FAIR EMPLOYMENT AND HOUSING COUNCIL
REGULATIONS REGARDING TRANSGENDER IDENTITY AND EXPRESSION

FINAL 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 2. Discrimination in Employment
Article 5. Sex Discrimination

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person. Accordingly, FEHA requires that employers refrain from discrimination against transgender or gender non-conforming individuals in working conditions; facilities usage; dress and grooming standards; forms of address and gender pronoun usage; and use of an individual's legal name and/or gender.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in Los Angeles on June 27, 2016. The Council further solicited public comment on four modified texts at four subsequent meetings: August 31, 2016, in San Francisco; November 15, 2016, in San Francisco; January 10, 2017, in Los Angeles; and March 30, 2017, in Sacramento.

The following list summarizes the Council's notable amendments to the originally proposed text:
- making clear that each person has a gender identity;
- stating that a bona fide occupational qualification defense will not be justified by the mere fact that an individual is transgender or gender non-conforming, or that the sex assigned at birth is different from the sex required for the job;
- clarifying that employers should provide feasible alternative facilities to respect the privacy interests of *all* employees, rather than to "balance" interests as initially stated;
- restructuring section 11304(i) of the regulations for clarity; and
- making clear that sections 11016(b)(1) and 11032(b)(2) of the FEHA's regulations already preclude inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, unless the employer establishes a permissible defense.

Finally, the following list summarizes the Council's notable nonsubstantive revisions made to the text following the third 15 day public comment period:
- striking the definition of "facility" because the commonly understood meaning of "facility" as defined in the dictionary sufficiently captures the meaning of the term (this also resulted in the renumbering of subdivisions within section 11030);
- in section 11034(g), including an internal cross reference to the existing definition of business necessity and deleting "and does not discriminate…" to align with the definition of "business necessity";
- in section 11034(h), including an internal cross reference to the existing definition of permissible defense;
- in section 11034(h)(1), including an internal cross reference to the existing definition of permissible defense;
- in section 11034(h)(2), removing an erroneous cross reference that was included in error; and
- in the note of section 11034, removing reference to the *Lusardi* case per Government Code section 11349(e) because it is not binding on California (however, references to the case are still contained within the rulemaking file and illustrate the Council's intent to align its regulations with the EEOC's recent decision).

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses. Although the regulations require employers to provide feasible alternatives such as locking toilet stalls or shower curtains, an employer is not required to incur any

particular expense if infeasible. And existing California law already contains particular requirements with regard to gender-neutral signage, which should carry minimal costs.

DOCUMENTS RELIED UPON [Government Code Section 11347.3(b)(7)].

The following are documents relied upon, are included in the rulemaking file, were identified for the public in the initial statement of reasons, and would have been made available to the public upon request:
1. U.S. Dept. of Labor, Occupational Safety and Health Administration, "Best Practices: A Guide to Restroom Access for Transgender Workers (June 1, 2015)"
2. U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, "Frequently Asked Questions – EO 13672 Final Rule."

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as "authority" or "reference" for the proposed regulations and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Title:

Comment: The terms "transgender identity" and "transgender expression" are not terms commonly used to describe the transgender community. A more accurate title would be "Regulation Regarding Gender Identity and Expression" or "Regulations Regarding Transgender and Gender Non-Conforming People in the Workplace."

Council response: The Council agrees, but the title of the rulemaking action cannot be changed without re-noticing a new rulemaking action that would otherwise be identical but for the working title, which would mean that the regulations would become effective many months later than originally planned. Therefore, the Council has opted to proceed with the current title rather than initiate a new rulemaking action.

Section 11030(a) [Proposed]:

Comment: The Council has imbedded a definition of "facilities" within the text of Section 11034(e)(2). For sake of clarity, consistency, and ease of use, the definition is better placed in the formal "Definitions" portion of the regulations (*i.e.*, Section 11030.) Suggested definition of the word "facilities" is: "Facilities" includes but is not limited to restrooms, locker rooms, dressing rooms, dormitories, or similar rooms which may be designated for use by one gender etc.

Council response: The Council declines to define the word facilities as the word facilities as it is commonly used and defined by the dictionary provides sufficient clarity.

Comment: We propose adding a Section 10030(g) to separately define facilities. We recommend that this definition state ""Facility" includes but is not limited to restrooms, locker rooms, dressing rooms, dormitories, and other similar facilities."

Council response: The Council declines to define the word facilities as the word facilities as it is commonly used and defined by the dictionary provides sufficient clarity.

Section 11030(b):

Comment: So that the regulations are clear that every person has a gender identity, and that gender identity is not just about identifying as "male or female," we recommend redefining the phrase "gender identity" to state that: "'Gender identity' means each person's internal understanding of their own gender, which can include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex at birth, or transgender."

Council response: The Council agrees with this recommendation, and has redefined "gender identity" as follows: "'Gender identity' means each person's internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender."

Section 11030(c):

Comment: We recommend making clear that "sex" and "gender" are interchangeable and synonymous under California law.

Council response: The Council agrees and has added the word "gender" to the definition of "sex."

Section 11030(f):

Comment: The definition of "Transitioning" is "vague and limiting." We propose replacing it with language reading:

> "Transitioning" is a multi-step process of unlimited duration during which transgender people take steps to change their sex identity, gender expression, gender presentation or gender identity. The process of transitioning differs between individuals and which includes, but is not limited to: expression of personal choice to transition, expression of interest in changing gender or intent to change gender, presentation as a different sex, changing of appearance, changing of name or self-identifying pronoun, changing of legal gender on legal documents, adoption of mannerisms perceived as consistent with a particular gender identity, change in voice, choice of bathroom and/or facility usage that aligns with gender expression or identity participation in gender specific sports or recreational activities, hormone therapy, sex reassignment surgery, and/or other medical treatment or procedures. A change in gender role may be part time, or may involve changes in some parts of gender expression and not in others.

Council response: The Council declines to adopt this definition, as a concise definition is more likely to help readers understand what "transitioning" means, and also sufficient to capture that meaning.

Comment: We recommend striking the word "bathroom" to avoid ambiguity regarding the term "facility" as it is defined in section 11034(e). We also recommend adding identity documents as something a person may or may not change as part of a transition, and changing the ambiguous term "sex reassignment surgery" to the broader term "surgeries."

Council response: The Council agrees that the word "bathroom" should be stricken. The word facility as it is commonly used and as defined by the dictionary provides sufficient clarity. The Council also agrees that the word "sex reassignment surgery" should be replaced with the broader word surgeries to avoid ambiguity and confusion. The Council declines to add identity documents specifically, as the possibility that such documents may be changed is already encompassed by the reference to "changes in name and pronoun."

Comment: I recommend adding to the definition of "transitioning" language indicating that there may not be "a finite amount of time to the process."

Council response: The Council declines to add such language, as the current language is not limiting in terms of time, and the use of the word "process" might implicate that the time is finite.

Section 11031(a, e):

Comment: We urge that this Section be amended to clarify that just as employees must be permitted access to facilities consistent with the employee's gender identity or gender expression, employees must be permitted access to jobs or job duties consistent with the employee's gender identity or gender expression.

Council response: The Council agrees and has adopted language suggested by the commenter to implement this change, namely by adding a statement that application of the BFOQ defense will not be justified by "The fact that an individual is transgender or gender non-conforming, or that the individual's sex assigned at birth is different from the sex required for the job." The Council has added at subdivision (e) the further statement that "Employers shall permit employees to perform jobs or duties that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth."

Section 11034(b)(2):

Comment: As currently drafted, this subdivision seems unnecessarily wordy and confusing. We propose to simplify and clarify the language as follows:
(2) It is unlawful for an employer to condition the availability of fringe benefits on a particular sex, or on whether the employee is a head of household, principal wage earner, secondary wage earner, or other similar status.

Council response: The Council finds the existing regulatory language sufficiently clear and declines to make this modification.

Section 11034(b)(5) (Proposed):

Comment: We propose adding a new subsection to this section, to be numbered Section 11034(b)(5), that would clarify that it is unlawful to discriminate in the provision of benefits on the basis of an employee's or dependent's actual or perceived gender identity, including, but not limited to, the employee's or dependent's identification as transgender.

Council response: The Council declines to add such a subdivision. Section 11034(b)(1) already makes it unlawful for an employer to condition the availability of fringe benefits upon an employee's sex, and the regulations are also clear that nothing in the regulations prevents an employee for asserting rights under other provisions of the Fair Employment and Housing Act.

Section 11034(c):

Comment: The phrase "lines of progression" is outdated and confusing. Recommend replacing it with the word "promotion" or adding the word "promotion."

Council response: The Council declines to make this change as the existing regulatory language is sufficiently clear. The phrase "lines of progression" is one that has long been used in both the state and federal context.

Section 11034(e)(2):

Comment: We applaud the inclusion of this section and appreciate the Council's clarification that the definition of "facilities" includes locker rooms, dressing rooms, dormitories, and other similar facilities. Access to appropriate and safe restrooms and other sex-specific facilities is essential to ensure the safety and equality of transgender employees.

Council response: The Council agrees that access to appropriate and safe facilities is essential to the equality of transgender and gender non-conforming individuals. However, the Council ultimately has declined to define the word facilities as the word facilities as it is commonly used and defined by the dictionary provides sufficient clarity.

Comment: We suggest re-wording this subsection to read "(2) Equal access to comparable, safe, and adequate indoor and outdoor facilities shall be provided to employees without regard to the sex of the employee. This requirement shall not be used to justify any discriminatory employment decision."

Council response: The Council declines to specify that the regulation applies to both "indoor and outdoor" facilities, instead opting to use the catch-all word "facilities."

Comment: The inclusion of the word "safe" creates ambiguity for employers; it is unclear whether the use of this word is meant to exceed the safety standards already imposed by Cal-OSHA and

OSHA, and if this section provides a separate avenue of liability for an employee whose employer is already in compliance with Cal-OSHA and OSHA standards. The use of the word, coupled with the requirement that this section not be used to justify any discriminatory employment decision, puts employers in the predicament of maintaining safety while avoiding claims of discrimination based upon equal access.

Council response: The Council disagrees that the word "safe" creates ambiguity or places employers in a predicament. The initial statement of reasons references both Cal/Osha and Fed/OSHA, including Fed/OSHA's June 1, 2015, guidance for employers regarding restroom access for transgender workers. That guidance contains a discussion of the "duty to provide a safe workplace," including "toilet facilities that are sanitary and available," and to "protect all . . . employees . . . from any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site." (U.S. Dept. Labor's Occupational Safety & Health Admin., Best Practices: A Guide to Restroom Access for Transgender Workers (June 1, 2015) p. 3-4, at https://www.osha.gov/Publications/OSHA3795.pdf.)

Section 11034(e)(2)(A)-(B) (Section 11034(e)(2)(B) ultimately renumbered as 11034(e)(2)(C)):

Comment: "The proposed language in subdivision (A) states that an employer "shall" permit an employee to use a facility that corresponds to the employee's gender identity or expression regardless of the employee's assigned sex at birth. The proposed language in subdivision (B) states that to ensure privacy, an employer "shall" provide alternative facilities if no individual facility is available. These two sections create confusion for an employer as to whom the employer must provide an alternative facility – the employee who is transitioning or the employee who is using the facility for the sex the employee was assigned at birth? If the employer provides an alternative facility for the employee who is transitioning, does this create liability for the employer under subdivision (B) for requiring the employee who is transitioning to use a particular facility in order to ensure the privacy of other employees?"

Council response: In order to avoid ambiguity, the Council deleted reference to the requirement to provide an alternative facility only if no "individual facility is available" and instead created a general requirement to provide "feasible alternatives" to "respect the privacy interests of all employees." This section is clear that an employer may not require an employee to use a particular facility; an employee who is transitioning therefore may not be required to use any alternative facility that the employer may make available.

Section 11034(e)(2)(B) (ultimately renumbered as 11034(e)(2)(C)):

Comment: The requirement to provide alternative facilities could burden an employer, or be impossible for an employer who is simply a tenant in a building who lacks the ability to construct a new facility as required. Therefore, we recommend adding language to refer to the installation of private facilities "wherever possible."

Council response: The Council amended this section to require the provision of "feasible alternatives."

Comment: With regard to the example of a staggered schedule for showering, would an employer be liable for discrimination for requiring a transgender employee to shower at a different time than the gender of employees with whom the transgender employee identifies?

Council response: The Council declines to elaborate upon this point. The regulations are clear that an employer may not require an employee to use a particular facility and that equal access to facilities shall be provided. Therefore, while an employee who desires more privacy may request that they be provided an individual shower time, a transgender employee may not be singled out for a staggered shower schedule.

Comment: The last sentence of this section states that an employer cannot require an employee to utilize a particular facility. However, if an employer only has one facility available, or there is not another comparable facility available, then there is no option other than to require the employee to utilize that facility. We respectfully request the Council to clarify this issue.

Council response: The Council amended this section to require the provision of "feasible alternatives." No further clarification is necessary; if there is no feasible alternative, then employees will tautologically have no option but to use the available facility.

Comment: We recommend striking the phrase "to balance the privacy interests of all employees." That language is unnecessary to achieve the intent of the provision, and implies the inaccurate and harmful suggestion that the rights of transgender workers to be free from discrimination are somehow in conflict with or must be "balanced" against the privacy interests of non-transgender employees.

Council response: The Council agrees that the phrase "to balance the privacy interest of all employees" should be stricken, as it suggests balancing the right to be free from discrimination with other rights. The Council has replaced the phrase "to balance" with the phrase "to respect."

Comment: We recommend stating that an employer or other covered entity may not require an employee to use a "separate private facility" rather than a "particular facility."

Council response: The Council declines to follow this recommendation because the language prohibiting employers from requiring an employee to use a particular facility accurately captures the intent of the regulation.

Section 11034(e)(2)(C) (ultimately renumbered as 11034(e)(2)(D)):

Comment: We suggest adding the phrase "or procedure" after the phrase "medical treatment" to ensure clarity and comprehensiveness of coverage by this subdivision.

Council response: The Council agrees and added this phrase.

Comment: We recommend adding clarification that an employer may not require an employee to provide proof in the form of an identity document, such as a driver's license or birth certificate, to use facilities designated for use by a particular gender.

Council response: The Council agrees and has added the recommended clause indicating that employees shall not be required to "provide any identity document" to "use facilities designated for use by a particular gender."

Comment: I suggest stating "Transitioning or transitioned employees" to make clear that this language covers not only those who are transitioning, but those who have completed a transition process.

Council response: The Council has modified the language to make it more general so that it will facially apply to all employees: "Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender."

Section 11034(g):

Comment: We agree with the proposed amendment regarding an employer's ability to require an applicant to comply with grooming or dress standards that serve a legitimate business purpose and that do not discriminate based on sex, gender, gender identity, or gender expression, as this ensures the safety of the workplace as well as other legitimate business needs.

Comment: The Council agrees that the business necessity standard should apply to any grooming or dress standards that are inconsistent with an individual's gender identity or expression.

Comment: The final sentence in this section stating "It is unlawful to require individuals to dress or groom themselves in a manner inconsistent with their gender identity or gender expression," seems to be in direct conflict with the prior sentence permitting an employer to have gender-neutral grooming or dress standards that serve a legitimate purpose, even if those standards may be 'inconsistent' with the gender identity or expression of the applicant or employee.

Council response: The Council agrees that this subdivision merited clarification, and has amended it to state that it is "unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity (section 11010)."

Comment: We suggest amending subdivision (g) as follows:
(1) It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards, so long as the employer can show the following:

(A) The standard is justified by business necessity, as defined under section 11010(b);
(B) The employer has effectively notified its employees of the circumstances and time when compliance with the standard is required and consequences of violating the standard;
(C) Any such standard does not discriminate based on an individual's sex, including gender, gender identity, or gender expression.

(2) It is unlawful to require individuals to dress or groom themselves in a manner inconsistent with their gender identity or gender expression.

(3) It is unlawful to require an individual who is transitioning to dress or groom themselves in a manner that is based upon the individual's perceived sex.

Council response: The Council agrees that the business necessity standard is appropriate and has modified this subdivision to read that "It is unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity (section 11010)." The Council declined to retain the "It is lawful" phrasing with which this subdivision initially began in order to emphasize that dress and grooming standards that run contrary to gender identity and expression should not be the norm. For the same reason, the Council declined to incorporate the effective notification language, which might suggest more support for such standards than the Council intends. The Council declined to adopt section 3 of the proposed language because the prohibition the Council has adopted would already make this unlawful. The Council declined to include the language stating that "Any such standard does not discriminate based on an individual's sex, including gender, gender identity, or gender expression," because if the standard meets business necessity then any gender-identity or expression discrimination is excused.

Section 11034(h)(2) (ultimately renumbered as 11034(h)(1)):

Comment: Subsection (h)(2) should be amended to read:
(2) Unless an employer or other covered entity can meet its burden of showing a BFOQ, it is unlawful to require an applicant to identify their gender, during the application process, including during any job interviews. If the employer or other covered entity can meet its burden of showing a BFOQ, designation by the applicant of a gender that is inconsistent with the applicant's assigned sex at birth or presumed gender shall not be considered fraudulent or a misrepresentation for the purpose of any adverse employment action or claim based on the applicant's designation.

> (a) For the purposes of statistical data gathering and/or to meet a legally mandated obligation, an employer or other covered entity may request voluntary identification of an employee's gender once the employer or other covered entity has hired the employee. This information is to be collected and/or used by an employer or covered entity solely for statistical and record keeping purposes in compliance with all other applicable law.

Council response: The Council has partially incorporated subsection (a) of the comments, regarding data gathering for statistical purposes, into the initial portion of subdivision (h), which reads that "For recordkeeping purposes in accordance with 11013(b), an employer may request an applicant to provide this information solely on a voluntary basis." The Council has also created subdivision (h)(4), which refers to the use of a legal name or gender to meet legally-mandated obligations. The Council rejected, however, the suggestion that the collection or use of gender for legally-mandated purposes should be voluntary since if the use is legally-mandated then there could be consequences to an employer for failing to comply with such obligations.

The Council agrees that it is unlawful for an employer to inquire as to gender unless pursuant to a permissible defense, such as a BFOQ, and has incorporated this language into the initial portion of subdivision (h), which states that "inquiries that directly or indirectly identify an individual on the

basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense (section 11010)."

Finally, the Council addressed fraud or misrepresentation in subdivision (h)(1). However, the Council concluded that an applicant's designation of gender inconsistent with assigned sex at birth or presumed gender could be fraud or misrepresentation if, and only if, an employer has a permissible defense. The Council did not feel it followed that if the employer had a BFOQ for requesting gender information that the information provided could not be a basis for a finding of fraud or misrepresentation.

Comment: Where school district employees must submit fingerprints that are used to obtain California and FBI criminal history reports, and the State Live Scan Service form requires designation of the applicant's gender, does the applicant/district need to continue to submit correct information, or should the district defer to whichever sex is designated by an applicant?

Council response: Pursuant to subdivision (h)(1), if the employer has a permissible defense, then an applicant's designation of a gender inconsistent with that assigned at birth may be considered fraudulent or a misrepresentation. Similarly, pursuant to subdivision (h)(4), an employer may use an employee's gender or legal name where necessary to meet a legally-mandated obligation.

Comment: We recommend that the Council prohibit questions regarding gender on job applications altogether unless needed for a legitimate business purpose.

Council response: The Council agrees and has added language to Section 11034(h) stating, "As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense."

Section 11034(h)(3):

Comment: An employer should not be subject to civil liability for unintentionally or mistakenly referring to an employee by the wrong name or gender pronoun. We request deletion of this subdivision.

Council response: The Council declines to delete this subdivision. The language indicates that an employer "*may* be liable under the Act" for failing to abide by an employee's stated name and/or pronoun preferences. This is not a strict liability standard, and nothing in the language of this section prevents an employer from offering as a defense that the use of the incorrect name or pronoun was mistaken or unintentional.

Comment: We recommend that the Council include an explicit reference to gender-neutral pronouns.

Council response: The Council agrees and has added the requested language indicating that this subdivision applies to "gender-neutral pronouns."

Section 11034(h)(3)-(4):

Comment: The requirement that an employer use an employee's stated name and pronoun preference may weaken security and cause confusion. The Council should amend these sections to permit an employer to use the legal name and gender of an individual as necessary for business use.

Council response: Subdivision (h)(4) states that an employer may use an employee's gender or legal name where necessary to meet a legally-mandated obligation. Therefore, where there is a legally-mandated business necessity, an employer may do as the commenter requests.

Section 11034(h)(4):

Comment: We recommend adding language allowing the use of an employee's gender or legal name as indicated on a government-issued identification document only if necessary to meet "an explicitly" legally mandated obligation. We also recommend adding language stating that an employer "otherwise must identify the employee exclusively in accordance with the employee's gender identity and preferred name."

Council response: The Council declines to amend the reference to "a legally-mandated obligation" to read "an explicitly legally-mandated obligation," as the Council feels that such amendment would make the meaning and intent of this regulation less clear, without furthering the protections offered to transgender individuals. The Council has, however, added language stating that in the absence of a legally-mandated obligation, an employer "must identify the employee in accordance with the employee's gender identity and preferred name," as the Council felt that this provided important clarification.

Section 11034(i)

Comment: This section should be revised and reorganized. The proposed redrafted language is as follows:

(i) Additional Rights

(1) It is unlawful for employers and other covered entities to inquire about, request, or seek other proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment, unless the employer or other covered entity can meet its burden of proving a BFOQ defense.

(2) It is unlawful to discriminate or retaliate against an employee because that employee has refused to respond to or otherwise comply with unlawful inquiries, requests, or requirements for documentation or other proof of that individual's sex, gender, gender identity, or gender expression.

(3) It is unlawful to discriminate or retaliate against an employee who initiates communication with the employer regarding any requested modification, adjustment, or reasonable accommodation to the employee's terms, conditions, rights and privileges in employment.

(4) It is unlawful to deny employment to an individual based wholly or in part on the individual's sex, gender, gender identity, or gender expression.

(5) Nothing in these regulations shall prevent an applicant or employee from asserting rights under other provisions of the Act, including leave under the California Rights Act and rights afforded to individuals with mental or physical disabilities.
(6) It is unlawful to discriminate against an individual who is transitioning, has transitioned or is perceived to be transitioning.

Council Response: For clarity, the Council divided (i)(1) into further subdivisions. The Council declined to add proposed subdivisions (i)(2)-(3) because retaliation is already prohibited under the Fair Employment and Housing Act.

Section 11034(i)(1):

Comment: We request that the Council include within the exceptions set forth in this Section "a reference to subdivision (h)(4) to include government mandated documents."

Council response: The Council declines to include this as an additional exception. If the employer has a bona fide occupational reason to request government-issued identification, then it may assert a BFOQ defense.

Comment: The Council should modify the phrase "to inquire" to read "to inquire about."

Council response: The Council agrees and has made this modification so that the sentence in question is grammatically correct.

Comment: As written, this subsection allows an employer to request documentation regarding an employee's sex, gender, gender identity, or gender expression any time the employee initiates communication with the employer regarding a requested adjustment to the employee's working conditions.

Council response: The Council agrees that this subdivision could be read as having the effect of allowing unbridled requests for documentation any time that an employee initiates communication regarding an adjustment to working conditions. The Council has therefore modified the language of this subdivision to make the inquiry about or requirement to provide documentation unlawful, and has separately indicated that nothing in that subdivision "shall preclude an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee's working conditions."

Comment: In order to ensure that this section is not interpreted in conflict with the remainder of the regulations, I recommend deleting the language of this section reading that "unless the employer or other covered entity meets its burden of proving a BFOQ defense, as defined above, or the employee initiates communication with the employer regarding any requested adjustment to the employee's working conditions."

Council response: The Council agrees that this subdivision could be read as having the effect of allowing unbridled requests for documentation any time that an employee initiates communication

regarding an adjustment to working conditions. The Council has therefore modified the language of this subdivision to make the inquiry about or requirement to provide documentation unlawful, and has separately indicated that nothing in that subdivision "shall preclude an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee's working conditions."

Section 11034(i)(3):

Comment: We request deletion of the reference to the California Family Rights Act (CFRA), as the right to take leave under the act is not dependent upon whether an employee is transgender or transitioning.

Council response: The Council declines to delete this subdivision. This subdivision is included to clarify that this regulation does not preclude an employee from asserting any rights available under any other provisions of the Fair Housing and Employment Act, and mentions CFRA as an example. No additional rights are created by this example.

Section 11034(i)(4):

Comment: This subsection states that it is unlawful to discriminate against an employee who is transitioning or has transitioned. "Transitioning" or "transition" is not a protected classification under Government Code Section 12940 for purposes of discrimination. In order to be consistent with the actual language of the Government Code, we respectfully request the Council to reference "gender expression" or "gender identity."

Council response: The Council declines to make this change. Discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning on the basis of those characteristics is by definition discrimination on the basis of gender identity or expression.

COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Title:

Comment: We again strongly suggest that the Council modify the title of the proposed regulation. While the intent of the regulations is clear from the title – and critically important – it should be noted that "transgender identity" and "transgender expression" are not terms commonly used to describe the transgender community. Rather, a more accurate title would be "Regulation Regarding Gender Identity and Expression" or "Regulations Regarding Transgender and Gender Non-Conforming People in the Workplace." This change would also be more inclusive of those who may be protected under the proposed regulations but who may not be defined as or refer to themselves as "transgender."

Council response: The Council agrees, but the title of the rulemaking action cannot be changed without re-noticing a new rulemaking action that would otherwise be identical but for the working

title, which would mean that the regulations would become effective many months later than originally planned. Therefore, the Council has opted to proceed with the current title rather than initiate a new rulemaking action.

Section 11030(a) [Proposed]:

Comment: The phrase "other similar facilities" in the definition of facilities is unclear, and leaves employers with a lack of certainty regarding the scope of the regulations. We recommend that council list the common characteristics of the facilities envisioned.

Council response: The Council has declined to define the word facilities as the word facilities as it is commonly used and defined by the dictionary provides sufficient clarity.

Comment: We recommend adding additional language to the definition of facilities to make clear that it applies to "rest areas" and "other inside or outside facilities." This language is necessary to cover employees who work outside and use facilities like portable rest rooms or outdoor rest areas.

Council response: The Council has declined to define the word facilities as the word facilities as it is commonly used and defined by the dictionary provides sufficient clarity.

Sections 11030(b)-(d) [Now Sections 11030(a)-(c)]

Comment: The inclusion of an employee's "perception" of their gender expression, gender identity, and sex in the definitions section creates ambiguity and confusion for employers as to how to comply with the regulations. We request that the Council revise these definitions to include only the gender that the employee has expressly indicated to the employer, and to allow employers a reasonable amount of time to respond if that expressed gender continues to change.

Council response: The Council has ultimately made modifications to the language of these definitions to make clear that the "perception" being referred to is the employer's or other third-parties' perception of an individual's gender expression, gender identity, or sex, and that discrimination is therefore prohibited based upon such third-party perception.

Section 11030(c) [Now Section 11030(b)]:

Comment: We recommend replacing the term "self-identification" with "internal understanding." We also suggest indicating that "each person" has a gender identity, rather than the present "a person's" which seems to refer only to transgender individuals.

Council response: The Council ultimately agrees and has replaced the term "self-identification" with "internal understanding," and has changed the reference to "a person's" gender identity to refer to "each person's" gender identity.

Section 11030(d) [Now Section 11030(c)]:

Comment: We suggest adding a clarification that the terms “sex” and “gender” are interchangeable, as gender is not otherwise defined.

Council response: The Council has added the word “gender” to the definition of “sex,” but declines to add further clarification, as Government Code section 12926(r)(2) already includes “gender” in the definition of “sex” for the purposes of California law.

Section 11030(e) [Now Section 11030(d)]:

Comment: We recommend clarifying that one common sex stereotype is the expectation that a person’s gender identity will be the same as their sex assigned at birth, and that another is that a person will identify as only one gender. We also recommend clarifying that sex stereotyping includes beliefs that extend beyond a person’s appearance or behavior to other assumptions related to masculinity and femininity, through additional examples. We recommend adding language to the definition stating that a sex stereotype “includes expectations relating to gender roles, gender expression—including clothing, hairstyle, activities, voice, mannerisms, or physical characteristics—and expectations relating to romantic and sexual attraction and relationships. Sex stereotypes also include the expectation that a person’s gender identity will be the same as their sex assigned at birth and the expectation that individuals will identify as only one gender.”

Council response: The Council declines to make the specific modification recommended by the commenter, as the language of this definition is already sufficiently broad as to cover all sex stereotyping. Nevertheless, in order to ensure that the regulation is read as broadly as intended, the Council has added language indicating that a “‘Sex Stereotype’ *includes, but is not limited to*, an assumption about a person’s appearance of behavior, *gender roles, gender expression, or gender identity*.”

Section 11030(g) [Now Section 11030(f)]:

Comment: We recommend striking the term “multi-step” from the definition of transitioning” as not all transgender individuals go through a sequence of physical and social changes. We also recommend adding the phrase “sex-segregated” before “activities like sports teams.”

Council response: The Council agrees that the term “multi-step” should be removed from the definition of transitioning for the reason stated by the commenter and deleted it. The Council declines to add the phrase “sex-segregated” when referring to sports teams, as that does not accurately capture the intent of the regulatory language. The Council has on its own initiative been more specific about the types of activities contemplated, which include a broader category of “employer-sponsored activities” such as team-building projects and volunteering.

Section 11031(a)(5)

Comment: The term “gender non-conforming” is not defined in the regulations and creates significant ambiguity.

Council response: The term “gender non-conforming” is a self-defining term and does not require further clarification.

Comment: This section states that the fact that an individual is transgender or gender non-conforming, or that the assigned sex at birth is different from the sex required for the job, does not justify application of the BFOQ defense. We request that the Council include language in this section indicating that business necessity may be a defense if an employer can prove that a particular sex is a business necessity required for the job.

Council response: The Council declines to make this modification. The regulation is clear that the fact that an individual is transgender or gender non-conforming, or that the individual’s sex assigned at birth is different from the sex required for the job, does *not* justify application of the BFOQ defense. Business necessity is simply a different way of stating that something is a BFOQ.

Section 11031(e)

Comment: This proposed section states that an employer "shall" permit employees to perform jobs or duties that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth. First, this subdivision does not appear to qualify as a "defense" to include in this section of the regulations. Second, this mandate is particularly challenging given the inclusion in the definitions of "gender identity," "gender expression," and "sex" as the employee's perception of his/her gender, discussed above. If an employer cannot ascertain the employee's perceived gender, it is impossible for the employer to ensure the employee is performing a job or duties that correspond to that perceived gender. Third, we respectfully request the FEHC to include language that recognizes the employee must be otherwise qualified to perform the job or duties which the employee seeks. Simply because an employee wants to perform a job or duties that the employee believes are consistent with his or her self-identified gender or perceived gender does not provide the employee with an automatic right to that position. However, the term "Employers shall," as used in this subdivision, provides that potential interpretation. Accordingly, we request the FEHC to include qualifying language at the end of this sentence such as, "if the employee is otherwise qualified to perform the job or duties and is eligible pursuant to any employer merit or seniority program."

Council response: The Council declines to modify this subdivision. (1) This subdivision contains general descriptions and clarifications of defenses, and does not only constitute a list of defense. (2) The Council has clarified the references to “perceived” gender identity, gender expression, and sex, to make clear that the perception in question is a third parties’ perception. (3) The regulation states that employers shall permit employees to perform jobs or duties that correspond to the employee’s gender identity or gender expression, *regardless of the employee’s assigned sex at birth.* The regulation does not, however, state that employers shall permit employees to perform jobs regardless of their qualifications or eligibility. The requested modification is therefore unnecessary.

Section 11034(b)(3):

Comment: We recommend adding a provision to this section to make clear that denying transgender employees equal access to health benefits, including treatments related to gender

transition, is a violation of the FEHA. Recommended additional language is "For example, an employee health benefit plan may not deny coverage for services related to gender transition where the same services are covered for other purposes."

Council response: The Council declines to make this addition. Health benefits are already covered under the umbrella term "fringe benefit plans" covered by this section, and it would be confusing to single this one example out for inclusion in the regulation.

Section 11034(e)(2):

Comment: The inclusion of the word "safe" creates ambiguity for employers; it is unclear whether the use of this word is meant to exceed the safety standards already imposed by Cal-OSHA and OSHA, and if this section provides a separate avenue of liability for an employee whose employer is already in compliance with Cal-OSHA and OSHA standards. The use of the word, coupled with the requirement that this section not be used to justify any discriminatory employment decision, puts employers in the predicament of maintaining safety while avoiding claims of discrimination based upon equal access.

Council response: The Council disagrees that the word "safe" creates ambiguity or places employers in a predicament. The initial statement of reasons references both Cal/Osha and Fed/OSHA, including Fed/OSHA's June 1, 2015, guidance for employers regarding restroom access for transgender workers. That guidance contains a discussion of the "duty to provide a safe workplace," including "toilet facilities that are sanitary and available," and to "protect all . . . employees . . . from any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site." (U.S. Dept. Labor's Occupational Safety & Health Admin., Best Practices: A Guide to Restroom Access for Transgender Workers (June 1, 2015) p. 3-4, at https://www.osha.gov/Publications/OSHA3795.pdf.)

Section 11034(e)(2)(A):

Comment: The inclusion of an employee's "perceived" gender identity, expression, or sex in the definitions section makes it impossible for an employer to accommodate the use of facilities as required by this regulation. An employer cannot accommodate an employee's perceived gender and still maintain the privacy of other employees.

Council response: The Council has made modifications to the language of the definitions to make clear that the "perception" being referred to is the employer's or other third-parties' perception of an individual's gender expression, gender identity, or sex. An employer must therefore permit use of facilities regardless of the employer's perception of the employee's gender expression, gender identity, or sex.

Section 11034(e)(2)(A)-(B) (Section 11034(e)(2)(B) ultimately renumbered as 11034(e)(2)(C)):

Comment: "The proposed language in subdivision (A) states that an employer "shall" permit an employee to use a facility that corresponds to the employee's gender identity or expression regardless of the employee's assigned sex at birth. The proposed language in subdivision (B) states

that to ensure privacy, an employer "shall" provide alternative facilities if no individual facility is available. These two sections create confusion for an employer as to whom the employer must provide an alternative facility – the employee who is transitioning or the employee who is using the facility for the sex the employee was assigned at birth? If the employer provides an alternative facility for the employee who is transitioning, does this create liability for the employer under subdivision (B) for requiring the employee who is transitioning to use a particular facility in order to ensure the privacy of other employees?"

Council response: In order to avoid ambiguity, the Council deleted reference to the requirement to provide an alternative facility only if no "individual facility is available" and instead created a general requirement to provide "feasible alternatives" to "respect the privacy interests of all employees." This section is clear that an employer may not require an employee to use a particular facility; an employee who is transitioning therefore may not be required to use any alternative facility that the employer may make available.

Section 11034(e)(2)(B) (ultimately renumbered as 11034(e)(2)(C)):

Comment: The requirement to provide alternative facilities could burden an employer, or be impossible for an employer who is simply a tenant in a building who lacks the ability to construct a new facility as required.

Council response: The Council amended this section to require the provision of "feasible alternatives."

Comment: With regard to the example of a staggered schedule for showering, would an employer be liable for discrimination for requiring a transgender employee to shower at a different time than the gender of employees with whom the transgender employee identifies?

Council response: The Council declines to further elaborate because the regulations are clear that an employer may not require an employee to use a particular facility and that equal access to facilities shall be provided. Therefore, while an employee who desires more privacy may request that they be provided an individual shower time, a transgender employee may not be singled out for a staggered shower schedule.

Comment: The last sentence of this section states that an employer cannot require an employee to utilize a particular facility. However, if an employer only has one facility available, or there is not another comparable facility available, then there is no option other than to require the employee to utilize that facility.

Council response: The Council amended this section to require the provision of "feasible alternatives." No further clarification is necessary; if there is no feasible alternative, then employees will tautologically have no option but to use the available facility.

Comment: We recommend striking the phrase "to balance the privacy interests of all employees." That language is unnecessary to achieve the intent of the provision, and implies the inaccurate and harmful suggestion that the rights of transgender workers to be free from discrimination are

somehow in conflict with or must be "balanced" against the privacy interests of non-transgender employees.

Council response: The Council agrees that the phrase "to balance the privacy interest of all employees" should be stricken, as it suggests balancing the right to be free from discrimination with other rights. The Council has replaced the phrase "to balance" with the phrase "to respect."

Section 11034(e)(2)(C) (ultimately renumbered as 11034(e)(2)(D)):

Comment: We recommend striking the word "particular" in this section to clarify that no medical treatment whatsoever is needed in order to use facilities in accordance with one's gender identity.

Council response: The Council agrees that the word "particular" may incorrectly imply that some evidence of medical treatment must be provided, and has stricken the word from this subdivision.

Section 11034(h):

Comment: An employer should not be subject to civil liability for unintentionally or mistakenly referring to an employee by the wrong name or gender pronoun after years of using a different name or pronoun. We request that the Council modify the language of this section to state that liability will only be imposed for "intentional or pervasive" failures to abide by the employee's requested name and/or pronoun.

Council response: The Council declines to add the requested language. The language of the section indicates that an employer "*may* be liable under the Act" for failing to abide by an employee's stated name and/or pronoun preferences. This is not a strict liability standard, and nothing in the language of this section prevents an employer from offering as a defense that the use of the incorrect name or pronoun was mistaken or unintentional.

Comment: The structure of this section places the general rule on the same level as the exceptions. This is awkward and leads to questions as to when the general rule or the exceptions would apply. We recommend restructuring either by moving the general rule right after the title and creating subsections to subdivision (h), or by moving the general rule immediately after the title and moving the remaining numbered items to subdivision (i).

Council response: The Council agrees and has restructured subdivision 11034(h) so that the general rule is stated directly after the title, and the further clarifications and exceptions follow in numbered subsections.

Section 11034(h)(2) (ultimately in the preamble):

Comment: We recommend that the Council prohibit questions regarding gender on job applications altogether unless needed for a legitimate business purpose.

Council response: The Council agrees and has added language to Section 11034(h) stating, "As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or

indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense."

Section 11034(h)(5) (ultimately renumbered as 11034(h)(4)):

Comment: We recommend adding language to this section making clear that even where an employer may use an employee's gender or legal name to meet a legally-mandated obligation, the employer "otherwise must identify the employee exclusively in accordance with the employee's gender identity and preferred name." We also recommend adding language to indicate that the legally-mandated obligation must be an explicit one.

Council response: The Council declines to amend the reference to "a legally-mandated obligation" to read "an explicitly legally-mandated obligation," as the Council feels that such amendment would make the meaning and intent of this regulation less clear, without furthering the protections offered to transgender individuals. The Council has, however, added language stating that in the absence of a legally-mandated obligation, an employer "must identify the employee in accordance with the employee's gender identity and preferred name," as the Council felt that this provided important clarification.

Section 11034(i)(1):

Comment: We request that the Council include a specific cross-reference to subsection (h)(4) to allow employers to request government-mandated documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment.

Council response: The Council declines to make this modification because it is unnecessary. Subdivision (i)(1) already allows employers to assert a BFOQ defense, and subdivision (h)(4) permits an employer to use an employee's gender or legal name where necessary to meet a legally-mandated obligation.

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11030(c) [Now Section 11030(b)]:

Comment: We recommend replacing the term "self-identification" with "internal understanding." We also suggest indicating that "each person" has a gender identity, rather than the present "a person's" which seems to refer only to transgender individuals.

Council response: The Council agrees and has replaced the term "self-identification" with "internal understanding," and has changed the reference to "a person's" gender identity to refer to "each person's" gender identity.

Comment: We urge the Council to maintain the clause that includes "perception" of gender identity to make clear that an individual does not have to prove their gender identity in order to invoke legal

protections and to protect those individuals discriminated against based on an inaccurate perception of gender identity.

Council response: The Council agrees and has included catch-all language making clear that the definition of sex, gender, gender identity and gender expression includes a perception by a third party of any of those characteristics.

Section 11030(d) [Now Section 11030(c)]:

Comment: We suggest adding a clarification that the terms "sex" and "gender" are interchangeable, as gender is not otherwise defined.

Council response: The Council has added the word "gender" to the definition of "sex," but declines to add further clarification, as Government Code section 12926(r)(2) already includes "gender" in the definition of "sex" for the purposes of California law.

Section 11030(e) [Now Section 11030(d)]:

Comment: We again recommend including illustrative examples of sex stereotyping to help clarify discriminatory sex stereotyping. We again recommend an explicit statement that an example of sex stereotyping includes expectations related to romantic and sexual attraction and relationships.

Council response: The Council declines to make the modification recommended by the commenter, as the language of this definition is already sufficiently broad as to cover all sex stereotyping, and is sufficiently clear without further illustrative examples or statements.

Section 11030(g) [Now Section 11030(f)]:

Comment: We appreciate the striking of the term "multi-step" to avoid implying that all persons who transition necessarily go through a sequence of physical and social changes, when some individuals may only make one change. We also recommend adding the clarifying phrase "sex-segregated" before "activities like sports teams."

Council response: The Council declines to add the phrase "sex-segregated" as that does not accurately capture the intent of the regulatory language.

Section 11034:

Comment: The EEOC decision that is cited in the note is slightly incorrect. The name of the plaintiff was "Tamara Lusardi," not "Tamra Lusardi."

Council response: The Council agrees and has corrected the name of the decision.

Section 11034(b)(3):

Comment: We again urge the FEHC to add a provision to clarify with more specificity that it is discrimination in violation of the FEHA to deny transgender employees equal access to health benefits, including treatments related to gender transition. Unfortunately, many health care plans continue to deny care to transgender workers based on outdated policies. This clarification is consistent with California state insurance law which prohibits insurers and managed health care plans from having blanket exclusions for treatments related to gender transition; state law prohibiting state agencies from entering into contracts with employers that discriminate against transgender employees in the provision of benefits; and the nondiscrimination provisions of the federal Affordable Care Act.

Council response: The Council declines to make this addition. Health benefits are already covered under the umbrella term "fringe benefit plans" covered by this section, and it would be confusing to single this one example out for inclusion in the regulation.

Section 11034(e)(2)(C):

Comment: We appreciate that the Council has struck the word "balance" from this section. One further recommendation would be to explicitly clarify that an entity may not require an employee to use a particular facility based on their gender identity by adding a clause stating that an employer or other covered entity may not require an employee to use a particular facility "*based on their gender identity or for any other reason*."

Council response: The Council declines to add the requested language as the language of the regulation is already sufficiently clear that an employee may not be required to use a particular facility.

Section 11034(h)(1):

Comment: We have attached a sample of job applications from across industries in California to illustrate that public and private section employees already follow the rule contemplated by Section 11034(h) (prohibiting applicants from identifying their sex, gender, gender identity, or gender expression on a job application unless the employer establishes a permissible defense). We therefore believe that it is reasonable to conclude that the proposed rule will not cause any sort of disruption in the marketplace or among stakeholders.

Council response: Because sections 11016(b)(1) and 11032(b)(2) of the FEHA regulations already state that inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense, the Council agrees that the proposed additional regulatory language will not cause disruption in the marketplace or among stakeholders.

Section 11034(h)(2):

Comment: We urge the FEHC to prohibit questions about gender on job applications absent a legitimate bona fide gender-based occupational qualification.

Council response: The Council agrees, and has added language to 11034(h) to this effect. That language reads, "As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense."

Section 11034(h)(4):

Comment: We urge the Council to change "gender or legal name" to "legal name and gender" to clarify that that the term "gender" refers to the gender marker on a government-issued identification that should only be used to meet a legally-mandated obligation.

Council response: The Council declines to make this change, as the regulation is already sufficiently clear in its reference to an "employee's gender . . . as indicated in a government-issued identification document."

COMMENTS RECEIVED DURING THE THIRD 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11030(c) [Now Section 11030(b)]:

Comment: We thank the Council for striking the infrequently used "self-identification" and replacing it with "internal understanding." We also appreciate the Council's inclusion of the clause that includes "perception" of gender identity. Keeping the provision will help clarify that there is no "actuality" burden upon a transgender or gender nonconforming employee to prove their gender identity in order to invoke their legal protections. The clause will also serve to protect those individuals who are discriminated against based on an inaccurate perception of their gender identity. The inclusion of the "perceived" clause is also consistent with the proposed definition of "sex."

Council response: The Council appreciates the feedback on its work on this provision.

Section 11030(d) [Now Section 11030(c)]:

Comment: We appreciate the inclusion of "gender" in the definition of "sex" in section 11030(c). We again suggest adding a clarification that the terms "sex" and "gender" are interchangeable and synonymous, since "gender" is not otherwise defined.

Council response: Council response: The Council has added the word "gender" to the definition of "sex," but declines to add further clarification, as Government Code section 12926(r)(2) already includes "gender" in the definition of "sex" for the purposes of California law.

Section 11030(e) [Now Section 11030(d)]:

Comment: We appreciate that the Council has expanded the definition of "sex stereotype" to include gender roles, gender expression and gender identity. We again recommend including illustrative examples of sex stereotyping to help clarify what constitutes discriminatory sex

stereotyping. We also again recommend an explicit statement that an example of sex stereotyping includes expectations related to romantic and sexual attraction and relationships.

Council response: The Council declines to make the modification recommended by the commenter, as the language of this definition is already sufficiently broad as to cover all sex stereotyping, and is sufficiently clear without further illustrative examples or statements.

Section 11030(g) [Now Section 11030(f)]:

Comment: We again recommend adding the clarifying phrase "sex-segregated" before "activities like sports teams," to avoid implying that joining a sports team is an inherently gender-based activity.

Council response: The Council declines to add the phrase "sex-segregated" as that does not accurately capture the intent of the regulatory language. Instead, the Council has modified the language of this regulation to state that transitioning may include "participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering)" more generally. While these activities are not "inherently gender-based," there may be gender norms involved in participating in these activities.

Section 11034(b)(3):

Comment: We again urge the FEHC to add a provision to clarify with more specificity that it is discrimination in violation of the FEHA to deny transgender employees equal access to health benefits, including treatments related to gender transition.

Council response: The Council declines to make this addition. Health benefits are already covered under the umbrella term "fringe benefit plans" covered by this section, and it would be confusing to single this one example out for inclusion in the regulation.

Section 11034(e)(2)(C):

Comment: We again urge the Council to explicitly clarify that an entity may not require an employee to use a particular facility because the person is transgender or for any other reason. We recommend including language stating that "an employer or other covered entity may not require an employee to use a particular *alternative* facility *because the person is transgender or for any other reason.*"

Council response: The Council declines to add the requested language as the language of the regulation is already sufficiently clear that an employee may not be required to use a particular facility.

Section 11034(e)(2)(E):

Comment: We recommend striking the term “comparable” to avoid any misinterpretation of the term to mean that an employer could limit access to a multi-user facility so long as the facilities are comparable. Instead, we propose substituting “appropriate.”

Council response: The Council declines to make this change as the word “comparable” is used elsewhere in the regulations when discussing facilities. Because section 11034(e)(2) states that “Equal access to comparable, safe, and adequate facilities shall be provided to employees without regard to the sex of the employee,” the Council does not believe the regulation is susceptible to the misinterpretation the commenter mentions.

Section 11034(h)(2):

Comment: We thank the Council for prohibiting the use of gender on job applications altogether unless it is needed for a legitimate business purpose.

Council response: The Council appreciates the feedback on this provision.

Section 11034(h)(4):

Comment: We urge the Council to change “gender or legal name” to “legal name and gender” to avoid ambiguity and clarify that that the term “gender” refers to the gender marker on a government-issued identification.

Council response: The Council declines to make this change, as the regulation is already sufficiently clear in its reference to an “employee’s gender . . . as indicated in a government-issued identification document.”

PUBLIC HEARING COMMENTS MADE JUNE 27, 2016 [Government Code Section 11346.9(a)(3)].

Madison Fairchild, Drian Juarez, and Melissa Petrofsky, on behalf of the California Employment Lawyer’s Association, commented on the text originally noticed to the public. Ms. Fairchild and Ms. Petrofsky submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above. Ms. Juarez’s comments about her experiences prompted a constructive dialogue and were much appreciated by the Council, but were not responsive to the noticed regulations and therefore do not warrant responses in this final statement of reasons.

PUBLIC HEARING COMMENTS MADE AUGUST 31, 2016 [Government Code Section 11346.9(a)(3)].

Noah Lebowitz commented on the text noticed for the first 15-day comment period. He submitted written comments that included all of his oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE NOVEMBER 15, 2016 [Government Code Section 11346.9(a)(3)].

Jennifer Barrera, Salina Vavia-Johnson, and Noah Lebowitz commented on the text noticed for the second 15-day comment period. They all either submitted written comments that included all of their oral comments and additional comments or alternatively reiterated points already made, all of which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE JANUARY 10, 2017 [Government Code Section 11346.9(a)(3)].

Michaela Mendelsohn was the only member of the public to speak at this meeting. Her comments about her experiences prompted a constructive dialogue and were much appreciated by the Council, but were not responsive to the noticed regulations and therefore do not warrant responses in this final statement of reasons.

PUBLIC HEARING COMMENTS MADE MARCH 30, 2017 [Government Code Section 11346.9(a)(3)].

Carl Borden was the only member of the public to speak at this meeting. He stated that Section 11034(e)(2)(b) of the proposed regulations, which require that employers and other covered entities with single-occupancy facilities under their control use gender-neutral signage for those facilities, potentially conflicted with Cal/OSHA's Agricultural Field Sanitation regulation, 8 CCR 3457 (c)(2)(A), which states that "[s]eparate toilet facilities for each sex shall be provided for each twenty (20) employees or fraction thereof." During the meeting, however, Mr. Borden reported that he received an email from Cal/OSHA clarifying that they would not enforce this regulation in a way that prohibited compliance with AB 1732 (2016), the law that sets forth the mandate captured by the proposed regulation.

There is not a subsequent notice of modifications or another 15-day public comment period because the one change presented at this meeting was non-substantial and the Council unanimously voted to submit this draft to the Office of Administrative Law as the final version of the regulations.