detainer actions to raise this defense. This may be a misconstruction arising from the language in Government Code 12955(f), which prohibits delays in unlawful detainers arising solely from claims of retaliation under FHA, or a misapplication of other inapplicable provisions of the Civil Code. Regardless of the cause of the confusion, raising a defense of discriminatory conduct (including an alleged failure to provide a reasonable accommodation) in an unlawful detainer is appropriate. The mere fact that a defense is raised and must be addressed during the litigation of the matter does not constitute an unwarranted delay. The proposed subdivision does not speak to the merits of any affirmative defense of failure to provide a reasonable accommodation raised in an unlawful detainer, which is left to the court. And trial courts, including unlawful detainer courts, retain general authority to prevent delay where warranted by particular conduct other than raising and litigating a claim of reasonable accommodation.

This proposed subdivision implements Government Code section 12927(c)(1), which defines discrimination to include “refusal to make reasonable accommodations in rules, policies, practices, or services when

these accommodations are necessary to afford a disabled person equal opportunity to use and enjoy a dwelling,” and which does not contain any provision limiting an affirmative defense of discrimination. It is also consistent with California law. See, e.g., the Judicial Council of California’s approved form for answers in unlawful detainers (UD-105) which provides an option for defendants as follows: “Affirmative Defenses...By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or the laws of the United States or California.” (at 3.f.) See also, Government Code 12955.6: “Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid.”

Subdivision (c)(7)(B) is necessary to clarify that a tenant may make a request for a reasonable accommodation at any time, including during the unlawful detainer action, and in appropriate circumstances after eviction. See, e.g., example in (c)(7)(B)(ii) concerning a request for an accommodation following an unlawful detainer trial. The requests must be considered under these proposed regulations at the time they are made. This clarification is necessary because some landlords have refused to consider reasonable accommodation requests once an eviction notice has been given or once an unlawful detainer action has been filed. Examples are provided in this subdivision to provide further clarification on the requirement that requests for accommodation must be considered at any time. See, e.g. *Douglas v. Kriegsfeld Corp.* (D.C. 2005) 884 A.2d 1109, 1121 (“Under the Fair Housing Act, unlawful discrimination occurs whenever a dwelling is ‘denied’ to a renter because of that renter’s handicap. Under federal case law interpreting that provision, a discriminatory denial can occur at any time during the entire period before a tenant is “actually evicted”; actionable discrimination is not limited to the shorter cure period specified in a notice to cure or quit, or to any other period short of the eviction order itself.” (Internal footnotes omitted).)

In the absence of the language in the proposed subdivision, the law could be interpreted in a manner that would provide fewer rights or remedies than FHA and its implementing regulations. Neither FEHA, nor the FHA statute or regulations, provide any exceptions to the obligation to consider a request for reasonable accommodations because of the time at which the request is made. Nor do the specific grounds for denial allow a denial to be made because of the timing of the request. See proposed subsection 12179; *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 7, 12. As proposed, the language in this subdivision accurately

reflects both FEHA and the federal law in compliance with Government Code section 12955.6.

**§ 12177. The Interactive Process.**

Proposed section 12177 is necessary to implement the legal requirement that persons considering a request for reasonable accommodation must engage in the interactive process, and to define and set the parameters for such a process. While there is no statutory definition of the interactive process in the housing context, the interactive process has been developed by the courts and HUD under FHA and FEHA, and by the Courts and DOJ under the ADA, to assist the parties in reaching a decision on a request in a thoughtful, structured manner.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), and f(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the HUD/DOJ Statement on Reasonable Accommodations, *supra*. See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 7 and 10.

**§ 12177, subd. (a).**

The proposed subdivision (a) is necessary to establish when the interactive process is triggered, and the focus and timing of the process.

*See HUD/DOJ Statement on Reasonable Accommodations, supra*, at Question 7.

**§ 12177, subd. (b).**

The proposed subdivision (b) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process. It establishes steps that must be taken when a person considering a request believes that the information received is insufficient. It establishes the obligation to seek specific additional information (as further described in proposed section 12178) and prohibits a denial for lack

of information unless appropriate steps have been taken.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 7 -10.

**§ 12177, subd. (c).**

Proposed subdivision (c) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and steps that must be taken before denying a request. It establishes the obligation to try to identify another equally effective accommodation before denying a request, if the person considering the request believes that granting the specific request should be denied pursuant to proposed section 12179. It also necessary to describe the obligations of both parties relating to consideration of a possible alternative accommodation.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 7-10.

**§ 12177, subd. (d).**

The proposed subdivision (d) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and the timing of the response. It establishes that a reasonable accommodation request must be considered promptly, and sets out some parameters for determining the appropriate timing.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 10, and 15.

**§ 12177, subd. (e).**

The proposed subdivision (e) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and the consequences arising from undue delay in responding. It establishes that an undue delay, based upon the factors in subdivision (d), may constitute a denial of a request for accommodation. This is a factual determination made on a case-by-case basis.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 10 and 15.

**§ 12177, subd. (f).**

The proposed subdivision (f) is necessary to prevent discrimination and

confusion, and to provide clarity, regarding the reasonable accommodation request process and the consequences arising from failure to reach an agreement. It establishes that a failure to reach an agreement on a request for an accommodation may constitute a denial of the request, and sets parameters for consideration of whether such a failure occurred and whether it constituted a denial. It is also necessary to establish that an individual can make a later request that must be considered pursuant to these regulations. As also noted in proposed section 12176, subd. (c)(4), this is necessary because circumstances relating to requests for accommodation can change over time for a wide variety of reasons, including that the nature or symptoms of the individual's disability or disabilities has changed, the individual has obtained new assistive devices or a new assistance animal, the individual has obtained additional documentation or relevant information relating to the need for the accommodation, the individual has obtained assistance or information to better understand the legal requirement or procedures for obtaining the accommodation, or the individual now has assistance in requesting and explaining more effectively the need for the requested accommodation.

*See HUD/DOJ Statement on Reasonable Accommodations, supra, at Questions 10 and 15.*

**§ 12178. Establishing that a Requested Accommodation is Necessary.**

This proposed section is necessary to establish the procedures for evaluating a request for a reasonable accommodation, and to identify what additional information can be requested under various circumstances. This is necessary to balance the privacy rights of the individual with a disability with the need for the person considering the request to determine whether the requested accommodation is necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling.

Similarly to proposed section 12176(b), this proposed subdivision is necessary to protect the privacy rights of individuals with disabilities, particularly as to their medical conditions and records, and to balance those privacy rights with the need to confirm that the accommodation is necessary under these regulations. As described in more detail below, in order to effectuate the proper balance, subdivisions (a) through (d) describe different predicates for obtaining various types of information. Subdivisions (e) through (g) describe the types of information and sources that are permitted under this section.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), and f(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the *HUD/DOJ Statement on Reasonable Accommodations, supra*. See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

This proposed section is specifically necessary pursuant to Government Code section 12955.6 because FEHA must provide at least the same level of protection to individuals covered by FEHA as the FHA. 24 C.F.R. section 100.202(c) prohibits inquiries about an individual's disability or perceived disabilities, or about the nature or severity of their disabilities. However, 24 C.F.R. section 100.204 requires consideration of requests for accommodation, thus establishing a limited exception to the prohibition on inquiries once a request has been made. Therefore, inquiries into the nature of a disability or the need for an accommodation must be strictly limited to inquiries or disclosures directly related to the consideration of the request for an accommodation and the implementation of any accommodation.

**§ 12178, subd. (a).**

The proposed subdivision (a) is necessary to establish that if an individual, directly or through a representative, makes a request for an accommodation which includes reliable information about the disability related need for the accommodation, no further inquiry is permitted.

Reliability is further discussed in subdivision (g.) In many circumstances, the disability-related need for the discrimination can be readily documented as part of the original request. For example, an individual who has sufficient residual hearing to engage in a conversation, but only while wearing their hearing aids, could just provide the required information verbally as part of the request, or could establish that they have hearing limitations and needs a blinking doorbell by providing a letter from a teacher at school or from a staff person at an organization providing assistance to deaf and limited hearing individuals. In those instances, the consideration of the request

proceeds without any further inquiry into the disability-related need.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

**§ 12178, subd. (b).**

The proposed subdivision (b) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and the varying obligations that arise based on the information initially available to the person considering a request. It establishes that no further information may be requested if the individual's disability is known or apparent to the person considering the request, and the need for the accommodation is also readily apparent or known. For example, an individual who uses a power wheelchair and has an adaptive van need not provide further information as to her disability or the disability-related need. The consideration of the request proceeds without any further inquiry into the disability-related need.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

**§ 12178, subd. (c).**

The proposed subdivision (c) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and the varying obligations that arise based on the information initially available to the person considering a request. It describes the information that may be requested if the individual's disability is known or apparent to the person considering the request, but the need for the accommodation is not readily apparent or known. For example, the person considering the disability may know that the individual has a cardiac disability and had a recent heart attack, but may not know how that is related to a request for closer parking space. Under those circumstances, subdivision (c) delineates the specific information that can be requested to establish the disability-related need.

See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

**§ 12178, subd. (d).**

The proposed subdivision (d) is necessary to prevent discrimination and confusion, and to provide clarity, regarding the reasonable accommodation request process and the varying obligations that arise based on the

information initially available to the person considering a request. It describes the information that may be requested if neither the individual's disability nor the need for the accommodation is apparent or known to the individual considering the request. For example, many disabilities, such as mental health, cognitive, or cardiac disabilities, may not be apparent or known to the person considering the request. Under those circumstances, subdivision (d) delineates the specific information that can be requested to establish the disability-related need.

*See HUD/DOJ Statement on Reasonable Accommodations, supra, at Questions 16-18.*

**§ 12178, subd. (e), (f) and (g).**

Proposed subdivisions (e), (f) and (g) are necessary to describe the types of information that can or cannot be requested to establish the disability-related need for the accommodation, keeping in mind the balancing of the privacy rights of the individual with a disability and the requirement to provide sufficient information to establish the need, as described in the beginning of this section.

Proposed subdivision (e) prohibits seeking information that would be irrelevant or unduly invasive of the individual's privacy rights. This is followed by proposed subdivision (f) which identifies a wide variety of permissible sources for establishing the disability-related need for the accommodation, including information provided directly from the individual with the disability as well as information from reliable third parties. This subdivision is necessary because medical professionals are not the only persons who can provide adequate information, for numerous reasons, including the following reasons. First, individuals with disabilities are often in the best position to understand and explain their disability-related need. Second, disabilities are not the same as diseases, and not all individuals with disabilities are under the current care of a medical provider with relevant information. For example, an individual who is blind may not need ongoing vision treatment. Third, many low income individuals with disabilities, including those without medical insurance, do not have ongoing relationships with health care providers who can document a particular disability. They may seek health care only in emergencies. Fourth, many health care practitioners, including those who are paid by Medi-Cal (Medicaid), charge to complete paperwork, and completion of that paperwork may be accompanied by significant delays, which puts a significant and unnecessary burden on individuals with disabilities. Fifth, while medical professionals are experienced at treating diseases, the

inquiry under FEHA is not a medical one and may not be understood by them. Sixth, individuals with disabilities interact with a number of other reliable sources who are better equipped to understand the nature of the accommodations they need, such as some of the persons identified in subdivision (f)(3)-(5).

In addition, requiring medical documentation under this subdivision would provide fewer rights than FHA, in violation of Government Code 12955.6.

Subdivision (g) provides guidance as to how a person evaluating the request can determine whether the information comes from a “reliable third party,” as that term is used in subdivision (f). See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

The proposed subdivision (g) is necessary to provide additional guidance on the use of the term reliability. See *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18.

#### **§ 12179. Denial of Reasonable Accommodation.**

The Council proposes to add section 12179 to describe the permissible circumstances under which a request for a reasonable accommodation may be denied. This is necessary to concisely describe and consolidate a complex body of law into one regulation that provides adequate guidance to the public on a subject that is often misunderstood.

Proposed subdivision 12179(a) lists the only permissible circumstances that permit a denial of a request for a reasonable accommodation. Subdivisions (b) and (c) describe additional criteria for consideration of such requests. If a person considering a request believes there is grounds under this section to deny a request for reasonable accommodation, they must proceed with the interactive process under proposed Section 12177(b) to determine if there is another accommodation that is equally effective.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), f(3)(B), and (f)(9), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the

equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the *HUD/DOJ Statement on Reasonable Accommodations*, *supra*, at Questions 5, 7, and 8.

**§ 12179, subd. (a).**

The proposed subdivision (a) is necessary to describe the permissible circumstances under which a request for a reasonable accommodation may be denied, and to provide guidance on how to determine the appropriateness of a reason for denial.

Requests for a reasonable accommodation can only be denied for the reasons established in subdivisions (a)(1)-(a)(5). Subdivision (a)(1) is necessary because if the person seeking the accommodation is not a person with a disability, they are not entitled to an accommodation. Subdivision (a)(2) is necessary because an accommodation need not be granted if there is not a disability-related need for the accommodation. Subdivision (a)(3) is necessary because a reasonable accommodation is not required if it would constitute a fundamental alteration, as further discussed in subdivision (c). Subdivision (a)(4) is necessary because a reasonable accommodation is not required if it would constitute an undue financial or administrative burden, as further discussed in subdivision (b). Subdivision (a)(5) is necessary because a reasonable accommodation is not required if the requested accommodation would constitute a direct threat to the health or safety of others or would cause substantial physical damage to the property of others, and such risks cannot be sufficiently mitigated or eliminated by another reasonable accommodation or otherwise. Subdivision (a) (5) further sets out specific criteria for consideration of whether a proposed accommodation would justify a denial under section 12179(a)(5).

*See, HUD/DOJ Statement on Reasonable Accommodations, supra, at Questions 5, 7, and 8.*

**§ 12179, subd. (b).**

The proposed subdivision (b) is necessary to further explain what constitutes an undue financial or administrative burden under subdivision (a)(4). This term is often subject to confusion, so proposed subdivision (b) describes in more detail the factors that must be considered, on a case-by-case basis, in determining whether something constitutes an undue burden.

See, *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Question 7 and 9.

**§ 12179, subd. (c).**

The proposed subdivision (c) is necessary to further explain what constitutes a fundamental alteration under subdivision (a)(3). This term is often subject to confusion, so proposed subdivision (c) describes in more detail whether something constitutes a fundamental alteration, and provides an example for additional clarification.

See, *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 7 and 8.

**§ 12179, subd. (d).**

The proposed subdivision (d) is necessary to prohibit the consideration of fears or prejudices, or possible unfairness to others, in evaluating a request for a reasonable accommodation, since these are not permissible factors under the law and in fact would be discriminatory. The purpose of FEHA is to eliminate discrimination against people with disabilities based on unwarranted fears, prejudices and stereotypes. The subdivision is also necessary to establish that each request must be considered on its own merits, without consideration of possible future requests.

See, *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 5, 7 and 8.

**§ 12180. Other Requirements or Limitations in the Provision of Reasonable Accommodations; and Examples.**

The purpose of proposed section 12180 is to provide additional guidance on the consideration of reasonable accommodation requests. This is necessary because this is an area of law that is often misunderstood. This section is further necessary to establish some requirements and limitations that are not otherwise specifically addressed in proposed sections 12176-12179.

This section is also necessary to provide some examples of common situations involving requests for accommodations, in order to provide further guidance to the public about application of the provisions in proposed sections 12176-12179.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), f(3)(B), and (f)(9), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the *HUD/DOJ Statement on Reasonable Accommodations, supra*.

**§ 12180, subd. (a).**

The proposed subdivision (a) is necessary to implement provisions of law relating to reasonable accommodations that are not otherwise addressed in proposed sections 12176-12179 regarding reasonable accommodations. The subdivision includes three requirements relating to areas of common confusion, which are necessary in order to provide further clarity. Subdivision (a)(1) prohibits charging for processing or granting a reasonable accommodation. Proposed subdivision (a)(2) implements the requirement that the person considering the request may have to incur some costs to respond to the requests, and that such costs do not constitute grounds for denial, unless they constitute an undue burden pursuant to Section 12179(a) and (b). Proposed subdivision (a)(3) implements the requirement that individuals with disabilities may not be asked or required to waive their rights to future accommodations, as such waivers would conflict with the purpose and intent of FEHA.

*See, HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 9 and 11.

**§ 12180, subd. (b).**

The proposed subdivision (b) is necessary to provide examples of common situations involving reasonable accommodations, to provide further guidance in areas that create confusion or are often misunderstood. All of the examples illustrate situations in which there is a reasonable accommodation request and provide guidance as to how the request should be considered in light of the proposed regulations in Sections 12176 through 12179. Because every reasonable accommodation request has to be considered on a case-by-case basis, and individual facts are extremely

relevant, none of the examples apply to all situations. Each example explicitly provides qualifying language that the outcome depends on the absence of additional relevant facts. However, because the situations are fairly common, they provide general and necessary guidance to the general public as to how such request should be evaluated.

The examples are derived from general statutory concepts, case law, and HUD regulations and guidance, and other relevant law. See, 24 C.F. R. section 100.204(b) (examples); *HUD/DOJ Statement on Reasonable Accommodations, supra*.

### **§ 12185. Assistance Animals.**

The purpose of this proposed section is to implement the sections of FEHA prohibiting discrimination against people with disabilities, including Government Code sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, in regards to all types of assistance animals used by individuals with disabilities. It is necessary to provide clear guidance on an issue addressed by a number of overlapping California statutes and federal laws that have created a great deal of confusion among the public. Assistance animals are defined in proposed subdivision 12005(g). As further described in proposed subdivision 12005(g), assistance animals include both service animals (subdivision 12005(g)(1)) and support animals (subdivision 12005(g)(2)).

Proposed section 12185 is necessary to clarify both the similarities and the differences between the two main categories of assistance animals. In order to do so effectively, the proposed section separately sets out standards for service animals (subdivision (b)) and support animals (subdivision (c)). The proposed section is also necessary to set out provisions applicable to all assistance animals (subdivision (d)).

Discrimination against individuals with disabilities who use service animals is prohibited both by FEHA and by Civil Code sections 54.1 and 54.2, as well as by the American with Disabilities Act. (See, Government Code section 12926.1(a) (the ADA provides a floor for FEHA).) Service animals are permitted as of right in housing and common areas, as addressed in proposed subdivision (a). Support animals may be permitted as a reasonable accommodation under FEHA, as well as under the FHA, as addressed in proposed subdivision (b).

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and

remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), and f(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations and service animals, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by 28 C.F.R. section 36.302(c) and the *Joint Statement of the Department of Housing and Urban Development and the Department of Justice on "Reasonable Accommodations Under the Fair Housing Act,"* May 17, 2004 (*HUD/DOJ Statement on Reasonable Accommodations*), available at <http://www.justice.gov/crt/about/hce> or [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf); HUD FHEO Notice: FHEO-2013-01, April 25, 2013, "Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, April 25, 2013, (*FHEO Notice*), available at [https://www.hud.gov/sites/documents/SERVANIMALS\\_NTCFHEO2013-01.PDF](https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF); 24 C.F.R. 5.303; and HUD Final Rule, "Pet Ownership for the Elderly and Persons with Disabilities" (*HUD Final Rule on Pet Ownership*); 73 FR 63834.01, 2008 Westlaw 469049 (October 27, 2008) (provisions allowing pets in public housing); DOJ Revised Requirements on Service Animals (*DOJ Service Animal Requirements*), July 12, 2011, available at [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm); and DOJ guidance document "Frequently Asked Questions about Service Animals and the ADA" (*DOJ FAQ on Service Animals*), July 20, 2015, available at [https://www.ada.gov/regs2010/service\\_animal\\_qa.pdf](https://www.ada.gov/regs2010/service_animal_qa.pdf).

**§ 12185, subd. (a).**

To provide necessary clarity, the proposed subdivision (a) references the definition for assistance animals, including guide dogs, signal dogs, service dogs, miniature horses, and service animals in training, as defined more specifically in proposed section 12005(d). Miniature horses are referenced in proposed section 12005(d) because they are specifically included in FHA.

**§ 12185, subd. (b).**

Proposed subdivision (b) is necessary to implement the appropriate standards for service animals. Individuals with disabilities are entitled to service animals as a right under California law. Civil Code 54.1(b)(6)(A),

Civil Code 54.2. Unlike support animals, no request for a reasonable accommodation needs to be made for an individual with disabilities to be accompanied by or have a service animal in their home or to enjoy other housing opportunities.

Pursuant to Government Code 12955.6, the proposed section provides greater rights and remedies to individuals who use service animals than does the FHA, because Civil Code sections 54.1 and 54.2 allow service animals as of right and no request for a reasonable accommodation is necessary. Pursuant to Civil Code section 54.1(b)(6)(B), however, reasonable conditions related to both service animals and support animals are permitted, as set out in more detail in proposed subdivision 12185(d)(6), and a number of other provisions apply equally to service animals and support animals, as set out in proposed subdivision 12185. Further, Civil Code 54.2 provides that: “A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and this section does not limit the access of any person in violation of that act.” This is consistent with Government Code section 12926.1(a) (“The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-3361). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.” Therefore, the proposed subdivision is necessary to make explicit that FEHA provides rights and remedies related to service animals that are equal to or greater than those in the ADA.

In order to comply with these mandates, it is necessary for the proposed subdivision to specify the scope of individuals who are entitled to have service animals, the scope of coverage of the provision, and the questions that can be asked of individuals to determine whether the animal is a service animal.

*See, HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (c).**

Proposed subdivision (c) is necessary to provide more guidance to the public about applying the general reasonable accommodations standards set out in proposed sections 12176-12180 to the specific issues that arise when considering requests for accommodations regarding support animals.

Individuals with disabilities are entitled to have support animals pursuant to a request for a reasonable accommodation (as distinguished from service animals permitted as of right).

Discrimination in housing includes a “refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations are necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.” California Government Code 12927(c)(1); *Auburn Woods I* at 1591 (holding that plaintiffs were entitled to a support animal because “substantial evidence supported the FEHC determination that Auburn Woods discriminated [under FEHA] by refusing a reasonable accommodation for the Elebjaris' disabilities.”)

*See, HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (c)(1).**

The proposed subdivision (c)(1) is necessary to clarify that the general reasonable accommodations standards set out in proposed sections 12176-12180 apply to the specific issues that arise when considering requests for accommodations regarding support animals,

*See, HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (c)(2).**

Proposed subdivision (c)(2) is necessary to address the specific circumstances relating to online services that provide documentation that an individual has a disability-related need for a support animal. This is an area that is particularly susceptible to provision of inadequate or fraudulent documentation, given the prevalence and easy availability of the internet. However, some online services do provide accurate documentation that may otherwise not be readily available to individuals with disabilities. Therefore, this subdivision is necessary to set minimum standards relating to the reliability of such online documentation, in accord with proposed section 12178(f) that information from a reliable third party must be considered in evaluating a request for a reasonable accommodation. The proposed subdivision balances the conflicting interest by establishing a presumption that an online “certification” is not reliable if it does not include an individualized assessment from a medical professional. The proposed

subdivision further describes the components of such an assessment. This is an exception to the general rule that documentation from a medical professional is not required to establish a disability-related need for an accommodation. As part of the balancing of interests, the proposed subdivision further provides that a person considering a request for an accommodation who decides the online certification is insufficient must provide an opportunity to the individual requesting the accommodation to provide specific additional information before denying the request.

**§ 12185, subd. (d).**

The proposed subdivision (d) is necessary to set out provisions applicable to all assistance animals, including both service animals and support animals.

*See, Civil Code sections 54.1 and 54.2; HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (d)(1).**

The proposed subdivision (d)(1) is necessary to make clear that there may be other obligations that are equally or more protective of individuals covered by FEHA that apply in particular situations, such as where there is specific government funding under Section 504 of the federal Rehabilitation Act, or where there are specific requirements that might provide greater protection than the proposed regulations to particular types of housing. For example, see, e.g., 24 C.F.R. 5.303 and *HUD Final Rule on Pet Ownership, supra.*

*See, HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (d)(2) and (d)(3).**

Proposed subdivisions (d)(2) and (3) are necessary to address costs related to assistance animals. Subdivision (d)(2) is necessary to implement the prohibition on charging fees of any kind in connection with assistance animals, including service animals and support animals. This is also consistent with proposed section 12180(a)(1), prohibiting fees in connection with requests for reasonable accommodations. Proposed subdivision (3) is the necessary corollary, which provides that individuals with disabilities may be required to cover the costs of repairs for damages to the premises caused by assistance animals, excluding ordinary wear

and tear.

See, Civil Code section 54.1(b)(6)(B); *HUD/DOJ Statement on Reasonable Accommodations, supra* at Questions 9 and 11; *FHEO Notice, supra*; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

**§ 12185, subd. (d)(4).**

The proposed subdivision (d)(4) is necessary to clarify that individuals may have more than one service animal, and to establish the requirement that each animal must be individually determined to meet the requirement for service animals. Among other reasons, multiple animals may be appropriate because service animals may not perform the same tasks. For example, one dog might assist an individual with pulling their wheelchair or picking up items, and another might alert an individual to an imminent seizure.

Proposed subdivision (d)(4) is also necessary to make explicit that that individuals may have more than one support animal, and that the usual requirements for consideration of reasonable accommodation requests in proposed sections 12176 through 121780 apply to requests for more than one support animal (as distinct from service animals). The proposed subdivision specifies that each subsequent or additional support animal must be evaluated on its own merits. This is consistent with proposed subdivisions 12176(c)(4) and 12177(f) (consideration of multiple and subsequent requests). The proposed subdivision also clarifies the relationship between request for accommodations for multiple support animals and permitted defenses in proposed section 12179.

See, Civil Code sections 54.1 and 54.2; *HUD/DOJ Statement on Reasonable Accommodations, supra*; *FHEO Notice, supra*; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

**§ 12185, subd. (d)(5).**

The proposed subdivision (c)(1) is necessary to prohibit breed or size restrictions, as such restrictions bear no relationship to the permitted inquiries for either service animals or support animals.

See, Civil Code section 54.1 and 54.2; *HUD/DOJ Statement on Reasonable Accommodations, supra*; *FHEO Notice, supra*; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

**§ 12185, subd. (d)(6).**

Proposed subdivision (d)(6) is necessary to establish that reasonable conditions can be imposed on all assistance animals (service animals and support animals), so long as those conditions do not interfere with the normal performance of the animal's duties and the conditions are uniformly applied to all animals. This subdivision is necessary to make it explicit both that covered entities may not single out individuals with disabilities for disparate treatment and that generally applicable, reasonable rules regarding control of animals are also applicable to individuals with disabilities, unless modified by a request for a reasonable accommodation. The rules also make it explicit that control over the animal can be exercised by the individual with a disability or by persons assisting the individual, in order to comply with the reasonable conditions (for example, another person could assist the individual with a disability by walking the dog and/or disposing of animal waste). The proposed subdivision provides examples for further guidance to the public about the application of this subdivision.

*See, Civil Code section 54.1(b)(6)(B); HUD/DOJ Statement on Reasonable Accommodations, supra; FHEO Notice, supra; DOJ Service Animal Requirements, supra; and DOJ FAQ on Service Animals, supra.*

**§ 12185, subd. (d)(7).**

The proposed subdivision (d)(7) is necessary to establish that animal vests, identification cards, or certificates are not necessarily sufficient to establish disability, the fact that an animal is an assistance animal, or that the support animal meets a disability-related need. (Note that proposed subdivision (c)(2) above relating to online services which establishes specific requirements for documentation from online services.)

This is necessary because in most instances, there are no uniform national or state provisions for such methods of identification or for training of service or support animals. The only uniform state standard is that Civil Code section 54.1(b)(6)(C)(i) recognizes that guide dogs that are trained by a person licensed under Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code meet the definition of a service animal. However, there are many other ways of training guide dogs and service dogs, so documentation of such training cannot be required. For an example, a woman with a disability who uses a wheelchair may be able to personally train a dog to fetch items for her or pull her wheelchair, without the need for assistance from a dog trainer. Further, since service animals are permitted as of right and only two questions are permitted to be asked, there is no requirement that documentation of this training be

provided. See proposed section 12185(b).

See, Civil Code section 54.1 and 54.2; *HUD/DOJ Statement on Reasonable Accommodations, supra*; *FHEO Notice, supra*, at Questions 9 and 11; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

**§ 12185, subd. (d)(8).**

The proposed subdivision (d)(8) is necessary to establish that denial of permission for an assistance animal is not grounds for eviction of the individual with a disability or for denial of any housing opportunity. The individual with the disability has the option of removing the animal from the premises after receipt of appropriate notice. Furthermore, as set forth in proposed sections 12176(c)(4) and 12177(f), the individual can renew the request for an animal at any time.

See, Civil Code section 54.1(b)(6)(B); *HUD/DOJ Statement on Reasonable Accommodations, supra*; *FHEO Notice, supra* at Questions 9 and 11; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

**§ 12185, subd. (d)(9)(A)-(D).**

Proposed subdivision (d)(9) is necessary to establish the grounds for denial of an assistance animal that apply to both service animals and support animals. The proposed subdivision establishes that both service animals and support animals can be excluded if the animal constitutes a direct threat to the health or safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and that harm cannot be sufficiently mitigated or eliminated by another reasonable accommodation. In order to provide necessary guidance to the public, these concepts and their application to assistance animals are explained in more detail in subdivisions (d)(9)(A) through (d)(9)(D). For support animals, subdivision (d)(9)(A) establishes that these provisions apply in addition to the possible grounds for denial of a request for reasonable accommodation established in proposed section 12179. For all assistance animals, subdivision (d)(9)(B) establishes that the determination of potential harm must be based on an individualized assessment that relies on objective evidence. This is consistent with proposed section 12179(d) prohibiting denials based on fears, prejudices, or possible perceptions of others. For all assistance animals, subdivision (d)(9)(C) implements criteria that must be considered in determining whether there is a direct threat to others or a risk of substantial physical damage to the property of others,

including an obligation to consider potential reasonable accommodations that would sufficiently mitigate or eliminate the problem. For all assistance animals, subdivision (d)(9)(C) discusses specific evidence regarding potentially dangerous dogs that can be considered in making the necessary determination.

See, Civil Code section 54.1(b)(6)(B); *HUD/DOJ Statement on Reasonable Accommodations, supra*; *FHEO Notice, supra* at Questions 9 and 11; *DOJ Service Animal Requirements, supra*; and *DOJ FAQ on Service Animals, supra*.

#### **Article 24. Consideration of Criminal History Information in Housing.**

The purpose of this Article is to clarify how a practice that includes seeking information about, consideration of, or use of criminal history information may violate FEHA. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

Unlawful housing discrimination under FEHA, when based on criminal history information, runs contrary to significant public policies which support the facilitation of re-entry of former prisoners, and the importance of housing in that regard. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016) (*HUD Guidance on FHA and Use of Criminal Records*); *The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al.*, Civil Action No. CV-14-6410 (VMS), U.S. District Court, Eastern District of New York (Filed 10/18/2016) (*DOJ Statement of Interest in Fortune Society*). However, many housing providers and others subject to FEHA currently have policies or practices that use criminal history information in order to make housing decisions. While providers and others have legitimate interests in screening potential tenants or borrowers to determine if they can fulfill a tenant's or borrower's obligations, individuals who have been arrested or who have criminal records often face difficult barriers in obtaining housing because of their criminal records, even if their criminal history bears no relationship to their ability to be a responsible tenant, housing consumer or borrower. Consequently, they have a high risk of becoming homeless, which is in turn linked to a greater propensity to reoffend.

Furthermore, nationally and in California, arrest, conviction and

incarceration rates of African Americans and Hispanics (or Latinos), and possibly other protected classes, are disproportionate to their numbers in the general population. HUD Guidance on FHA and Use of Criminal Records, *supra*. Hence, the use of criminal history information in housing decisions is likely to disproportionately negatively affect African Americans and Latino populations. *Id.* While having a criminal record is not a protected characteristic under FEHA, restrictions on housing opportunities based upon policies or practices that use criminal history violate the Act if, without sufficient legal justification: (1) they have a discriminatory effect on members of protected classes; (2) they constitute intentional discrimination based on membership in protected classes; or, (3) they include statements about the use of criminal history information that are discriminatory.

The primary benefits of these regulations will be to prevent discrimination, to reduce instances of discrimination, and to provide a clear basis for the department and courts to apply FEHA to cases where such discrimination is alleged. A secondary benefit will be to assist in enabling formerly incarcerated persons to successfully reenter society and to reduce recidivism.

All of the proposed subsections of this subdivision are consistent with Government Code sections 12955 and 12955.8. As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, DOJ's enforcement activity. *HUD Guidance on FHA and Use of Criminal Records, supra; DOJ Statement of Interest in Fortune Society, supra.*

### **§ 12265. Prohibited Uses of Criminal History Information.**

The purpose of this section is to outline the prohibited uses of criminal history information and to identify three potentially lawful types of practices, subject to the requirements of Article 24. This section is necessary to provide guidance regarding the lawful and unlawful use of criminal history information in housing. It applies to criminal history information, and criminal convictions, and directly related convictions, as those terms are defined in proposed section 12005(i), (j) and (l), respectively. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

### **§ 12265, subd. (a).**

The Council proposes to add this subdivision to set out the general rule that any practice of a person that includes seeking information about,

consideration of, or use of criminal history information may be unlawful in four distinct circumstances: (1) if it has a discriminatory effect under Article 7, unless a legally sufficient justification applies under section 12266; (2) if it constitutes intentional discrimination under section 12267; (3) if it constitutes a discriminatory statement under section 12268; or (4) if it relates to information specifically prohibited under section 12269. This section is necessary to provide clarity and guidance regarding the circumstances in which a practice that includes seeking information about, consideration of, or use of criminal history information may be unlawful and the types of claims that can be brought against such practices. While having a criminal record is not a protected characteristic under FEHA, restrictions on housing opportunities based upon policies or practices that use criminal history violate the Act if they do not have sufficient legal justification. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

Subsection (1) clarifies that proposed Article 7, Practices with a Discriminatory Effect, is a legal standard for such liability as supplemented by section 12266. This section is necessary to clarify the standards under which a discriminatory effect claim will be decided. Proposed section 12266 provides more specificity and clarity as to the requirements for a legally sufficient justification in criminal history information cases.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*; *DOJ Statement of Interest in Fortune Society, supra*.

Subsection (2) cross-references section 1227, the section articulating the liability standard for when a practice that includes seeking information about, consideration of, or use of criminal history information may constitute intentional discrimination. This subsection is necessary to clarify the standards under which an intentional discrimination claim will be decided.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*.

Subsection (3) cross-references section 12268, the section articulating the liability standard for when a practice that includes seeking information about, consideration of, or use of criminal history information may constitute a discriminatory statement. This subsection is necessary to clarify the standards under which a discriminatory statement claim will be decided.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*.

Subsection (4) cross-references section 12269, the section articulating specific practices related to criminal history information that are unlawful. This subsection is necessary to provide guidance to the section that articulates some specific unlawful practices.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*.

**§ 12265, subd. (b).**

The Council proposes to add this subdivision to identify three potentially lawful types of criminal history information practices, subject to the requirements of Article 24. This subdivision is necessary to clarify that not all inquiries or use of criminal history information in housing are prohibited, but only those that are discriminatory. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. The subdivision lists three potentially lawful types of criminal history information practices. First, a practice that uses a “bright line” policy (that is, categorical exclusions that do not consider individualized circumstances) may be lawful, subject to the requirements of Article 24. Second, a practice that conducts an individualized assessment of an individual’s circumstances may be lawful, subject to the requirements of Article 24. Third, a practice that combines a “bright line” policy with an individualized assessment of an individual’s circumstances may be lawful, subject to the requirements of Article 24. For example, a policy that combines a bright line rule for certain types of criminal convictions with an individualized assessment for other types of convictions under circumstances specified in the policy (either discretionary or required) may be lawful.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra* at 4 – 7 (discussing various kinds of criminal conviction information practices). This subdivision is also consistent with principles identified in other federal laws regarding criminal conviction information practices in employment context. *El v. SEPTA*, 479 F.3d 232, 245 (3d Cir. 2007).

**§ 12266. Establishing a Legally Sufficient Justification Relating to Criminal History Information.**

The purpose of this section is to provide more specificity and clarity to the application of the discriminatory effect standard in criminal history information cases by setting out what constitutes a legally sufficient justification when a discriminatory effect has been shown in criminal history information cases. The complainant's burden of proof in criminal history information cases is provided in sections 12060 and 12061. This section is necessary to clarify a potential respondent's burden of proof in these cases. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

FEHA recognizes that business establishments may have different interests or purposes than non-business establishments (e.g. public entities), and that their burden for establishing a legally sufficient justification should reflect that difference. Those differences are reflected in proposed subdivisions (b) and (c), applied to the consideration of criminal history records. Government Code section 12955.8, subd. (b) sets out distinct and specific standards for business establishments and for non-business establishments. Accordingly, the proposed subdivision identifies distinct and specific standards for business establishments in subsection 12266, subd. (b) and for non-business establishments in subsection 12266, subd. (c). Proposed subsections 12266, subd. (d) and (e) apply to both kinds of respondents.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD's Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard (HUD Discriminatory Effects Standard Final Rule)*, 78 Fed. Register 11460, 11470 - 11471 (Feb. 15, 2013). FEHA

creates a similar test for establishing a legally sufficient justification but one that takes into account the different purposes. The proposed subdivision is necessary to provide guidance to the public because section 12955.8, subd. (b) sets out different criteria for businesses that are not explicitly addressed under federal law, and because those criteria and 12955.8, subd. (b)(1) provide greater protection for members of protected classes than under parallel FHA provisions.

**§ 12266, subd. (a)**

The Council proposes to add this subdivision to set forth the general rule that a respondent must meet all of the elements specified in section 12266 and in sections 12062, subds. (c) and (d) in order to establish a defense under the applicable law. This subdivision is necessary to provide clarity to parties, factfinders and the public as to what is required for a defense.

**§ 12266, subd. (b)**

The Council proposes to add this subdivision to specify each of the elements a business establishment, as defined in 12005, subd. (f), whose criminal history information practice has a discriminatory effect must meet in order to establish a defense, and to explain how to determine when such a defense is properly asserted. This subdivision is necessary because it clarifies potential respondents' rights and obligations by clarifying that a person may employ a criminal history information practice that has a discriminatory effect only if all of the elements for a legally sufficient justification are met. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

In this context of criminal history information practices, it is likely that the reason for a business establishment's adoption of a practice that includes seeking information about, consideration of, or use of criminal history information would be to prevent harm to a business interest. For example, if the business interest is health and safety of tenants and employees, then a person may want to adopt a criminal history information practice to preventing them being injured. Or if the interest is collecting rents regularly, then a person may want to adopt a criminal history information practice to prevent failures to pay rent. Accordingly, subsection (b)(1) requires that persons identify the interest(s) they want to protect. To prevent a harm requires identifying actual threats to the interest that could cause that harm, and then taking action to stop or avoid those threats in order to reduce the actual risk of that harm occurring. Accordingly, subsection (b)(2) requires that the practice effectively carries out the identified business interest.

However, if a practice has been found to have a discriminatory effect, under subsection (b)(3) the person must prove that there is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.

There are three elements. First, under subsection (b)(1), the person must establish that the practice is intended to serve a substantial, legitimate, nondiscriminatory interest that is necessary to the operation of the business. “Substantial” is defined in section 12005, subd. (ff). “Legitimate” is defined in section 12005, subd. (s). “Nondiscriminatory” is defined in section 12005(t). The interests named in in paragraph (b)(1) of the subdivision (the safety of its residents, employees, or property) are examples of the types of interests which landlords might offer to support their practice of using criminal background information to screen prospective tenants. Other persons may proffer other or additional interests. The phrase “necessary to the operation of the business” limits the nature of business interests that qualify to meet the requirements of this element.

Second, under subsection (b)(2), the person must establish that the practice effectively carries out the identified business interest. This element includes several requirements or prongs.

First, the practice must seek, consider, and use only criminal history information regarding directly related convictions as defined in section 12005, subd. (l). Directly related means a criminal conviction has a direct and specific negative bearing on the identified interest supporting the practice, e.g. the conviction is directly related to an individual’s likelihood of paying rent. If a practice included a criminal conviction that is not directly related to protecting its identified interest, then that practice would not be effective in carrying out the identified interest, e.g. a practice that banned prospective tenants who had committed jaywalking would not be effective in carrying out the interest of ensuring that tenants pay rent because jaywalking bears no direct and specific negative bearing on paying rent. This requirement for directly related criminal convictions is supported by *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8<sup>th</sup> Cir. 1975) from the Title VII context.

Third, demonstrating that the practice effectively carries out the identified business interest requires showing that taking adverse action on the basis of the criminal conviction is necessary to prevent a demonstrable risk to accomplishing the identified interest. A demonstrable risk is a risk that is

more than speculative and is based on objective evidence. Even if a criminal conviction is directly related, if the risk that such a conviction will pose a direct and specific negative bearing on the identified interest supporting the practice is speculative or negligible, then the practice will not effectively carry out the identified business interest. Accordingly, this requirement requires the person defending the practice to provide objective evidence that the risk posed is demonstrable. For example, even if a criminal conviction is directly related, if the rate of recidivism for that crime is negligible, then that criminal conviction would not pose a demonstrable risk. This requirement is consistent with *EI v. SEPTA*, 479 F.3d 232, 245 - 46 (3d Cir. 2007)(stating that “Title VII...require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level of risk and those that do not”). The last two sentences of subdivision (b)(2) offer two examples that might, under some circumstances, constitute a basis for a particular practice.

Under subsection (b)(3), the person must establish that there is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect. This subsection is necessary to incorporate this element of a legally sufficient justification to a discriminatory effect from Article 7. Its specific requirements are articulated in section 12266, subd. (d).

### **§ 12266, subd. (c)**

The Council proposes to add this subdivision to specify each of the elements a person that is not a business establishment, as defined in 12005(f), whose practice has a discriminatory effect must meet in order to establish a defense, and to explain how to determine when such a defense is properly asserted. This subdivision is necessary to provide guidance to entities that are not business establishment, as defined in 12005(f). The requirements in subds. (c)(1), (2) and (4) are the same as for business establishments except for the use of the term “purpose” instead of “business interest.” The requirement in subd. (c)(3), “The identified purpose is sufficiently compelling to override the discriminatory effect,” is directly derived from Government Code section 12955.8, subd. (b)(1), and only applies to a person other than a business establishment. The proposed subdivision is necessary to provide guidance to the public because section 12955.8, subd. (b) sets out a distinct additional criteria for non-business establishments to establish that its actions had a legally sufficient justification, because non-business entities, particularly government entities, operate for reasons other than business profit.

**§ 12266, subd. (d).**

The Council proposes to add this subdivision to clarify that a person whose criminal history information practice has a discriminatory effect has the burden of proof to establish that there is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect in order to establish a legally sufficient justification for the practice. This subdivision is necessary to provide additional guidance as to how to evaluate the “less discriminatory alternative” element in criminal history information cases.

This subdivision is directly derived from Government Code 12955.8, subd. (b)(1). This requirement is generally stated in proposed sections 12062, subds. (a)(3) and (b)(4). This subdivision offers further guidance on how to apply this requirement in the context of criminal history information practices. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The subdivision clarifies that a court’s determination of whether there is a feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect is a fact-specific and case-specific inquiry and will depend on the particulars of the criminal history information practice under challenge. The subdivision provides five factors that a court must consider in determining whether there is feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect than the challenged criminal history information practice. The subdivision also allows a court to consider any other factor that it deems relevant to the determination.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*. The factors in the subdivision were taken from this federal guidance, because it accurately reflects California law. This subdivision is also consistent with the principles in other federal law regarding criminal conviction information practices in employment context. See, e.g. *El v. SEPTA*, 479 F.3d 232, 245 (3d Cir. 2007) and *Waldon v. Cincinnati Pub. Sch.*, 941 F.Supp. 2d 884 (S.D. Ohio 2013).

As provided in subd. (d)(1), whether the practice provides the individual: (A) an opportunity to present individualized, mitigating information either in

writing or in person; and (B) written notice of the opportunity to present mitigating information is relevant to this determination. Without providing such an opportunity and notice of it, the person may not learn about inaccuracies in the criminal history information it is considering or about possible mitigating information which may lead it to not take adverse action against an individual with a criminal conviction. Individualized assessments allow individuals to provide information to correct errors in criminal history information and so prevent an adverse housing decision from being made based on inaccurate information. If so, individualized assessments will assist in reducing discrimination. Individualized assessments allow individuals an opportunity to provide mitigation information. Persons utilizing criminal history information practices may be inclined to not take adverse action against an individual with a criminal conviction if they receive mitigation information. If so, this practice would be likely to equally or better accomplish the identified business interest with a less discriminatory effect.

As provided in subd. (d)(2), whether the practice requires consideration of the factual accuracy of the criminal history information is relevant to this determination because of the documented errors in criminal history information. A practice that requires consideration of the factual accuracy of the criminal history information allows the person to correct errors in criminal history information and therefore avoid an adverse housing decision from being made based on inaccurate information. If so, this practice would be likely to equally or better accomplish the identified business interest with a less discriminatory effect.

As provided in subd. (d)(3), whether the practice requires consideration of mitigating information in determining whether to take an adverse action is relevant to this determination because individualized assessments allow individuals to provide information to correct errors in criminal history information and so prevent a person from taking adverse action based on inaccurate information. If so, individualized assessments will assist in reducing discrimination. Individualized assessments allow individuals an opportunity to provide mitigation information. Persons utilizing criminal history information practices may be inclined to not take adverse action against an individual with a criminal conviction if they receive mitigation information. If so, this practice would be likely to equally or better accomplish the identified business interest with a less discriminatory effect.

As provided in subd. (d)(4), whether the practice delays seeking, considering, or using a third party report of criminal history information until

after an individual's financial and other qualifications are verified is relevant to this determination because determining that an individual is otherwise qualified before seeking, considering, or using criminal history information about the individual might make the person more likely to continue to consider an application. If so, this practice would be likely to equally or better accomplish the identified business interest with a less discriminatory effect. In contrast, a practice that seeks, considers, or uses criminal history information before an individual's financial and other qualifications are verified may lead to adverse action being taken against individuals based upon the criminal history information alone without consideration of their financial and other qualifications. See, e.g. *HUD Guidance on FHA and Use of Criminal Records, supra*.

As provided in subd. (d)(5), whether the practice includes providing a copy or description of a person's policy on the use of criminal history information to an individual upon request is relevant to this determination because individuals with a criminal history will be able to select dwellings for which they meet all qualifications and, if the practice includes an individualized assessment opportunity, individuals can prepare relevant information to correct any inaccuracies in criminal history information about them and mitigating information responsive to the person's policy. If so, this practice would be likely to equally or better accomplish the identified business interest with a less discriminatory effect.

Subd. (d)(6) is included because a court may deem other factors not identified in this subsection to be relevant to the determination that there is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect in order to establish a legally sufficient justification for the practice.

**§ 12266, subd. (e).**

The Council proposes to add this subdivision to define mitigating information as it is used in this Article and to provide several non-exhaustive examples in order to clarify what types of information may suggest that an individual with a directly related criminal conviction is not likely to pose a demonstrable risk to the achievement of the identified interest or purpose. This subdivision is necessary to provide specificity and clarity for persons to design criminal history information practices and for courts to determine whether there is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect under section 12266, subd. (d). Further clarity is necessary to ensure compliance with the law and to prevent

misconstruction of provisions in the statute and proposed regulations.

The subdivision defines “mitigating information” as credible information about the individual that suggests that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest. It further defines “credible information” as information that a reasonable person would believe is true based on the source and content of the information. The subdivision then provides six specific examples of possibly mitigating information. The subdivision also allows a court to consider any other relevant facts or circumstances surrounding the criminal conduct and/or conduct after the conviction as possibly mitigating information.

As provided in subd. (e)(1), whether the individual was a juvenile at the time of the conduct upon which the conviction is based may be relevant as mitigating information because the individual may be able to demonstrate that they have matured and so a crime committed while a juvenile does not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest.

As provided in subd. (e)(2), the amount of time that has passed since the date of conviction may be relevant as mitigating information because the longer the individual has spent without another conviction may suggest that they are unlikely to commit another crime in the future, and so a crime committed in the past may not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest.

As provided in subd. (e)(3), evidence that the individual has maintained a good tenant history before and/or after the conviction may be relevant as mitigating information because (at least in the landlord-tenant context) such information may suggest that their criminal history may not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest.

As provided in subd. (e)(4), evidence of rehabilitation efforts (as exemplified in the subsection) or other conduct demonstrating rehabilitation, such as maintenance of steady employment, may be relevant as mitigating information because such information may suggest that the individual is not likely to commit any crime in the future and so their criminal history may not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest.

As provided in subd. (e)(5), whether the conduct arose from the individual’s

status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses against the individual may be relevant as mitigating information because such information may suggest that the individual is not a threat to others and so their criminal history may not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest.

As provided in subd. (e)(6), whether the conduct arose from the individual's disability, or any risks related to such conduct, which could be sufficiently mitigated or eliminated by a reasonable accommodation may be relevant as mitigating information because such information may suggest that the individual is capable of fulfilling any obligations if provided with appropriate reasonable accommodation and so their criminal history may not accurately reflect on their likelihood of posing a demonstrable risk to the achievement of the identified interest. It is also relevant because intervening treatment for the disability may have eliminated the risk.

Subd. (e)(7) is included because a court may deem other facts or circumstances surrounding the criminal conduct and/or conduct after the conviction not identified in this subsection to be relevant mitigating information.

### **§ 12267. Intentional Discrimination and the Use of Criminal History Information.**

The purpose of this section is to set out the general rule that a practice using criminal history information may violate Government Code section 12955.8, subd. (a) and any implementing regulations, if it is implemented in an intentionally discriminatory manner. This section is necessary to provide guidance to the public and to alert persons that if they employ an individualized assessment policy that is implemented in a discriminatory manner, it could violate Government Code section 12955.8, subd. (a). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

### **§ 12267, subd. (a).**

The Council proposes to add this subdivision specifying when criminal history information practices may violate Government Code section 12955.8(a) and any implementing regulations by intentionally discriminating on the basis of membership in a protected class. This subdivision is necessary to clarify FEHA's legal standard for such liability in the criminal history information practice context. Subdivisions (a)(1) and (a)(2) provide

specific examples of potential violations. These examples are necessary to provide additional guidance to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA. Specifically, the examples in subds. (a)(1) - (2) are taken from the *HUD Guidance on FHA and Use of Criminal Records, supra*.

**§ 12267, subd. (b).**

The Council proposes to add this subdivision to further explain the first example in section 12267, subd. (a)(1). The subsection is necessary to clarify that under certain circumstances the action would not be, in and of itself, unlawful. This subsection is necessary to account for the possibility that a change in practice may be due to a person bringing a prior practice into compliance with this regulation. Specifically, if a person has acted upon criminal history information differently for a member of a protected class than the person has acted upon comparable information for another individual, this difference in treatment may demonstrate pretext. However, if the different action is the result of an intervening change in policy pursuant to complying with newly adopted regulations, and the later enacted policy is applied uniformly, the different action shall not, in and of itself, be considered unlawful.

**§ 12268. Discriminatory Statements Regarding Criminal History.**

The purpose of this section is to set out the general rule that a person's notice, advertisement, application, or other written or oral statement regarding criminal history information may violate Government Code section 12955(c) or its implementing regulations or violate Article 7. This section is necessary because it makes explicit and clarifies the rule that a discriminatory statement based upon the use of criminal history information may give rise to a valid (though pre-existing) cause of action. The problem it addresses is that if a housing provider makes certain statements about the use of criminal information in its screening policy (e.g. "We don't allow criminals here."), members of protected classes may be illegally dissuaded from applying for housing or such statements may have a disparate impact on members of protected classes. The benefit of this section will be to prevent or reduce such instances of discrimination.

**§ 12268, subd. (a).**

The Council proposes to add this subdivision to set out the general rule that liability could be based either on the legal standard for discriminatory statement liability or on Article 7 (if the discriminatory statement has a discriminatory effect that is not supported by a legally sufficient justification). This section is necessary to clarify the legal bases for upon which a discriminatory statement based upon the use of criminal history information may give rise to a valid cause of action.

**§ 12268, subd. (b).**

The Council proposes to add this subdivision to articulate two explicit exceptions to the potential liability identified in section 12268, subd. (a). This subsection is necessary to provide guidance regarding lawful statements based upon the use of criminal history information. In particular, advertising a lawful screening policy or providing individuals a copy of a lawful screening policy pursuant to section 12266, subd. (d)(5) is not unlawful. Also, offering an individual an opportunity to present individualized, mitigating information pursuant to sections 12266(d) or (e) is not unlawful.

**§ 12269. Specific Practices Related to Criminal History Information.**

The purpose of this section is to set out some specific practices related to criminal history information that are unlawful, to clarify the relationship between investigative consumer reports and look-back periods, and to enumerate related provisions in federal and state law. This section is necessary to clarify potential complainants' and respondents' rights and obligations in the context of criminal history information practices. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

**§ 12269, subd. (a).**

The Council proposes to add this subdivision to enumerate further limitations on certain uses of particular kinds of criminal history information and to clarify when such information or policy is permissible. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

Subdivision (a)(1) makes it unlawful to seek, consider, use, or take an adverse action based on criminal history information about any arrest that has not resulted in a criminal conviction. This subdivision is necessary to

provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices. The prohibition on use of criminal history information other than convictions is supported by *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 2323, 241 (1957); *U.S. v. Berry*, 553 F.3d 272, 282 (3d Cir. 2009); and *U.S. v. Zapete-Barcia*, 447 F.3d 57, 60 (1<sup>st</sup> Cir. 2006)) and certain California statutes (e.g. Labor Code section 432.7).

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records*, *supra*.

Subdivision (a)(2) makes it unlawful to seek, consider, use, or take an adverse action based on information about any referral to or participation in a pre-trial or post-trial diversion program or a deferred entry of judgment program. This prohibition does not apply if this information was provided by an individual for purposes of offering mitigating information. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices.

Subdivision (a)(3) makes it unlawful to seek, consider, use, or take an adverse action based on information about any criminal conviction that have been sealed, dismissed, vacated, expunged, sealed, voided, invalidated, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4). This prohibition does not apply if this information was provided by an individual for purposes of offering mitigating information. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices. It takes into account state policies that protect privacy of rehabilitated individuals, and that reduce barriers to re-integration.

Subdivision (a)(4) makes it unlawful to seek, consider, use or take an adverse action based on any adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system unless pursuant to an applicable court order. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the

context of criminal history information practices. This prohibition is supported by the fact that in general California does not permit the general public to access juvenile case files. See, e.g. Cal. Rules of Court, Rule 5.552. Given the confidentiality of juvenile records, persons should not seek, consider, use or take an adverse action based on them unless pursuant to an applicable court order. This prohibition does not apply if this information was provided by an individual for purposes of offering mitigating information.

Subdivision (a)(5) makes it unlawful to implement a “blanket ban” or categorical exclusion practice that takes adverse action against all individuals with a criminal record regardless of whether the criminal conviction is directly related to a demonstrable risk to the identified substantial, legitimate, nondiscriminatory interest or purpose. Examples of such prohibited practices include bans against all individuals with a criminal record, bans against all individuals with prior convictions, bans against all individuals with prior misdemeanors, and bans against all individuals with prior felonies. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices. Such bans are likely to have a discriminatory effect that cannot be justified. See, e.g. *HUD Guidance on FHA and Use of Criminal Records, supra*, at 6: (“A housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable to meet this burden [of proving that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest].”)

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra* and *DOJ Statement of Interest in Fortune Society, supra*. This subdivision is also consistent with the principles in other federal law regarding criminal conviction information practices in employment context, specifically, *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *Field v. Orkin Extermination Co.*, No. 00-5913, 2002 WL 32345739, at \*1 (E.D. Pa. Feb 21, 2002).

**§ 12269, subd. (b).**

The Council proposes to add this subdivision to clarify the relationship

between laws regulating investigative consumer reports and criminal history information practices with regard to look-back periods, to clarify that a court may consider shorter look-back periods in its determination of whether there is a feasible alternative practice under subsection 12266(d), and to define look-back periods and their role in the use of criminal history information. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices.

A look-back period limits the inquiry to criminal activity that occurred during a certain amount of time prior to the present. Look-back periods are intended to ensure that the criminal history information considered is relevant to the decision being made. Certain laws regulating investigative consumer reports allow the reporting of certain criminal history information up to seven years from the date of disposition, release or parole. In other words, these reports may use a look-back period of seven years. (While the issue of whether criminal background checks constitute “investigative consumer reports” subject to federal and state laws is currently being litigated, see e.g. in *Moran v. Screening Pros* (9<sup>th</sup> Cir, Case No. 12-57246), this regulation is drafted to reflect current law.) If a court finds that a criminal history information practice has a discriminatory effect under sections 12060 and 12061, as part of its demonstration of a legally sufficient justification under section 12266, the respondent must demonstrate that there is no feasible alternative practice that would equally or better accomplish the identified business interest or purpose with a less discriminatory effect. Look-back periods are relevant to this determination because shorter look-back periods that exclude old convictions may be likely to equally or better accomplish the identified business interest with a less discriminatory effect. Therefore, this subdivision clarifies that as part of its determination under section 12266, the court may consider the look-back period employed by the practice.

**§ 12269, subd. (c).**

The Council proposes to add this subdivision to provide an explicit reference to related federal and state laws to which persons who obtain investigative consumer reports or criminal history information from third parties may also be subject. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices to facilitate compliance with the related federal and state laws.

**§ 12270. Compliance with Federal or State Laws, Regulations, or**

### **Licensing Requirements Permitting or Requiring Consideration of Criminal History.**

The purpose of this section is to alert potential respondents of their legal duties and rights under other federal or state laws that may permit or require consideration of criminal history in particular housing decisions. This section is necessary to clarify the relationships between FEHA's requirements and those of other federal or state laws, to maintain consistency between the laws, and to clarify that this section does not change potential respondents' legal duties and rights under other federal or state laws, except where FEHA provides greater rights and remedies than FHA. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

#### **§ 12270, subd. (a).**

The Council proposes to add this subdivision to clarify the effect that compliance with other federal or state laws that obligate consideration of specific criminal history information has on a potential respondent's liability under Article 24. Some federal or state provisions are less protective of persons with criminal history in that they may require consideration of criminal history information that FEHA would not otherwise allow. Some of these federal and state laws only apply to certain types of public or subsidized housing, such as the examples provided in the subdivision. This subdivision is necessary to clarify that compliance with those other federal or state laws that also apply to particular situations may constitute an affirmative defense to conduct that might otherwise be prohibited under FEHA. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, *HUD Guidance on FHA and Use of Criminal Records, supra*; HUD Memorandum re: Use of Arrest Records in Screening Program Applicants or Evicting or Terminating Assistance of Tenants of Public and Other HUD-Assisted Housing (April 8, 2015); HUD Notice PIH, November 2, 2015, re: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.

#### **§ 12270, subd. (b).**

The Council proposes to add this subdivision to clarify that if specific federal or state laws prohibit consideration of specific criminal history information in particular transactions that the FEHA would otherwise allow, a person who fails to comply with these federal or state laws that are more protective of persons with criminal histories may also violate the FEHA. This subdivision is necessary to provide additional guidance to potential complainants and respondents regarding their legal rights and duties in the context of criminal history information practices to facilitate compliance with the related federal and state laws. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

Some of these federal and state laws only apply to certain types of public or subsidized housing. This subdivision is necessary to clarify that persons subject to those federal and state laws are obligated to comply with those prohibitions in addition to the FEHA's requirements. For example, federal law *requires* that Public Housing Authorities provide public housing, project-based Section 8, and Section 8 HCV applicants with notification and the opportunity to dispute the accuracy and relevance of a criminal record *before* admission or assistance is denied on the basis of such record.

As required by Government Code section 12955.6, the proposed subdivision is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically, HUD Notice PIH 2015-19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions; HUD Guidance on FHA and Use of Criminal Records, *supra*; HUD Memorandum re: Use of Arrest Records in Screening Program Applicants or Evicting or Terminating Assistance of Tenants of Public and Other HUD-Assisted Housing (April 8, 2015).

### **§ 12271. Local Laws or Ordinances**

The purpose of this section is to alert potential respondents of their legal duties and rights under local laws or ordinances that may be more protective of members of protected classes and further limit consideration of criminal history in housing decisions and to clarify that this section does not change potential respondents' legal duties and rights under those local laws or ordinances. This section is necessary to clarify that municipalities can legislate beyond FEHA because FEHA is a floor, not a ceiling, on an individual's right to be free from discrimination. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of

provisions in the statute and proposed regulations. The subdivision offers one example: Article 49, San Francisco Police Code.

### **TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS**

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

### **REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

### **REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

### **EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The proposed amendments clarify existing law without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, tenants, housing providers, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.

### **ECONOMIC IMPACT ANALYSIS/ASSESSMENT**

Because the proposed regulations provide detail about compliance with existing obligations but do not create any new liabilities or obligations, the

Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs or housing within the state; the creation of new businesses or housing or the elimination of existing businesses or housing within the state; the expansion of businesses or housing currently doing business within the state; or worker safety and the environment. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.