

FAIR EMPLOYMENT & HOUSING COUNCIL
Fair Housing Regulations

SUPPLEMENT TO 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

Subchapter 7. Discrimination in Housing

Article 1. General Matters

§ 12005, subd. (b). [initially 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. See, e.g., proposed sections 12120 (Harassment); 12130 (Retaliation); and 12266 (Criminal History). 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.

An adverse action is a component of potentially unlawful conduct under various FEHA provisions, such as retaliation, harassment, and discrimination. It is not by itself unlawful under FEHA unless other

components of the applicable FEHA provisions are also established.

It is necessary to explain that the adverse action itself need not be directly related to a housing accommodation or opportunity because this is not always clear to the regulated community. See, e.g., *Linkletter v. Western & Southern Financial Group., Inc.* (2017) 851 F.3d 632, 638 (adverse actions can include actual or threatened actions that adversely affect someone’s employment in retaliation for the person exercising their rights under the FEHA or assisting others in exercising those rights); *Smith v. Steckel* (1975) 510 F.2d 1162, 1164 (actions can violate the FHA even when “no discriminatory housing practice may have occurred”); 24 CFR § 100.400.

The Council included the examples in subdivision (1)(A) because they are common and illustrative types of adverse actions taken against tenants or applicants for rental housing. It is also necessary to include these in the definition to illustrate the broad range of actions encompassed by the FEHA and FHA. See, e.g., Government Code 12927(c)(1), 12955, 12955.7; *Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205 (refusal to rent, demanding credit checks only for black applicant); *Samuelson v. Mid-Atlantic Realty Co., Inc.* (D. Del. 1996) 947 F.Supp. 756, 761 (“manner in which a rental agreement can be terminated constitutes a term, condition, or privilege of the rental agreement itself. The FHAA contemplates that events associated with the departure of a tenant are conditions of a rental agreement”); *Harris v. Itzhaki* (1999) 183 F.3d 1043, 1052 (serving eviction notice even when tenant not actually evicted); *HUD v. Tucker*, (Aug. 24, 1992 HUDALJ 09-90-1008-1, 09-90-1009-1) 1992 WL 406533, *10-*12 (refusing to add household member and initiating eviction process); *Hess v. Fair Employment & Housing Com.* (1982) 138 Cal.App.3d 232, 236 (refusal to rent based on marital status); *Concerned Tenants Ass’n of Indian Trails Apts. v. Indian Trails Apts.* (1980 N.D. Ill.) 496 F.Supp. 522, 524-26 (reducing services and discriminating in terms, conditions, or privileges of rental); 24 CFR §§ 110.50 – 110.70

Examples in subdivision (1)(B) are adverse actions related to rental agreements and leases that are also prohibited by other California laws. These are necessary to harmonize FEHA with other California law. Unlawful conduct is an adverse action. Civil Code 1940.2(a) enumerates specific types of conduct that are unlawful for a landlord to do for the

purpose of influencing a tenant to vacate a dwelling (see, e.g. 12927(c)(1) harassment, cancellation or termination of a rental agreement). Civil Code 1940.3(b), 1940.35, 1942.5, and Code of Civil Procedure 1161.4(a) make certain actions of landlords unlawful in regard to citizenship or immigration status of tenants and applicants and include actions to harass or retaliate. See also Unruh Act, Civil Code § 51(b) (prohibiting discrimination on basis of “citizenship, primary language, or immigration status”).

Subdivision (2) is necessary to clarify that adverse actions can include the consideration of criminal history information. See, e.g., *Sams v. Ga West Gate, LLC* (S.D. Ga., Jan. 30, 2017, No. CV415-282) 2017 WL 436281; *Alexander v. Edgewood Management Corporation* (D.D.C., July 25, 2016, No. CV 15-01140 (RCL)) 2016 WL 5957673; *Jackson v. Tryon Park Apartments, Inc.* (W.D.N.Y., Jan. 25, 2019, No. 6:18-CV-06238 EAW) 2019 WL 331635; *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions*, (D. Conn., Mar. 25, 2019, No. 3:18-CV-705 VLB) 2019 WL 1398056; *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)

Examples in subdivision (3) are adverse actions relating to the sale of a dwelling or residential real estate or similar residential real estate-related transactions. These are necessary to encompass Government Code 12927(c)(1): “Discrimination includes refusal to sell ...housing accommodations; ...[and] the cancellation or termination of a sale... .” *Holmes v. Bank of America Nat. Trust & Sav. Ass’n* (1963) 216 Cal.App.2d 529, 535–536 (conspiracy to impose special restrictions upon the sale, financing and occupancy of real property).

Examples in subdivision (4) are actions relating to provision of financial assistance for dwellings or residential real estate. These are necessary to encompass Government Code 12955(e): It is unlawful “[fo]r any person, bank, mortgage company or other financial institution that provides financial assistance . . . to discriminate...” *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386.

Subdivision (5) encompasses other actions. It is a necessary provision because the breadth of adverse actions does not allow all adverse actions to be explicitly listed. See, e.g. *The Committee Concerning Community*

Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 715 (timely provision of law enforcement personnel); *Llanos v. Estate of Coehlo* (E.D. Cal. 1998) 24 F.Supp.2d 1052, 1059 (steering and rules discriminating against children); *Fair Housing Congress v. Weber* (C.D. Cal. 1997) 993 F.Supp. 1286, 1294 (same); *Linkletter v. Western & Southern Financial Group, Inc.* (6th Cir. 2017) 851 F.3d 632, 635 (Employer’s rescission of job offer to women was in retaliation for her support of a shelter’s fair housing claims, and thus violated FHA); *San Pedro Hotel Co., Inc. v. City of Los Angeles* (9th Cir. 1998) 159 F.3d 470, 477 (refusing loan and conducting allegedly discriminatory City inspections); *United States v. Youritan Construction Co.* (N.D.Cal. 1973) 370 F.Supp. 643, 648, aff’d as modified, 509 F.2d 623 (9th Cir. 1975) (delaying tactics and discouragement of rental applications, failure to set objective and reviewable procedures for rental applications); *Hamad v. Woodcrest Condominium Ass’n* (6th Cir. 2003) 328 F.3d 224, 236–237; *Woods v. Foster* (1995 W.D.Ill.) 884 F. Supp. 1169, 1174-75 (courts have very broadly applied the parallel language in the FHA encompassing adverse actions that “otherwise make unavailable or deny a dwelling”).

§ 12005, subd. (d).

The Council proposes to add the definition of “assistance animal” and its related subcategories. 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.

Different federal and state statutes use different terms for various types of assistance animals. These regulations also include separate provisions that apply to different types of assistance animals. See section 12185. To avoid confusion and to harmonize the different definitions, it is necessary to specify the different types of animals and to describe the provisions that apply to each.

FEHA is among the broadest of the applicable statutes, covering all types of assistance animals. *Auburn Woods I Homeowners Assn. v. Fair*

Employment & Housing Com. (2004) 121 Cal.App.4th 1578, 1596. Different types of animals can be assistance animals, not just dogs. *Janush v. Charities Housing Development Corp.* (N.D. Cal. 2000) 169 F.Supp.2d 1133, 1135–1136 (two birds and two cats.); *Whittier Terrace Associates v. Hampshire* (Mass. App. Ct. 1989) 26 Mass.App.Ct. 1020, 1020 [532 N.E.2d 712, 713] (therapy cat.) Airlines also recognize that service animals may include animals other than dogs. 14 C.F.R. section 382.117, revised May 13, 2009.

The first term that is defined in the introductory paragraph of 12005(d) is “assistance animals.” “Assistance animals” is an umbrella term which includes within it all the various categories of assistance animals, including the two main categories, service animals and support animals. 12005(d), 12185(a). Many provisions of the regulations apply to all assistance animals, as set out in 12185(d), so a single term was necessary to avoid confusion and redundancy.

The next term that is defined in 12005(d)(1) is “service animals.” “Service Animals” are a subset of assistance animals which are trained to carry out tasks and provide specific assistance to individuals with disabilities. The term “service animals” is used in the ADA, FHA and in FEHA to describe animals who provide this type of assistance. Different rights attach to service animals than to the other main type of assistance animals (support animals). It is necessary to include this definition of “services animals” for clarity regarding the application of those specific rights to “service animals.”

The category of “service animals” can be broken down into different subcategories, so it is necessary to define those subcategories. In particular, the California Disabled Persons Act (DPA), California Civil Code section 54.1 et seq. sets out specific rights for some kinds of service dogs in housing. In addition, service animals are specifically addressed under the ADA and other laws. In order to harmonize FEHA, other laws, and Civil Code 54.1 et seq., it is necessary to incorporate some of the definitions of specific types of service animals from the other laws.

Civil Code Section 54.1(b)(6)(A) specifically provides:

(6)(A) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for a person,

firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired on the basis that the individual uses the services of a *guide dog*, an individual who is deaf or hard of hearing on the basis that the individual uses the services of a *signal dog*, or to an individual with any other disability on the basis that the individual uses the services of a service dog, . . . ” (emphasis added.)”

While the rights are similar for each type of service dog described in 54.1, it is necessary for clarity to specify the terms used in Civil Code 54.1 and other statutes and to describe them as subsets of service animals.

As noted in section 54.1(b)(6)(A), the subsets of service animals covered by Civil Code 54.1 are:

1. Section 54.1(b)(6)(C)(i). Guide Dogs. Guide dogs refer to dogs that help guide individuals who are blind, whether trained by a licensed individual or as defined under the ADA. Guide dogs are also called “seeing eye dogs.” 24 C.F.R. Section 100.204(b)(1).
2. Section 54.1(b)(6)(C)(ii). Signal Dogs. Signal dogs refer to dogs trained to alert an individual who is deaf or hard of hearing to intruders or sounds.
3. Section 54.1(b)(6)(C)(iii). Service Dogs. Service dogs refer to dogs individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.
4. Sections 54.1(c) and 54.2(b). Service Animals in Training. Because service animals are, by definition, trained to perform particular tasks, there is a period where they are still undergoing training. This definition is necessary to ensure that this subset of service animals is covered by the relevant provisions of the regulations.

Another category of service animals that is specifically covered by related statutes is miniature horses. The Council determined it was necessary to incorporate the definition of miniature horses that is used in the ADA and the FHA. 28 C.F.R. section 35.136(i), revised March 15, 2011, and 28 C.F.R. section 36.302(c)(9), revised October 11, 2016. *Anderson v. City of Blue Ash* (6th Cir. 2015) 798 F.3d 338 (Plaintiff established miniature horse was trained to assist daughter with her disability, within meaning of the FHA).

However, the rights of individuals to assistance animals under FEHA is not limited to those service animals enumerated in the DPA or those covered by the ADA. *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1596; *Overlook Mut. Homes, Inc. v. Spencer* (S.D. Ohio 2009) 666 F.Supp.2d 850, 858–859. The second main category of assistance animals is “support animals.” These animals are treated differently in significant ways from service animals, and therefore it is necessary to define them.

Subdivision 12005(d)(2) defines “support animals.” Support animals are not trained to perform tasks. Instead they provide emotional, cognitive, or other similar support to individuals with disabilities. *Overlook Mut. Homes, Inc. v. Spencer* (S.D. Ohio 2009) 666 F.Supp.2d 850, 861 (the types of animals that can qualify as reasonable accommodations under the FHA include emotional support animals, which need not be individually trained); *Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc.* (D.N.D. 2011) 778 F.Supp.2d 1028, 1036; *HUD v. Riverbay Corp., The Sec’y, United States Dep’t of Hous. & Urban Dev., the Charging Party, on Behalf of: Joseph Archibald, Complainant* (May 7, 2012) 2012 WL 1655364.

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; 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; 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; 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.

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), revised October 11, 2016, reasonable accommodations for service animals, and in particular 28 C.F.R. 36.302(c)(9), revised October 11, 2016, miniature horses; 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. (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.

The examples in the proposed regulation are derived from cases

interpreting “business establishment” under Civil Code section 51. Section 51, subdivision (b) of the Civil Code itself provides that it applies to “...accommodations, advantages, facilities, privileges, or services *in all business establishments of every kind whatsoever.*” (emphasis added) Interpreting this phrase, the California Supreme Court has held that it must be understood “in the broadest sense reasonably possible.” See, e.g. *Isbister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 78 (citing *Burks v. Poppy Const. Co.*, (1962) 57 Cal. 2d 463, 468); *Pack v. Fort Washington II*, (E.D. Cal. 2009) 689 F. Supp. 2d 1237, 1248. The term “business establishment” encompasses organizations involved in housing. See, e.g. *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721; *Burks v. Poppy Const. Co.* (1962) 57 Cal. 2d 463; *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386; *Iniestra v. Cliff Warren Investments, Inc.* (C.D. Cal. 2012) 886 F. Supp. 2d 1161. The phrase covers common interest developments. See, e.g. *O’Connor v. Vill. Green Owners Assn.* (1983) 33 Cal. 3d 790). While Section 51.2 and 51.3 of the Civil Code exclude mobilehome parks from the Unruh Act’s coverage regarding certain age-restrictions, mobilehome parks are otherwise covered by the Unruh Act. See, e.g. *Schmidt v. Superior Court* (1989) 48 Cal. 3d 370, 385. Both nonprofit organizations and for-profit organizations are included in the phrase. See, e.g. *Burks v. Poppy Const. Co.* (1962) 57 Cal. 2d 463 (for-profit); *O’Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 (nonprofit). Whether governmental bodies are business establishments is subject to the specific circumstances of each case, but they are generally not subject to the Unruh Act when enacting legislation. See, e.g. *Harper v. Lugbauer* (N.D. Cal. Mar. 15, 2012) No. C 11-01306 JW, 2012 WL 1029996, 5, citing *O’Connor v. Vill. Green Owners Assn.* (1983) 33 Cal. 3d 790, 795 for the proposition that “business establishments” is to be interpreted broadly and citing cases on both sides of the question); *Qualified Patients Assn’ v. City of Anaheim* (2010) 187 Cal.App.4th 734, 741). Truly private social clubs not engaged in business activity are not covered. See, e.g. *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 617.

This definition provides necessary guidance to the public about which types of entities are subject to which standard for justifying practices that have a discriminatory effect.

§ 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. See, for example, *Jackson v. Tyron Park Apartments, Inc.* (W.D. New York, Jan. 25, 2019) 2019 WL 331635; *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions, LLC* (D. Conn. Mar. 25, 2019) 2019 WL 1398056. The Council proposes to define criminal conviction specifically in relation to “criminal history information” as defined in section 12264 and “directly-related conviction” as defined in section 12005, subd. (k). This clarification is necessary because Article 24 of the proposed regulations limits the lawful use of criminal history information to certain criminal convictions as defined in the regulations. Without further guidance, the term is subject to misinterpretation. This definition is also necessary to confirm that misdemeanors as well as felonies are “criminal convictions.” See *Alexander v. Edgewood Management Corporation* (D.D.C., July 25, 2016, No. CV 15-01140 (RCL)) 2016 WL 5957673. The Council also chose this definition because it provides guidance in simple, common, and readily understood terms regarding what constitutes a criminal conviction.

§ 12005, subd. (n) [initially 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 in Government Code sections 12927(h)(1) and 12955(e) and throughout the proposed regulations and case law. It 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 both FEHA and in FHA. See 24 C.F.R. sections 100.115 - 100.130, revised October 14, 2016. 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) and 12955(e).

It is also necessary to provide this definition because FHA and FEHA provisions regarding financial assistance are structured differently, even though they are similar in content.

Under the FEHA, the term “financial assistance” is used independently of “real estate-related transactions.” Government Code section 12955(e) provides that it is unlawful “[f]or any person, bank, mortgage company or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate” This provision is not limited to “real estate-related transactions.” Section 12927(h)(1), which does address “real estate-related transactions,” also refers to financial assistance, but it is not the exclusive use of the term. Subdivisions 12955(h), (i) and (j) address separate real estate-related transactions.

By comparison, the FHA and accompanying HUD regulations only use the term “financial transactions” under the umbrella of “real estate-related transactions.” See 42 U.S.C.A. § 3605(b)(1); 24 C.F.R. Part 100, subpart C - Discrimination in Residential Real Estate–Related Transactions, specifically sections 100.110 through 100.135, revised October 14, 2016.

In order to ensure that the financial assistance provisions of FEHA provide no less protection than FHA, pursuant to Government Code 12955.6; it is necessary to define “financial assistance” in a manner that encompasses the broader scope of transactions under the FEHA statute as well as the same or similar transactions covered under the portions of the FHA regulations addressing the topic under the heading of real estate-related transactions. Therefore, the proposed regulations include definitions of both “financial assistance” in subdivision 12005(n) [initially 12005(o)], and “residential real estate-related transactions” in subdivision 12005(cc) [initially subdivision (dd)]. In accord with Government code 12955(e), proposed subdivision 12005(n) is the broader definition. In accord with Government Code 12927(h), proposed subdivision 12005(cc)(1) [initially (dd)(1)] incorporates the term of “financial assistance” as one component of residential real estate-related transactions. See *also* 24 C.F.R. section 100.115. See *also* proposed

sections 12100 (Financial Assistance Practices with Discriminatory Effect) and 12155 (Residential Real-Estate-Related Practices with Discriminatory Effect.)

Subdivision 12005(n) covers the making or purchasing of loans, grants, or the provision of other financial assistance relating to the purchase, organization, development, construction, improvement, repair, maintenance, rental, leasing, occupancy or insurance of dwellings that are secured by residential real estate. Government Code 12927(h)(1) (financial assistance for “constructing, improving, repairing, or maintaining a dwelling” and financial assistance “secured by residential real estate”); 24 C.F.R. section 100.115 (similar); Government Code 12955(e) (financial assistance “for the purchase, organization, or construction or any housing accommodation.”) See also 24 C.F.R. sections 100.120, revised October 14, 2016 (Discrimination in the making of loans and in the provision of other financial assistance), 100.125 (Discrimination in the purchasing of loans, including pooling or packaging loans or other debts or securities), 100.130, revised October 14, 2016 (Discrimination in the terms and conditions for loans or other financial assistance.)

It is necessary to provide other examples for further clarity. Proposed subdivision (n)(1) covers “(1) mortgages, reverse mortgages, home equity loans, and other loans secured by residential real estate.” These are all types of financial assistance secured by residential real estate and that are for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling. Government Code section 12927(h)(1); 24 C.F.R. section 100.115, *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386 (mortgage loan); *Swanson v. Citibank, N.A.* (7th Cir. 2010) 614 F.3d 400, 405 (home equity loan.)

Proposed subdivision (n)(2) covers insurance and underwriting relating to residential real estate, including construction insurance, property insurance, liability insurance, homeowner’s insurance, and rental insurance.”) Courts have held that types of financial assistance not enumerated in the statutes are also covered by the term, such as insurance. *Nationwide Mutual Insurance Co. v. Cisneros* (6th Cir. 1995) 52 F.3d 1351, 1360 (property insurance); *National Fair Housing Alliance, Inc. v. Prudential Insurance Co. of America* (D.D.C. 2002) 208 F. Supp. 2d 46, 55-57 (homeowner’s insurance); *Nevels v. Western World Ins. Co., Inc.* (W.D. Wash. 2004) 359 F.Supp.2d 1110, 1121–1122 (liability insurance); *Viens v. America Empire*

Surplus Lines Ins. Co. (D. Conn. 2015) 113 F.Supp.3d 555, 570–571 (property insurance.)

Proposed subdivision (o)(3) covers “loan modifications, foreclosures, and the implementation of the foreclosure process.” It is necessary to clarify that these are also components of the provision of financial assistance. *Molina v. Aurora Loan Services, LLC* (11th Cir. 2015) 635 Fed.Appx. 618, 624–625 (mortgage loan modification); *City of Miami v. Wells Fargo* (May 3, 2019 11th Cir. Nos. 14-14544, 14-14543) ___ F.3d ___, 2019 WL 1966943 (discriminatory lending practices under FHA that resulted in disproportionate foreclosures on homeowners of protected classes).

§ 12005, subd. (o). [initially 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.”

Section 12920 of the Act states it is the public policy of this state that “the practice of discrimination...in *housing accommodations* is declared to be against public policy.” (emphasis added)

Section 12927, subd. (d) of the Act provides a brief definition of “housing accommodation”: “Housing accommodation” means any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families and any vacant land that is offered for sale or lease for the construction thereon of any building, structure, or portion thereof intended to be so occupied.”

FEHA’s definition of housing accommodation is very broad. 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 subd. 12005(o)(1), 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.

The specific types of housing accommodations used as examples in the proposed regulation are either the subject of cases or analogous to housing accommodations that are the subject of cases. See, for example, *Sisemore v. Master Financial*, (Cal. Ct. App. 2017) 151 Cal.App. 4th 1386 (single family home); *Walnut Creek Manor v. Fair Employment & Hous. Com.* (1991) 54 Cal. 3d 245 (apartments); *U.S. v. Real Estate Development Corp.* (N.D.Miss.1972) 347 F.Supp. 776 (apartments).

Regarding community associations, condominiums, townhomes, planned developments, community apartment projects, and other common interest developments as defined in the Davis-Stirling Common Interest Development Act (known colloquially as homeowner associations (HOAs)); housing cooperatives, including those defined under Civil Code 4100(d); See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment & Hous. Com.* (2004) 121 Cal. App. 4th 1578; *Robinson v. 12 Lofts Realty, Inc.* (2d Cir. 1979) 610 F.2d 1032 (cooperative apartment buildings).

Regarding dormitories, see, e.g. *U.S. v. University of Nebraska at Kearney* (D.Neb. 2013) 940 F. Supp. 2d 974, 975, 298 Ed. Law Rep. 223 (university housing qualified as dwelling under the FHA).

Regarding sober living homes, see, e.g. *Lakeside Resort Enterprises, LP v. Board of Sup'rs of Palmyra Tp.* (3rd Cir. 2006) 455 F.3d 154, as amended, certiorari denied 549 U.S. 1180; *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir.2013) 730 F.3d 1142, 1156-1157.

Regarding supportive housing, see, e.g. *Sharon v. New Directions Inc.* (C.D. Cal. Jan. 12, 2016) No. 2:15-CV-04239-SVW-E, 2016 WL 158223 (supportive housing).

Regarding licensed and unlicensed group living arrangements, see, e.g. *City of Edmonds v. Oxford House, Inc.* (1995) 514 U.S. 725; *Abdus-Sabur v. Hope Village, Inc.* (D.D.C. 2016) 221 F. Supp. 3d 3, 9 (halfway house is dwelling); *Connecticut Hosp. v. City of New London* (D.Conn. 2001) 129 F.Supp.2d 123 (halfway house). Transitional housing is a form of group living arrangement.

Regarding residential motels or hotels, see, e.g. *Red Bull Associates v.*

Best Western Intern., Inc. (S.D. N.Y. 1988) 686 F. Supp. 447, order aff'd, 862 F.2d 963 (2d Cir. 1988) (Fair Housing Act assumed to apply to hotel that provides long-term accommodations to homeless.). Single room occupancy hotel rooms and boardinghouses are analogous to residential hotels.

Regarding emergency shelters, homeless shelters, and shelters for individuals surviving domestic violence, HUD regulations defining “dwelling unit” include as examples “shelters intended for occupancy as a residence for homeless persons.” 24 C.F.R. § 100.201, revised November 24, 2008. Following the mandate that the FEHA must be at least as protective as the FHA, the Council also considered the reasoning in cases in which courts have found that the FHA covers temporary accommodations such as emergency shelters, homeless shelters, and shelters for individuals surviving domestic violence. See, e.g. *Community House, Inc. v. City of Boise* (D. Idaho 2009) 654 F.Supp.2d 1154, 1167, rev'd and remanded on other grounds, 623 F.3d 945 (9th Cir. 2010) (homeless shelter that includes transitional housing apartments held to be a dwelling); *Woods v. Foster* (N.D. Ill. 1995) 884 F.Supp. 1169 (homeless shelter for individuals surviving domestic violence covered, despite 120-day limit on stay of residents); *Hunter on behalf of A.H. v. District of Columbia* (D.D.C. 2014) 64 F.Supp.3d 158, 176 (homeless shelter qualified as dwelling because the plaintiffs expected to remain at the shelter indefinitely and shelter residents were provided their own rooms to return to each day); *Defiore v. City Rescue Mission of New Castle* (W.D.Pa.2013) 995 F.Supp.2d 413.

Regarding cabins and other structures housing farmworkers, see, e.g. *Villegas v. Sandy Farms, Inc.* (D.Or. 1996) 929 F.Supp. 1324 (migrant farm worker cabins); *Hernandez v. Ever Fresh Co.* (D. Or. 1996) 923 F. Supp. 1305 (migrant farm worker housing covered); *Lauer Farms, Inc. v. Waushara County Bd. of Adjustment* (E.D. Wis. 1997) 986 F. Supp. 544, 559. In the Council’s experience, farmworker housing often includes bunkhouses.

Regarding hospices, see, e.g. *Baxter v. City of Belleville* (S.D.Ill.1989) 720 F.Supp. 720.

Regarding manufactured homes; mobilehomes and mobilehome sites or spaces; modular homes, factory-built houses, multi-family manufactured homes, see, e.g. *Salisbury v. Hickman* (E.D. Cal. 2013) 974 F. Supp. 2d

1282; *Olsen v. Stark Homes, Inc.* (2d Cir. 2014) 759 F.3d 140, 152 (collecting authorities holding that mobile home park spaces qualify as dwellings under the FHA). A recreational vehicle used as a home or residence is analogous to a mobilehome.

Regarding floating homes; floating home marinas, berths, spaces, and communities, live aboard marinas, berths, and spaces: “Floating homes” are defined in California Health & Saf. Code, § 18075.55, subd. (d). as “a floating structure that is designed and built to be used as a stationary waterborne residential dwelling with no mode of power on its own, dependent on connections to onshore utilities and permanently connected to an onshore sewage system.” A “floating home marina” is defined California Civil Code section 800.4 as “an area where five or more floating home berths are rented to accommodate floating homes.” Floating homes and floating home marinas are subject to regulation under California Civil Code sections 800 et seq. (the Floating Home Residency Law). Floating homes (AKA houseboats) are analogous to mobile homes. Floating home marinas, berths and spaces are analogous to mobile home parks. Floating home communities and live aboard marinas are analogous to common interest developments.

Regarding rooms used for sleeping purposes; and rooms in which people sleep within other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling: This language is taken directly from HUD’s regulations prohibiting discrimination on the basis of disability. 24 C.F.R. section 100.201, revised October 24, 2008. Because Government Code section 12955.6 provides that FEHA must be at least as protective as the FHA, “housing accommodation” must be interpreted to include this type of accommodation. This language is also necessary to clarify that housing accommodations can include, for example, the types of homes or apartment buildings that business establishments rent to tenants who sleep in separate rooms while sharing cooking, living, and other facilities, which is a growing trend in California’s tight housing market. Finally, this language is also necessary to distinguish which rooms FEHA would apply to in a building that contained both commercial office space and residential spaces. See, e.g. *Home Quest Mortg. LLC v. American Family Mut. Ins. Co.* (D.Kan.2004) 340 F.Supp.2d 1177, 1184-85 (portion of building that contained commercial office space was not a “dwelling” under FHA).

Regarding vacant land in subd. (o)(3), the language regarding vacant land is verbatim from Section 12927, subsection (d) of FEHA. See, e.g. *H.O.P.E., Inc. v. Lake Greenfield Homeowners Association* (N.D. Ill. 2017) 2017 WL 1493708, at *4 (vacant lot considered “dwelling” once plans made to build residence on it).

Subd. (o)(4) explicitly incorporates all “dwellings” defined and covered by the federal Fair Housing Act. This ensures that the proposed definition applies at least as broadly as the definition of a “dwelling” in the FHA and 24 CFR 100.20.

§ 12005, subd. (p). [initially 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. See, e.g., *The Committee Concerning Community Improvement v. City of Modesto* (9th Cir. 2009) 583 F.3d 690, 713–714 (holding that Section 3604(b) of the federal FHA 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”); *Pacific Shores Properties LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142 (FHA prohibits discriminatory limiting of “housing opportunities”); 24 CFR § 100.70, revised March 18, 2013 (FHA prohibits the discriminatory restriction or denial of “housing opportunities”).

The proposed definition elaborates on section 12921, subdivision (b) of the Act which provides: “The *opportunity to seek, obtain, and hold housing* without discrimination ... is hereby recognized as and declared to be a civil right.” (emphasis added) The proposed definition 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.

The term “housing opportunity” is also necessary to provide a shorthand way of referring to the whole package of housing rights protected under the

Act. The rights provided under FEHA protect the full spectrum of housing opportunities before, during, and after sales and rentals. These rights are explicitly articulated in various sections of the Act, and the definition draws from language in several of these different sections.

For example: section 12927, subd. (c)(1) of the Act prohibits any discrimination in the “refusal to sell, rent, or lease housing accommodations,” including “refusal to negotiate for the sale, rental, or lease of housing accommodations.” It also specifically prohibits any discrimination in “the terms, conditions, privileges, facilities, and services *in connection with* housing accommodations,” (emphasis added) and specifically protects the “enjoyment of housing accommodations.” In this context, “enjoy” means to possess and derive the benefit of the housing accommodation without discrimination. Section 12927, subd.(c)(1) of the Act prohibits “harassment in connection with those housing accommodations.” Section 12927, subd.(c)(1) of the Act requires reasonable accommodations that are necessary for a person with a disability to have an “equal opportunity to use and enjoy a dwelling”). Section 12927, subd. (h) prohibits discrimination in real estate-related transactions. Section 12955, subd. (e) prohibits discrimination in the provision of financial assistance for “the purchase, organization or construction of any housing accommodation.” Section 12955, subd. (l) of the Act prohibits discriminatory public or private land use practices. Section 12955, subs. (f) and (g) of the Act and section 12955.7 prohibit discriminatory threats, intimidation, coercion and retaliation in the context of the exercise or enjoyment of housing rights protected under the Act.

The elaboration on “housing opportunities” is further 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. (u). [initially 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.

A definition of “person” is necessary in order to incorporate in one place all of the different provisions of FEHA and the FHA that encompass “persons.” See, e.g. Government Code sections 12955, 12925(d) (applicable to all of FEHA) and 12927(f) (applicable to FEHA housing provisions), and other provisions cross-referenced in those sections. The proposed definition in 12005(u) 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.

Subdivision 12005(u)(2) is necessary to clarify that owners, as defined in section 12005(t) [initially subd. (u)] are a subset of persons, as specified in 12927(f).

Subdivision 12005(u)(3) is necessary to incorporate individuals and entities identified in Government Code section 12927(f) and those specifically identified in the Fair Housing Act, 42 U.S.C. section 3602(d), and the implementing regulations at 24 C.F.R. section 100.20, such as “labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 U.S.C., receivers, and fiduciaries.” 24 C.F.R. section 100.20. It also includes entities and individuals specifically identified in Government Code section 12925, such as “limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.”

Subdivision 12005(u)(4) is necessary to incorporate entities and individuals specifically identified in Government Code section 12927(f), such as “all institutional third parties, including the Federal Home Loan Mortgage Corporation.” In order to be fully inclusive, it is necessary to also include other entities who are similar to the Federal Home Loan Mortgage Company, such as other entities that comprise the secondary loan market. Entities in the secondary loan market purchase or pool housing loans and securities and provide guarantees and other financing for housing. These are specifically covered under Government Code 12955(e) and 24 C.F.R. section 100.125(b), so it is necessary to include them here in the definitions. See e.g. *Government Code 12955.6*. Specifically, 24 C.F.R. section 100.125(b) covers:

- (1) Purchasing loans or other debts or securities which relate to, or which are secured by dwellings
- (2) Pooling or packaging loans or other debts or securities which relate to, or which are secured by, dwellings. . . .
- (3) Imposing or using different terms or conditions on the marketing or sale of securities issued on the basis of loans or other debts or securities which relate to, or which are secured by, dwellings

See *Adkins v. Morgan Stanley* (S.D.N.Y., July 25, 2013, No. 12 CV 7667 HB) 2013 WL 3835198, at *9 (activities as loan purchaser and mortgage securitizer fall within the scope of the FHA.)

Subdivision (u)(5) is necessary to provide clarity as to the applicability of FEHA to condominiums and similar planned or common interest developments that are alternative methods of owning housing, and to the homeowner associations (HOAs) that are responsible for those developments. *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1582, 1599 (condominium development and homeowners association); See also *Astralis Condominium Ass'n v. Secretary, U.S. Dept. of Housing and Urban Development* (1st Cir. 2010) 620 F.3d 62 (condominium association); *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790 (owner association); *Frances v. Village Green Owners Ass'n*, (1986) 42 Cal.3d 490 (citing *O'Connor* and holding that an owner association “for all practical purposes” operated as a housing project’s landlord); *Reeves v. Carrollsburg Condominium Unit Owners Ass'n* (D.D.C., Dec. 18, 1997, No. CIV. A. 96-2495RMU) 1997 WL 1877201, at *7–8; *Overlook Mut. Homes, Inc. v. Spencer* (S.D. Ohio 2009) 666 F.Supp.2d 850, 851 (mutual housing association covered by FHA). For additional clarity, Civil Code Section 4100 is cited, which provides that common interest developments include “(a) A community apartment project; (b) A condominium project; (c) A planned development; [and] (d) A stock cooperative.”

Subdivision (u)(6) is necessary to clarify that the state and the entire range of political subdivisions, agencies, districts and other political entities are subject to the Act. Government Code 12927(f) provides that “‘Person’ includes all individuals and entities that are described...in the definition of ‘owner’ in subdivision (e) of this section,” and subdivision 12927(e) (“owner”) “includes the state and any of its political subdivisions and any agency thereof.” *Keith v. Volpe*, 858 F.2d 467 (9th Circuit 1988); *Khan v. San Francisco Housing Authority* (N.D. Cal., May 8, 2008, No. C 07-6209

CW) 2008 WL 2024600; *Avenue 6E Investments, Limited Liability Company v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493; *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1172–1173. See also, Government Code 12955(l), regulating “*public land use practices*” and covering other planning activities undertaken by public entities.

Subdivisions 2005(u)(7) and (8) are necessary to make explicit that the previously mentioned entities are not an exclusive list, and that any entity that has the power to make housing unavailable or infeasible through its practices or anyone injured by discriminatory practices will constitute a person under the FEHA. *Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, 208 (“The definition of ‘person aggrieved’ contained in section 810(a) [of the FHA] is in terms broad, as it is defined as ‘(a)ny person who claims to have been injured by a discriminatory housing practice’”); *Woods v. Foster* (N.D. Ill. 1995) 884 F.Supp. 1169, 1173 (“[T]he FHA should be given a “generous construction” to effectuate its “broad and inclusive” language.”) See also *Doctors Co. v. Superior Court* (1989) 49 Cal. 3d 39, 48 (explaining that the FEHA is different than other statutes that specify the specific persons who may held liable because the FEHA frequently does not, and instead includes broadly worded provisions, such as 12955(g), which imposes liability on any person who aids or abets a violation). The FEHA includes several broadly worded provisions, such as, for example, Government Code section 12955(k), which makes it unlawful to “otherwise make unavailable or deny a dwelling based on discrimination” without limiting this provision to particular persons. Therefore, it is necessary that the definition of “person” in subdivision (u)(7) including all individuals or entities who may be subject to these provisions. See also *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995) (insurance companies); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America* (D.D.C. 2002) 208 F.Supp.2d 46, 63; *U.S. v. Mitchell* (N.D. Ga. 1971) 327 F.Supp. 476, 486–487 (real estate brokers); *Swanson v. Citibank, N.A.* (7th Cir. 2010) 614 F.3d 400, 407 (lender and appraiser); *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386 [60 Cal.Rptr.3d 719 (lender.)]

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 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. (v). [initially 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.

Section 12920 of the Act states it is the public policy of this state that “the *practice* of discrimination...in housing accommodations is declared to be against public policy.” (emphasis added) The term “practice” is used broadly to encompass individual and multiple acts and failures to act. Section 12955.8, subs. (a) and (b) provide that proof of a violation of “includes, but is not limited to, an act or failure to act.” See, e.g., *Auburn Woods I Homeowners Assn. v. Fair Employment & Hous. Com.* (2004) 121 Cal. App. 4th 1578, 1599 (failure to provide reasonable accommodation). Practice also include explicit (or written) and implicit policies. See, e.g., *Bischoff v. Brittain* (E.D. Cal. Oct. 10, 2014) No. 2:14-1970, 2014 WL 5106991, at *6 (unwritten policy); *Fair Hous. Cong. v. Weber* (C.D. Cal. 1997) 993 F. Supp. 1286, 1293 (informal policy); *Bryant Woods Inn, Inc. v. Howard Cty.* (D. Md. 1996) 911 F. Supp. 918, 939 (custom as policy), *aff’d*, 124 F.3d 597 (4th Cir. 1997).

The form of written practice can be, for example, a rule, law, ordinance, regulation, decision, standard, policy, procedure. Sometimes several of the terms are used together in a string. For example, section 12927, subd. (c)(1) provides that it is unlawful housing discrimination under the Act to refuse to make reasonable accommodations “in rules, policies, practices, or services” when those accommodations may be necessary to afford a

disabled person equal opportunity to use and enjoy a dwelling. However, often these terms are used interchangeably as synonyms or without definition. The proposed regulation clarifies that any of them can be a “practice” that is subject to a determination of whether the practice is unlawful as discriminatory under the Act. See, e.g. *Pack v. Fort Washington II* (E.D.Cal.2009) 689 F.Supp.2d 1237 (apartment rule); *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1581, review denied (housing policies); *Johnson v. Macy* (C.D. Cal. 2015) 145 F.Supp.3d 907, 917 (housing decision). Section 12993, subd. (c) of the Act specifically provides for the possibility that the Act will preempt a local law or ordinance that is discriminatory. See e.g. *City & Cty. of San Francisco v. Post* (2018) 22 Cal.App.5th 121, 130, review denied (July 11, 2018) (holding local ordinance not preempted by FEHA); *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S. Ct. 2507, 2522 (holding “[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”); *Keith v. Volpe* (C.D. Cal. 1985) 618 F.Supp. 1132, 1150–1151 (demolition of homes due to freeway construction coupled with the denial of permits for replacement housing for the displaced households violated fair housing law); *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 496–497 (developers plausibly claimed that denial of a request for rezoning to permit higher-density development violated the FHA).

A common interest development’s governing documents (Covenants, Conditions and Restrictions) as well as the rules adopted by a home owners’ association and decisions made based upon them are subject to being found as unlawful practices under the Act. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment & Hous. Com.* (2004) 121 Cal. App. 4th 1578, 1584; *Robinson v. 12 Lofts Realty, Inc.* (2d Cir. 1979) 610 F.2d 1032, 1039 (decision by vote of condominium stockholders).

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. This definition provides examples that clarify that the “practice” or “practices” are to be applied at least as broadly and protectively as HUD’s definition of “discriminatory housing practice” at 24 C.F.R. § 100.20 and its application of that term at 24 C.F.R. § 100.1 through 100.600, effective October 14, 2016.

Article 18. Disability

§ 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.

The manner in which requests for reasonable accommodations is handled is a rule, policy or practice of the person responding to the request. Therefore, the requests themselves are covered by the general accommodation provisions in section 12176(a) of the Act, which states that “[i]t is a discriminatory housing practice for a person to refuse to make reasonable accommodations in rules, policies, practices” Subdivision 12176(c)(6) is necessary to clarify how section 12176(a) of the Act is applied to requests for accommodations themselves, an area where there is confusion in practice.

The issue can arise in numerous ways. For example, a blind person may need assistance in filling out a form requesting an accommodation or may need a Braille version of the form; a person with cognitive disabilities may need to have an aide or relative assist them with a request for an accommodation; a person with limited vision may need a large print version of an accommodation form and related documents; or a person who is deaf may need an ASL interpreter to engage in discussions during the interactive process.

§ 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. Subdivision (e) describes prohibited inquiries. Subdivisions (f) through (h) [initially (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. (g) and (h). [initially subd. (f) and (g)]

Proposed subdivision (g) identifies a wide variety of permissible third-party sources for establishing the disability-related need for the accommodation. 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) [initially (g)(3)-(5)].

In addition, requiring medical documentation under this subdivision would provide fewer rights than FHA, in violation of Government Code 12955.6. The enumerated items in (g)(1)-(5) are listed in the *HUD/DOJ Statement on Reasonable Accommodations, supra*, at Question 18 (“A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.”) See *also Sinisgallo v. Town of Islip Housing Authority* (E.D.N.Y. 2012) 865 F.Supp.2d 307, 338–339 (quoting HUD/DOJ Statement on Reasonable Accommodations and

holding that a disability may be verified by “[a] doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party,” emphasis omitted)

The items enumerated in (g)(1)-(5) are all examples of individuals who have some level of familiarity with the individual requesting the accommodation and who can provide information about the nature of the disability and the need for the accommodation. This list of items is necessary to provide guidance to individuals who may not have familiarity with the various systems and individual that provide services to individuals with disabilities. Items (g)(1) and (g)(2) are medical professionals or health care providers. Item (g)(4) are nonmedical services provides, including those who provide care in the individual’s home or social workers who assist the individual.

Item (g)(3) identifies as a source of information peer support groups, which are a widely recognized component of treatment and recovery systems for individuals with various types of disabilities such as mental health disabilities, cognitive disabilities, and substance abuse disabilities, and which are supported by the federal government and a variety of California state systems for treatment and recovery for individuals with disabilities. Peer workers and peer recovery support services have become increasingly central to people’s ability to live with or recover from mental and/or substance use disorders. It is necessary to include them in the list because some people are unfamiliar with them, but in many cases an individual in a peer support group may have the most contact with the individual with a disability and may be in the best position to provide evidence of the disability and need for accommodations. See, e.g., “What are Peer Recovery Support Services?”, United States Substance Abuse and Mental Health Services Administration, at <https://store.samhsa.gov/product/What-Are-Peer-Recovery-Support-Services-/sma09-4454>; Welfare & Institutions Code Section 4361(d)(1) (peer support as component of provision of clinically appropriate or evidence-based mental health treatment and wraparound services to meet the individual needs of participants in Diversion Funding for Individuals with Serious Mental Disorders); Welfare & Institutions Code Section 5671(f) (peer support as component of Community Residential Treatment System); Welfare & Institutions Code Section 5806(a)(5) (peer support as component of County Systems of Care); Welfare & Institutions Code Section 5348(a)(2)(E) (peer support as component of Assisted Outpatient Treatment); Welfare & Institutions Code Section 5450(b)(2)(J) (peer

support as component of outpatient care); and Welfare & Institutions Code Section 14700(a)(2)(A) (peer support as component of state mental health care systems.)

Subdivision (g)(5) is necessary to show that information can come from sources other than those previously enumerated. It is not possible to list all sources of information, given the wide range of possible disabilities and accommodations. Subdivision (g)(5) also ensures that California law provides rights at least as protective as the FHA, as required by Government Code 12955.6. *See, e.g., HUD/DOJ Statement on Reasonable Accommodations, supra*, at Question 18 (“a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability.”) Several examples are provided to help provide guidance about individuals who could provide reliable information, and additional guidance about reliability is provided in subdivision (h). *See, e.g. Sinisgallo v. Town of Islip Housing Authority* (E.D.N.Y. 2012) 865 F.Supp.2d 307, 338–339 (quoting HUD/DOJ Statement on Reasonable Accommodations and holding that a disability may be verified by “[a] doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party,” emphasis omitted).

Subdivision (h) 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 (g). This guidance is necessary so that a person evaluating the request can determine how to inquire about “reliability” without improperly seeking information that is not necessary to evaluate the reasonable accommodation request. *See HUD/DOJ Statement on Reasonable Accommodations, supra*, at Questions 16-18. Because of the range of possible third-party sources, it is not possible to establish a bright line rule, but the section provides guidance as to how to evaluate such sources. The Council selected the three listed factors because, in general, they are all sufficiently relevant to determining reliability without being improperly intrusive.

§ 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)(6).

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. *Giebeler v. M & B Associates* (9th Cir. 2003) 343 F.3d 1143, 1147; *United States v. California Mobile Home Park Mgmt. Co.* (9th Cir. 1997) 107 F.3d 1374, 1380 (9th Cir.1997) (“*Mobile Home II*”).

Subdivision (a)(2) is necessary because an accommodation need not be granted if there is not a disability-related need for the accommodation. *Giebeler*, at 1147-1149, 1155-1156; *Mobile Home II*, at 1380-1382.

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). *Giebeler*, at 1157.

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). *Giebeler*, at 1157.

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; *Sinisgallo v. Town of Islip Housing Authority* (E.D.N.Y. 2012) 865 F.Supp.2d 307, 336; 340-341; *Roe v. Sugar River Mills Associates* (D.N.H. 1993) 820 F.Supp. 636, 640.

Subdivision (a)(6) is necessary to clarify that requests for support animals are a type of reasonable accommodation when it may be appropriate, depending on the circumstances, to consider whether the requested accommodation (permitting the presence of the support animal) constitutes a direct threat to the health or safety of others or would cause substantial physical damage to the property of others. In the Council’s experience, the issue of how to assess reasonable accommodation requests that involve

support animals is an area that can be confusing, so additional clarification is provided. Just as it may be appropriate to consider these factors when considering other requested accommodations, it may likewise be appropriate to consider them when the requested accommodation involves a support animal.

§ 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; *Giebeler*, at 1152-1159; *McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1270 (fact-specific, individualized analysis required.) The Council selected the six listed factors because they are helpful examples of particularly common and important issues to consider in the fact-specific, individualized determination of whether an accommodation poses an undue financial or administrative burden.

§ 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. This is necessary to fully implement the policies underlying FEHA. Since consideration of a request for a reasonable accommodation is required by law, individuals cannot charge for such activities. Further, charging a fee to process a request would delay many requests, and would make requests unavailable to large numbers of individuals with disabilities who are low income. *See Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc.* (D.N.D. 2011) 778 F.Supp.2d 1028, 1038; *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*), Question 11.

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). *Giebeler v. M & B Associates* (9th Cir. 2003) 343 F.3d 1143, 1152–1153; *United States v. California Mobile Home Park Mgmt. Co.* (9th Cir. 1994) 29 F.3d 1413, 1416 (“Mobile Home I”).

Proposed subdivision (a)(3) implements the requirement that individuals with disabilities may not be asked or required to waive their rights to future accommodations. This subdivision is necessary, as such waivers would conflict with the purpose and intent of FEHA and FHA. Furthermore, people’s physical health and the nature of their disabilities may change over time, so they may need an additional or different accommodation at a later date. For example, an individual who is deaf is granted an accommodation to have an American Sign Language (ASL) interpreter at lease negotiation meetings. At a later date, the same individual develops mobility disabilities and requests a parking space close to their apartment. The landlord cannot bar the tenant from seeking a subsequent accommodation.

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 requests should be evaluated.

The examples are derived from general statutory concepts, case law, and

HUD regulations and guidance, and other relevant law, modified as necessary to comply with FEHA and for further clarification. See, 24 C.F. R. section 100.204(b) (examples); *HUD/DOJ Statement on Reasonable Accommodations*, *supra*.

Subdivision (b)(1): 24 C.F.R. 100.204(b)(2);

Subdivision (b)(2): This subdivision is necessary because the Council has found that the type of reasonable accommodation requested in the example is a common one that can create confusion, so it is necessary to provide clarification that the requested accommodation may be appropriate for some individuals with disabilities. See, e.g., *Giebeler v. M & B Associates* (9th Cir. 2003) 343 F.3d 1143, 1152–1153, 1157; *United States v. California Mobile Home Park Mgmt. Co.* (9th Cir. 1994) 29 F.3d 1413, 1416 (“*Mobile Home I*”); *McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1263–1264; *Samuelson v. Mid-Atlantic Realty Co.*, 947 F.Supp. 756 (D.Del.1996); *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*), Question 6, Example 2, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

Subdivision (b)(3): *Giebeler v. M & B Associates* (9th Cir. 2003) 343 F.3d 1143.

Subdivision (b)(4): In the Council’s experience, persons with disabilities may need reasonable accommodations in the timing, location, or manner of executing housing related transactions, such as signing loan documents or paying rent, but confusion can arise regarding such requests. Therefore, this subdivision is necessary to provide an example of one such accommodation request that demonstrates the required, overall analysis of what constitutes a reasonable accommodation in this context. See, e.g., *Giebeler v. M & B Associates* (9th Cir. 2003) 343 F.3d 1143, 1157; *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*), Question 6, Example 2.

Subdivision (b)(5): 24 CFR 100.204(b)(1): *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*), Question 6, Example 3; 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; DOJ Revised Requirements on Service Animals (*DOJ Service Animal Requirements*), July 12, 2011, available at 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.; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1593–1594 [18 Cal.Rptr.3d 669, 679–680]; Government Code sections 12927(c)(1), 12955(m) (FEHA prohibits discriminatory provision of inferior terms and privileges of housing accommodations and protects someone who is not in a protected class but is associated with someone else who is).

Subdivision (b)(6): *Dadian v. Village of Wilmette* (7th Cir. 2001) 269 F.3d 831, 839; *Trovato v. City of Manchester, N.H.* (D.N.H. 1997) 992 F.Supp. 493, 497; *Bassilios v. Torrance* (C.D.Cal. 2015) 166 F.Supp. 3d 1061 (Reasonable accommodation to provide disabled parking spot in a public street in front of home).

Subdivision (b)(7): *Bentley v. Peace and Quiet Realty 2 LLC* (E.D.N.Y. 2005) 367 F.Supp.2d 341, 346; *Wiesman v. Hill* (D. Mass. 2009) 629 F.Supp.2d 106, 112. See also 24 C.F.R. § 100.65(b)(2), revised October 14, 2016.

Article 24. Consideration of Criminal History Information in Housing.

§ 12264 [initially 12005(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 state statutes and case law. This definition is also necessary to enable the

Council to state rules succinctly rather than provide a definition mid-sentence. Article 24 of the proposed regulations limits the lawful use of criminal history information. Numerous state statutes use the phrase “criminal history information,” e.g. California Penal Code sections 11105(a)(2)(A) (defining “state summary criminal history information”) and 13300(a)(1) (defining “local summary criminal history information”). Similarly, numerous cases use the phrase “criminal history information,” e.g. *Westbrook v. County of Los Angeles* (App. 2 Dist. 1994) 27 Cal.App.4th 157, 160 review denied; *Denari v. Superior Court* (App. 5 Dist. 1989) 215 Cal.App.3d 1488, 1492. Without further guidance, the term is subject to misinterpretation, particularly since it is used as a technical term in the proposed regulations. This proposed definition clarifies what constitutes criminal history information for purposes of Article 25.

The illustrative examples of criminal history information are necessary to clarify the types of this information that may be included in records that could be used to discriminate against classes of persons protected by the FEHA. Further clarification is needed because, among other reasons, California statutes’ references to “criminal history information” recognize that this is a broad term, which includes not only information about arrests, charges, bookings, or convictions but also “similar data.” (See, e.g., Penal Code §§ 1105(a)(2)(A); 13300(a)(1)). In the Council’s experience, access to housing opportunities have been denied or impaired based on records that reflect a variety of contacts with law enforcement agencies, such as having been questioned, apprehended, detained, or taken into custody without having been arrested, booked, or charged. Criminal history information used to deny or impair access to housing opportunities can be found in records generated not only by local police but by any law enforcement or prosecutorial agency from many different jurisdictions, including criminal history information in military agencies’ files. It is also necessary to clarify that criminal history information can appear not only in law enforcement records but also reports generated for other purposes by public and private entities. For example, in the Council’s experience, investigative consumer reports and other reports used in background checks of rental applicants can include criminal history information that is used to deny or impair access to housing opportunities. See, e.g., *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions* (D. Conn., Mar. 25, 2019, No. 3:18-CV-705 VLB) 2019 WL 1398056, *1, *4-7 (FHA applies to private

consumer reporting agency that generated reports with criminal history information that landlords used to screen rental applicants); *Jackson v. Tryon Park Apartments, Inc.* (W.D.N.Y., Jan. 25, 2019, No. 6:18-CV-06238 EAW) 2019 WL 331635; *Sams v. GA West Gate, LLC* (S.D. Ga., Jan. 30, 2017, No. CV415-282) 2017 WL 436281; *Alexander v. Edgewood Management Corporation* (D.D.C., July 25, 2016, No. CV 15-01140 (RCL)) 2016 WL 5957673.

§ 12265. Prohibited Uses of Criminal History Information.

The purpose of this section is to specify in one place the prohibited uses of criminal history information that can violate the FEHA. This section is necessary to provide guidance regarding the 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 sections 12264 and 12005(i) and (k), 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 if it has a discriminatory effect under Article 7, unless a legally sufficient justification applies under section 12266. 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 can 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.

Subdivision (a) 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. 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. See *Sisemore v. Master Fin., Inc.*, (2007) 151 Cal. App. 4th 1386, 1421–22 (holding that while licensed home day care providers are not a protected class under FEHA...“the essence of a disparate impact claim is that a challenged policy, while facially neutral (i.e., not evidencing intentional discrimination against a protected class), in practice and effect is discriminatory toward a particular protected class.... Thus, the fact that Master Financial's policies, on their face, impacted an unprotected class (i.e., family day care home operators) does not preclude a disparate impact claim.”) Also see *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*), available at: <https://www.justice.gov/crt/file/903801/download> at 11 – 12 (“Although the FHA does not forbid housing providers from considering applicants’ criminal records, it does require that providers do so in a way to avoid overbroad generalizations that disproportionately disqualify people based on a characteristic protected by the statute, such as race or national origin. To that end, the FHA bars criminal records bans that have a disparate impact on applicants based on race or national origin unless they are supported by a legally sufficient justification.”) See also *Jackson v. Tryon Park Apartments, Inc.* (W.D.N.Y., Jan. 25, 2019, No. 6:18-CV-06238 EAW) 2019 WL 331635, at *3; *Sams v. GA West Gate, LLC* (S.D. Ga., Jan. 30, 2017, No. CV415-282) 2017 WL 436281, at *5; *Alexander v. Edgewood Management Corporation* (D.D.C., July 25, 2016, No. CV 15-01140 (RCL)) 2016 WL 5957673, at *3–4; *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions* (D. Conn., Mar. 25, 2019, No. 3:18-CV-705 VLB) 2019 WL 1398056, at *9-10.

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*; *DOJ Statement of Interest in Fortune Society, supra*.

§ 12265, subd. (b). [initially subd. (a)(2)]

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 if it constitutes intentional discrimination. See, e.g., *Allen v. Muriello*, (7th Cir. 2000) 217 F.3d 517; Government Code section 12955.8, subd. (a) (prohibiting intentional discrimination). This subdivision also cross-references section 12267, which explains the liability standard for when a practice that includes seeking information about, consideration of, or use of criminal history information may constitute intentional discrimination.

As required by Government Code section 12955.6, this 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. See, e.g., *HUD Guidance on FHA and Use of Criminal Records*, *supra*.

§ 12265, subd. (c). [initially subd. (a)(3)]

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 if it constitutes a discriminatory statement. This subdivision is necessary to clarify that such discriminatory statements could create a separate basis for liability distinct from, for example, intentional discrimination. See, e.g., *Jancik v. Department of Housing and Urban Development* (1995) 44 F.3d 553, 556. Discriminatory statements are unlawful under section 12955, subd. (c) of the FEHA.

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. (d). [initially subd. (a)(4)]

This subdivision is necessary to clarify that not only general categories of practices regarding criminal history information but specific practices may violate the FEHA. Subdivision (d) cross-references section 12269, the section articulating specific practices related to criminal history information that are unlawful.

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

§ 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. See, e.g. *Sisemore v. Master Financial*, (Cal. Ct. App. 2017) 151 Cal.App. 4th 1386, 1418 – 23; *Jackson v. Tryon Park Apartments, Inc.* (W.D.N.Y., Jan. 25, 2019, No. 6:18-CV-06238 EAW) 2019 WL 331635; *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions* (D. Conn., Mar. 25, 2019, No. 3:18-CV-705 VLB) 2019 WL 1398056. This subdivision is also necessary to clarify that this defense applies to all respondents.

§ 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 specifying 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. This further clarification 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.

Consistent with Government Code section 12555.8, subd. (b), there are three elements, which the Council has described in subdivisions (b)(1), (2), and (3).

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. (ee). "Legitimate" is defined in section 12005, subd. (r). "Nondiscriminatory" is defined in section 12005(s). 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. The practice must seek, consider, and use only criminal history information regarding directly related convictions as defined in section 12005, subd. (k). 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 subdivision provides guidance on how to apply the definition of directly-related conviction, 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. See, e.g. *HUD Guidance on FHA and Use of Criminal Records* articulated the same factors as relevant. *HUD Guidance on FHA and Use of Criminal Records, supra* at 7; *Green v. Missouri Pacific R.R.* (8th Cir. 1975) 523 F.2d 1290, 1297-98, citing *Butts v. Nichols* (S.D.la. 1974) 381 F.Supp. 573, 580-81 (from the Title VII context); *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, (2015) 135 S. Ct. 2507 (looking to Title VII for guidance in FHA discriminatory effect case).

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. *HUD Guidance on FHA and Use of Criminal Records, supra* at 6 (“...[A] housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a *demonstrable risk* to resident safety and/or property and criminal conduct that does not.”) (emphasis added) 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”) which was cited by *HUD Guidance on FHA and Use of Criminal Records, supra* at 6, applying the same reasoning to the housing context. See also *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, (2015) 135 S. Ct. 2507 (looking to Title VII for guidance in FHA discriminatory effect case)

The last two sentences of subdivision (b)(2) offer two illustrative examples that are respectively unlikely or likely, under specific circumstances, to be considered directly-related convictions. These examples are necessary to help respondents and persons in protected classes understand this element of the defense.

Third, under subsection (b)(3), the respondent 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). See also FEHA section 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.”

§ 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 establishments, as defined in 12005(f), because the Act includes separate provisions for business and nonbusiness establishments in Government Code section 12955.8, subd. (b).

The requirements in subds. (c)(1), (2) and (4) are the same as for business establishments except for the use of “purpose” instead of “business interest” which is directly derived from Government Code section 12955.8, subd. (b) 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 criterion 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.

§ 12269. Specific Practices Related to Criminal History Information.

§ 12269, subd. (a).

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 *HUD Guidance on FHA and Use of Criminal Records, supra* at 5 (“A housing provider with a policy or practice of excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.”) *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957); *U.S. v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009); and *U.S. v. Zapete-Barcia* (1st Cir. 2006) 447 F.3d 57, 60 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. An individual's successful participation in a pre-trial or post-trial diversion program or a deferred entry of judgment program is equivalent to the judgment that the individual does not pose a demonstrable risk to the public. See, e.g. California Penal Code section 1000.4; Cal. Lab. Code section 432.7. These legal determinations are intended to give a person a "second chance." In some cases, the law explicitly permits an individual to deny ever being arrested on the charge. California Penal Code section 1000.4. In many cases these legal determinations do not amount to a "criminal conviction," much less a "directly-related conviction." The effect of these legal determinations is that a conviction, if there was one, does not have a direct and specific negative bearing on the identified interest or purpose supporting the practice because the individual does not pose a demonstrable risk to the public. For these reasons, this criminal history information should not be used or considered in housing decisions.

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. A criminal conviction that has been sealed, dismissed, vacated, expunged, sealed, voided, invalidated or otherwise rendered inoperative by judicial action or by statute is equivalent to the judgment that the individual does not pose a demonstrable risk to the public. See, e.g. Cal. Penal Code section 4852.01 et seq.; Cal. Lab. Code section 432.7. These legal determinations are intended to give a person a "second chance." A criminal conviction that has been sealed, dismissed, vacated, expunged, sealed, voided, invalidated or otherwise rendered inoperative by judicial action or by statute is not a "directly-related conviction" since the effect of these legal determinations is that such a conviction does not have a direct

and specific negative bearing on the identified interest or purpose supporting the practice because the individual does not pose a demonstrable risk to the public. For these reasons, this criminal history information should not be used or considered in housing decisions.

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].”) See, e.g. *Jackson v. Tryon Park Apartments, Inc.* (W.D.N.Y., Jan. 25, 2019, No. 6:18-CV-06238 EAW) 2019 WL 331635, at *3; (blanket felony conviction policy) *Sams v. GA West Gate, LLC* (S.D. Ga., Jan. 30, 2017, No. CV415-282) 2017 WL 436281, at *5; (99 year felony or misdemeanor crim history rule); *Simmons v. T.M. Assocs. Mgmt., Inc.* (W.D. Va. 2018) 287 F. Supp. 3d 600, 602 – 604 (blanket policy); *Green v. Missouri Pacific R.R.* (8th Cir. 1975) 523 F.2d 1290, 1298-99 (discussing how a company’s absolute ban on employment for any conviction except a minor traffic offense fails to satisfy the no less restrictive alternative part of Title VII’s discriminatory effect test); *Field v. Orkin Extermination Co.* (E.D. Pa. Feb 21, 2002) No. 00-5913, 2002 WL 32345739, at *1 (finding a blanket policy of denying employment to any person having a criminal conviction is a violation of Title VII); *HUD Guidance on FHA and Use of Criminal Records*, at 6; *DOJ Statement of Interest in Fortune Society, supra* at 22.

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*.

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

The Council relied upon the following technical, theoretical or empirical studies, reports, or similar documents in proposing the adoption of these regulations:

1. 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 Reasonable Accommodations Under the Fair Housing Act)
2. HUD FHEO Notice: Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (FHEO Notice)
3. HUD Final Rule, Pet Ownership for the Elderly and Persons with Disabilities

4. DOJ Revised Requirements on Service Animals (DOJ Service Animal Requirements)
5. DOJ guidance document Frequently Asked Questions about Service Animals and the ADA (DOJ FAQ on Service Animals)
6. U.S. Department 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)
7. HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule (HUD Discriminatory Effects Standard Final Rule)
8. 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)
9. FEHC Precedential Decisions:
 - a. *DFEH v. Merribrook Apts.* (1988) FEHC Precedential Dec. No. 88-19, 1988 WL 242651
 - b. *DFEH v. Atlantic North Apartments, et al.* (1983) FEHC Precedential Dec. No. 83-12, 1983 WL 36461
 - c. *DFEH v. McWay Family Trust* (1996) FEHC Precedential Dec. No. 96-07, 1996 WL 774922
 - d. *DFEH v. O'Neill* (2008) FEHC Precedential Dec. No. 08-08, 2008 WL 5869851
 - e. *DFEH v. DeSantis* (2002) FEHC Precedential Dec. No. 02-12, 2002 WL 1313078
10. Judicial Council of California's approved form for answers in unlawful detainers (UD-105)
11. HUD's November memorandum with the subject "Questions and Answers on Sexual Harassment under the Fair Housing Act" (HUD FAQ Sexual Harassment)
12. Bill Analysis, Senate Committee on Judiciary, AB 2244 (1993-94 Reg. Sess.)
13. Joint Policy Statement on Discrimination in Lending
14. Stats. 1993, c. 1277 (A.B. 2244), § 6
15. Stats. 1980, c. 992, § 4
16. Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act (November 10, 2016)

17. 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)
18. 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, and Related Q&A (Updated August 6, 2015)
19. Legislative Intent Language on GC 12955, Chapter 1277, Statutes of 1993, Sec. 18
20. Legislative Intent Language on FHA, H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24
21. California Attorney General Guidance: Letter to All California Mayors from the Office of the Attorney General, Bill Lockyer, A.G. re “Adoption of a Reasonable Accommodation Procedure
22. HUD’s Office of General Counsel, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency
23. 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)
24. DOJ Statement of Interest in Fortune Society
25. California Rules of Court, Rule 5.552
26. 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
27. HUD Notice PIH re: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions
28. Article 49, San Francisco Police Code
29. “What are Peer Recovery Support Services?”, United States Substance Abuse and Mental Health Services Administration, at <https://store.samhsa.gov/product/What-Are-Peer-Recovery-Support-Services-/sma09-4454>
30. California Building Codes Chapter 11B-108
31. *HUD v. Tucker*, (Aug. 24, 1992 HUDALJ 09-90-1008-1, 09-90-1009-1) 1992 WL 406533