

ATTACHMENT C

FAIR EMPLOYMENT & HOUSING COUNCIL Housing Regulations Regarding Definitions; Intentional Discrimination; Discriminatory Notices, Statements, and Advertisements; Consideration of Income; Residential Real Estate-Related Practices; and Disability

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 7. Discrimination in Housing

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

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

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

Subchapter 7. Discrimination in Housing

Article 1. General Matters

§ 12005. Definitions.

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

§ 12005, subd. (o)(3).

The Council proposes to add this subdivision to the definition of “housing accommodation” in order to implement Stats. 2019, ch. 599 (AB 1497) which modified section 12927, subd. (d) of the Act. The new statute clarifies that transactions facilitated by hosting platforms for short term rentals as defined in section 22590 of the Business and Professions Code are included as housing accommodations for purposes of FEHA. This addition is necessary to clarify for the public that these transactions are included in the definition of “housing accommodation” and are therefore subject to FEHA’s anti-discrimination requirements.

§ 12005, subd. (r).

The Council proposes to add the definition of “interior.” This addition is necessary to define a term that is used throughout the proposed regulations and enables the Council to state rules

succinctly rather than provide a definition mid-sentence. See, e.g., proposed sections 12179 (Denial of Reasonable Accommodation or Modification; and 12181 (Other Requirement or Limitations in the Provision of Reasonable Modifications; and Examples).

Addition of the subdivision is also necessary to comply with Government Code section 12955.6, Construction with other laws, which provides, in relevant part: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. sections 100.1 et seq.)” See, e.g., 24 C.F.R. sections 100.201 (Definition of “interior”) and 100.203(a), revised November 24, 2008; HUD Notice of Final Rule: “Implementation of the Fair Housing Amendments Act of 1988,” (HUD Notice of Final FHAA Rule), 54 Fed. Reg. 3232-01 at 3232, 3234, 3245, 3247-3249, and 3288-3289 (January 23, 1989), 1989 WL 272684; and 42 U.S.C. section 3604(f)(3)(A).

§ 12005, subd. (t) and (aa).

The Council proposes to add the definition of “military or veteran status,” and to revise the definition of “Protected bases” and “protected classes.” These additions are necessary due to the legislature’s inclusion of military or veteran status as a protected category in FEHA pursuant to Stats. 2019, ch. 601 (SB 222). The new term is used throughout the proposed regulations as a component of “protected classes” and “protected bases,” and the new and revised definitions enable the Council to state rules succinctly rather than provide a definition mid-sentence. See, e.g., proposed revised section 12005, subd. (aa) (definition of “protected bases or protected classes,”) and proposed section 12050 (Discriminatory Practices). The definition adds examples to each of the branches of military service for clarity. The statute also clarifies that members or former members are covered regardless of duty status or discharge status since the Legislature did not limit the definition in any manner and since the purpose of the Act as stated in Government Code section 12920 is to provide effective remedies for discriminatory practices in housing.

§ 12005, subd. (ty)(2).

The Council proposes to add this subdivision to the definition of “owner” in order to implement Stats. 2019, ch. 599 (AB 1497) which modified section 12927, subd. (d) of the Act. This bill clarified that transactions facilitated by housing platforms for short term rentals as defined in section 22590 of the Business and Professions Code are included as housing accommodations for purposes of FEHA. This addition is necessary to clarify that a person who offers a housing accommodation as defined in section 12005(o)(3) pursuant to a transaction facilitated by a hosting platform is an “owner” for purposes of FEHA.

§ 12005, subd. (wy).

The Council proposes to use “housing accommodation” instead of “building” in the definition of “premises.” This substitution is necessary to clarify what constitutes “premises” because the premises of a housing accommodation may include multiple buildings, such as a multifamily housing complex where common use areas such as a workout space or community room are in separate buildings. This revision is also necessary to clarify a term that is used in the statute and throughout the proposed regulations and enables the Council to state rules succinctly rather than provide a definition mid-sentence. See, e.g., subdivision 12005(b) (definition of “adverse action”), proposed revisions to subsection 12176 (Reasonable Accommodations and Reasonable Modifications), and proposed section 12181 (Other Requirements or Limitations in the Provision of Reasonable Modifications; and Examples).

§ 12005, subd. (eegg).

The Council proposes to revise the definition of “substantial interest” by adding a cross-reference to the provision in which it is used in section 12062(a)(1). This addition is a nonsubstantial change necessary to clarify the meaning of this technical term.

§ 12005, subd. (hh).

The Council proposes to add the definition of “substantial purpose” and add a cross-reference to the provision in which it is used in section 12062(b)(1). The phrase “substantial purpose” is defined as “the purpose is integral to the non-business establishment’s institutional mission.” Section 12062(b)(1) sets out one of the elements of a legally sufficient justification for a practice with a discriminatory effect for a nonbusiness establishment. That subdivision, which is an existing regulation and not part of this rulemaking action, provides that a business establishment must establish that its practice “is necessary to achieve one or more substantial, legitimate, nondiscriminatory purposes of the nonbusiness establishment.” While the phrase “substantial purpose” itself is not used in the regulations, this definition combines with the definitions of “legitimate” in section 12005(r) and “nondiscriminatory” in section 12005(s) to articulate each of the parts of this element. This addition is necessary to clarify the meaning of this technical term and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

Article 3. Intentional Discrimination

The Council proposes to add this article to implement section 12955.8(a) of the Act regarding the legal rights and duties of the public with regard to intentional discrimination under the Act. The legislature initially added this section by Stats. 1993, c. 1277 (AB 2244).

§ 12040. Definitions.

The purpose of this section is to give meaning to terms used throughout the “Intentional Discrimination” article of the regulations.

§ 12040, subd. (a).

The Council proposes to add that “‘Intentional discrimination’ means ‘intentional violation’ as defined in section 12955.8(a) of the Act.” Section 12955.8(a) of the Act provides: “Proof of an intentional violation of this article includes, but is not limited to, an act or failure to act that is otherwise covered by this part, that demonstrates an intent to discriminate in any manner in violation of this part. A person intends to discriminate if [any protected status] is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice.” This addition is necessary to clarify the meaning of this technical term used throughout this article and to fully implement Government Code section 12955.8(a). The Council used “intentional discrimination” instead of “intentional violation” because the latter is subject to misinterpretation and the former is the term used by practitioners. However, this is a nonsubstantial word choice and does not impact the underlying meaning.

§ 12040, subd. (b).

The Council proposes to add the definition of “motivating factor.” Section 12955.8(a) of the Act specifically incorporates “motivating factor” in its definition of intentional discrimination. The proposed definition comes from *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 199. See *McDonald v. Coldwell Banker*, 543 F.3d 498, 504 (9th Cir. 2008) (citing *Caldwell v. Paramount Unified Sch. Dist.* favorably for this definition.) This addition is necessary to clarify the meaning of this technical term by incorporating relevant case law.

Further, this subdivision relies on cases interpreting the federal Fair Housing Act (FHA), the Rehabilitation Act, and the Americans with Disabilities Act. *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* 121 Cal.App.4th 1578, 1591 (2004) (“Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA.” (*Auburn Woods I.*”)

§ 12041. Intentional Discrimination Practices.

The purpose of this section is to identify practices that violate section 12955.8(a) of the Act.

§ 12041, subd. (a).

The Council proposes to add this subdivision to identify practices that violate section 12955.8(a) of the Act. Subdivision (a) is necessary to state the basic rule that “practices that are motivated by discriminatory intent” violate the Act.

§ 12041, subd. (b).

The Council proposes to add subdivision (b) to set out the general liability rule, using language directly from section 12955.8(a) of the Act. Section 12955.8(a) of the Act explicitly prohibits “intentional discrimination” using the following language: “A person intends to discriminate if [a protected basis] is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice.” In *Harris v. City of Santa Monica*, the California Supreme Court affirmed that FEHA’s provision for intentional discrimination in *housing* is different from its provision for intentional discrimination in the *employment* context. In the employment context, proof of intentional discrimination requires proof that the illegitimate criterion was a “substantial motivating factor.” (*Harris*, 56 CA 4th 203, 217-218 (2013)). The court declined to treat intentional discrimination in employment the same as in housing because of the specific statutory language in section 12955.8(a) of the Act. (*Ibid.*)

FEHA’s liability rule for intentional discrimination in the housing context is also different from how courts have interpreted the federal Fair Housing Act’s prohibition of “disparate treatment.” The federal Fair Housing Act does not include language specifically prohibiting “intentional discrimination.” Courts have universally interpreted the phrase “because of” (e.g. 42 U.S.C. 3604(a) and (b)) to ban “disparate treatment,” and courts have developed liability rules applying this prohibition. In the absence of regulations interpreting and implementing section 12955.8(a) of the Act, some case law, e.g. *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), *cert. denied* 535 U.S. 1017 (2002), interpreted FEHA’s prohibition of intentional discrimination as being the same as the federal Fair Housing Act. However, the explicit language of section 12955.8(a) differs from the liability rules that some courts have developed to apply the federal Fair Housing Act. In particular, some courts have interpreted the federal Fair Housing Act’s prohibition against disparate treatment to allow a “mixed motive defense,” first articulated in the federal employment context in *Price Waterhouse v. Hopkins* (490 U.S. 228 (1989)). FEHA is more protective of members of protected classes and does not allow a “mixed motive defense” because it explicitly only requires a complainant to prove that any protected status “is a motivating factor in committing a discriminatory housing practice *even though other factors may have also motivated the practice.*” (Emphasis added.) Accordingly, this section is necessary to clarify what constitutes unlawful conduct under FEHA.

This subdivision is also necessary because of the specific language of section 12955.8(a) of the Act and to comply with section 12955.6 of the Act (which provides, in relevant part: “This part

may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws”). These regulations interpret and implement section 12955.8(a) of the Act to be more protective of members of protected classes than the federal Fair Housing Act.

Subdivision (b) also explains that “proving that discriminatory intent is a motivating factor does not require proof of personal prejudice or animus....” This is a well-settled rule in case law interpreting the federal Fair Housing Act. See, e.g., *Community Services, Inc. v. Wind Gap Mun. Authority*, 421 F.3d 170, 177 (3d Cir. 2005); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530–31 (7th Cir. 1990). This addition is necessary to clarify what constitutes unlawful conduct.

§ 12042. Burdens of Proof and Types of Evidence in Intentional Discrimination Cases.

The purpose of this section is to specify the burdens of proof that each party bears in intentional discrimination cases and to explain the different liability rules that apply when either direct evidence or indirect evidence (or circumstantial evidence) is used to prove a violation.

§ 12042, subd. (a).

The Council proposes to add this subdivision to specify a complainant’s burden in an intentional discrimination case. This addition is necessary to clarify what a complainant must prove in an intentional discrimination case by accurately implementing section 12955.8(a) of the Act.

§ 12042, subd. (b).

The Council proposes to add this subdivision to explain that intentional discrimination can be proved either through direct evidence or indirect evidence (sometimes called circumstantial evidence). Section 12955.8(a) of the Act specifically provides: “An intent to discriminate may be established by direct or circumstantial evidence.” This addition is necessary to fully implement the statute and clarify that intentional discrimination can be proved by either kind of evidence.

§ 12042, subd. (c).

The Council proposes to add this subdivision to define “direct evidence” and to explain what is required to establish liability as a matter of law in a direct evidence case. See *Department of Fair Employment and Housing v. Superior Court*, 99 Cal.App. 4th 896, 904 (2002) (if defendants admitted to rejecting applicants based upon race or marital status, DFEH’s investigation could end there). In a direct evidence case, the liability is established directly and, if the evidence is believed by the fact finder, there is no defense. The subdivision further describes two situations in which direct evidence can establish liability as a matter of law. This addition is necessary to incorporate the case law on “direct evidence” and clarify the meaning of “direct evidence” and the complainant’s burden of proof in a direct evidence case.

§ 12042, subd. (d).

The Council proposes to add this subdivision to explain the burdens of proof in cases involving indirect (or circumstantial) evidence of discrimination. Overall, this subdivision is necessary to clarify parties’ burdens in an indirect evidence case. This type of intentional discrimination claim employs a “burden-shifting” framework which requires specific explanation. In contrast to a direct evidence case under 12042(c), a complainant in an indirect evidence case must introduce evidence that logically raises an inference that the challenged practice is motivated by discriminatory intent.

Subdivision 12042(d)(1) articulates the complainant’s initial burden to establish a “prima facie

case.” The proposed subdivision states that the specific elements of a prima facie case will vary depending upon the particular facts. This flexibility is necessary to encompass all of the types of housing situations in which an intentional discrimination claim can be brought, including landlord-tenant cases, cases involving homeowner associations, municipal land use cases, mortgage discrimination cases, and others. See, e.g., *U.S. v. Badgett*, 976 F.2d 1176, 1178–79 (8th Cir. 1992) (“The elements of a prima facie case of discrimination will vary from case to case, depending on the allegations and the circumstances.”) See *Auburn Woods I* at 1591.

Nonetheless, a prima facie case will include three specific elements as outlined in subdivisions 12042(d)(1)(A)-(C). Subdivision 12042(d)(1)(A) identifies the first element, *viz.* that the injured individual(s) are members of a protected class, including under section 12955(m) of the Act which includes “a perception that the person has any of the characteristics [of any protected class] or that the person is associated with a person who has, or is perceived to have, any of those characteristics.” This element is necessary because the Act is intended to protect members of protected classes broadly understood from housing discrimination. Subdivision 12042(d)(1)(B) identifies the second element, *viz.* that the injured individual(s) were subject to adverse action regarding a housing opportunity or may be subject to such adverse action. This element is necessary because there must be an adverse action or a potential adverse action to constitute a violation of the Act. Subdivision 12042(d)(1)(C) identifies the third element, *viz.* that the injured individual(s)’ status as a member of a protected class was or is a motivating factor for the adverse action. This element is necessary because the Act requires a complainant to prove this linkage in order to establish an intentional discrimination violation.

Subdivision 12042(d)(2) explains that if a complainant meets the burden under subdivision 12042(d)(1), then the burden shifts to the respondent to defend against the inference of intentional discrimination that the complainant’s evidence has raised. This subdivision is necessary to explain that the nature of the respondent’s burden is to “produce evidence” that the challenged practice was solely motivated by a legitimate, nondiscriminatory reason. Complainants must produce and introduce admissible evidence regarding the motivation for the adverse action. That evidence must show that the sole motivation for the adverse action was “legitimate” (as defined in section 12005(r)) and “nondiscriminatory” (as defined in 12005(s)). The burden to show that the motivation was the “sole motivation” is the logical corollary of the fact that section 12955.8(a) of the Act explicitly only requires a complainant to prove that any protected status “is a motivating factor in committing a discriminatory housing practice *even though other factors may have also motivated the practice.*” (Emphasis added.)

Subdivision 12042(d)(3) explains the burden that the complainant bears if the respondent meets its burden under subdivision 12042(d)(2). This subdivision is necessary to explain that the complainant must show that the nondiscriminatory reason for the adverse action proffered by the respondent is either pretextual or false. The proposed subdivision provides one example of evidence that would be relevant to prove pretext and one example of evidence that would be relevant to prove that the proffered reason is false.

Subdivision 12042(d)(4) is necessary to explain the overall extent of a complainant’s burden rather than a step in the burden-shifting analysis like the previous subdivisions. It further clarifies that the complainant’s burden is not to prove that every individual who participated in the practice was motivated by discriminatory intent. Rather, a complainant must prove only that a person performed an act motivated by discriminatory intent, that the act was intended to cause an adverse action, and that the ultimate decision maker relied on the act in making the final decision

to take an adverse action against the complainant.

§ 12042, subd. (e).

The Council proposes to add this subdivision in order to clarify the liability rule in intentional discrimination cases. As explained in section 12041(b) above, section 12955.8(a) of the Act explicitly only requires a complainant to prove that any protected status “is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice.” Therefore, it does not require that the complainant prove that the protected status was the *sole* motivating factor. And, unlike some cases applying the federal antidiscrimination law in employment and housing cases, FEHA does not allow for a “mixed motive” defense because it explicitly provides that a violation occurs if any protected status “is a motivating factor in committing a discriminatory housing practice *even though other factors may have also motivated the practice.*” (Emphasis added.) This addition is necessary to clarify what constitutes the basis for legal liability under section 12955.8(a) of the Act and to distinguish it from some case law in federal antidiscrimination employment and housing cases which have applied different liability rules.

§ 12042, subd. (f).

The Council proposes to add that the “complainant retains the ultimate burden of persuasion on the discriminatory motivation throughout the case.” This addition is necessary to clarify the ultimate burden of proof in a case under the Act.

§ 12042, subd. (g).

The Council proposes to add that “[i]f a respondent demonstrates that a practice challenged as causing a discriminatory effect in Article 7 is supported by a legally sufficient justification, as defined in section 12062, such a demonstration does not constitute a defense against a claim of intentional discrimination under this Article.” This addition is necessary to avoid possible confusion between an *intentional discrimination claim* and a *discriminatory effect claim* by clarifying that a defense to a discriminatory effect claim under section 12062 will not constitute a defense to an intentional discrimination claim under this article.

Article 6. Discriminatory Advertisements, Statements, and Notices

The Council proposes to add this article to implement section 12955(c) of the Act. This article complies with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford ... fewer rights or remedies” than federal fair housing law. See 42 U.S.C. section 3604(c) and 24 C.F.R. section 100.75, effective March 12, 1989.

§ 12050. Discriminatory Practices.

The purpose of this section is to set out the general rule regarding notices, statements, and advertisements that are unlawful because they are discriminatory under section 12955(c) of the Act.

§ 12050, subd. (a).

The Council proposes to add that “it shall be unlawful for a person to make, print or publish, or cause to be made, printed or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of” a characteristic protected by the Act. This subdivision is necessary to set out the general rule regarding notices, statements, and advertisements that are unlawful because they are discriminatory under section 12955(c) of the Act.

§ 12050, subd. (b).

The Council proposes to add this subdivision to set out what must be proven to constitute liability for an unlawful notice, statement, or advertisement. This addition is necessary to clarify what needs to be proved to find liability under section 12955(c) of the Act. In particular, this subdivision identifies three required elements. Subdivision 12050(b)(1) articulates the first element which requires that the complainant show that the respondent made a notice, statement, or advertisement. This is a necessary element to hold any particular respondent liable for a violation of the Act. Subdivision 12050(b)(2) articulates the second element which requires that the complainant show that the notice, statement, or advertisement at issue was made with respect to the sale or rental of a housing accommodation. This is a necessary element to hold a respondent liable for a housing discrimination under the Act. Subdivision 12050(b)(3) articulates the third element which requires that the complainant show that the notice, statement, or advertisement at issue indicated a preference, limitation, or discrimination on the basis of a protected status. This element is necessary because the Act requires a complainant to prove this linkage in order to establish a violation. Notably, there is no requirement that the complainant be a member of a protected class in order to bring a complaint under this section of the Act. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972).

This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. See *Auburn Woods I* at 1591.

§ 12050, subd. (c).

The Council proposes to add this subdivision to set out the general liability rule for an unlawful notice, statement, or advertisement and to explain that section 12955(c) of the Act provides for a distinct basis for liability and therefore proof of discriminatory intent under Article 3 is not required. The liability rule that a notice, statement, or advertisement is discriminatory if it would suggest such a preference to an ordinary reader or listener is well-settled in federal Fair Housing law. See, e.g., *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934, (1972). In other words, section 12955(c) of the Act is essentially a "strict liability" statute: all that is required to establish liability is for the complainant to prove that the challenged notice, statement, or advertisement was made by the respondent, that the challenged notice, statement, or advertisement was made "with respect to the sale or rental of a housing accommodation" and that the challenged notice, statement, or advertisement "indicate" a discriminatory preference to an ordinary reader or listener. This addition is necessary to consolidate case law and clarify what must be shown to establish liability under this section of the Act.

This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. See also *Auburn Woods I* at 1591.

§ 12050, subd. (d).

The Council proposes to add this subdivision in order to further elaborate on what conduct is unlawful under section 12955(b) of the Act by identifying that it is unlawful to make or cause to be made any written or oral inquiry concerning a protected class, with the exception of source of income. Oral statements as well as written statements are subject to the proposed regulation. See 24 C.F.R. section 100.75(b), effective on March 12, 1989 ("The prohibitions in this section

[3604(c)] shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling"). The proposed regulation is derived directly from section 12955(b) of the Act. Source of income is not included because section 12955(p)(2) of the Act provides a statutory exception for a written or oral inquiry based upon source of income concerning the level or source of income. Section 12051(a) of the proposed regulations specifies this exception, and section 12141(b) of the proposed regulations further explains that exception. This addition is necessary to outline the scope of conduct is unlawful under section 12955(b) of the Act.

This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law.

§ 12050, subd. (e).

The Council proposes to add this subdivision to identify the broad scope of types and forms of statements and notices that are subject to the proposed regulation. Apart from exceptions specified in section 12051 of the proposed regulations, this section applies to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling. The proposed regulation articulates an illustrative, but not exhaustive list of types and forms of notices, statements, and advertisements that are subject to the proposed regulation, including electronic notices, statements or advertisements. This addition is necessary to clarify and outline the wide variety of communications that are unlawful under section 12955(c) of the Act.

§ 12050, subd. (f).

The Council proposes to add this subdivision to further elaborate on the scope of housing that is subject to the proposed regulation. In 42 U.S.C. section 3603(b) of the federal Fair Housing Act, Congress applied 42 U.S.C. section 3604(c) to dwellings that were otherwise exempt from the federal Fair Housing Act's prohibitions, *viz.* the exemptions for certain single-family house and certain rooms or units in multi-unit buildings of four units or less. See 42 U.S.C. sections 3604(b)(1) – (2). Section 12955(c) of the Act is the parallel provision of 42 U.S.C. section 3604(c). This subdivision is necessary to comply with section 12955.6 of the Act, which provides in relevant part: "Nothing in this part shall be construed to afford to the classes protected under this part fewer rights or remedies" than the federal Fair Housing Act. Therefore, apart from exemptions specified in the Act itself as specified in section 12051 of the proposed regulations, section 12050(a) must apply to notices, statements, and advertisements for any housing accommodation. This addition is necessary to clarify the scope of housing accommodations that are subject to the proposed regulation banning discriminatory statements.

§ 12050, subd. (g).

The Council proposes to add this subdivision to further elaborate specific examples of notices, statements, and advertisements that are prohibited as discriminatory under the proposed article.

The Council proposes to add subdivision 12050(g)(1) to identify types of media and formats that are subject to the prohibition of section 12050(a), including words, phrases, photographs, illustrations, symbols, or forms and that any such form of communication violates the Act if it conveys that a housing accommodation is or is not available to a particular group of persons based upon their protected status. See 24 C.F.R. section 100.75(c)(1), effective on March 12, 1989. This addition is necessary to clarify for the public that the prohibition against discriminatory notices, statements, and advertisements extends beyond oral and written words and that messages regarding availability or non-availability based upon protected status violate

the Act. This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law.

The Council proposes to add subdivision 12050(g)(1)(A) to specify that words or phrases that *explicitly* express a discriminatory preference or limitation are unlawful under section 12050(a) because their meaning is clear and not susceptible to any other interpretation. The proposed subdivision provides a non-exhaustive list of examples of such unlawful words and phrases. This addition is necessary to clarify for the public that particular formulations of words and phrases can be unlawful *per se* and are not subject to analysis under the “ordinary reader or listener” standard discussed above in subdivision (c) because their meanings are plain on their face. The Council proposes to add subdivision 12050(g)(1)(B) to specify that words or phrases that *might* suggest a discriminatory preference are subject to the “ordinary reader or listener” standard and that they are unlawful if under this standard they are found to suggest a discriminatory preference in the context in which they are used. The proposed subdivision provides a non-exhaustive list of examples of such words and phrases regarding various protected classes. This addition is necessary to clarify that particular formulations of words and phrases whose meanings are not plain on their face are not unlawful *per se*, but they can be found to constitute unlawful discrimination under the “ordinary reader or listener” standard.

The Council proposes to add subdivision 12050(g)(2) to explain that the prohibition against discriminatory statements applies to communications among agents, brokers, employees, prospective sellers or renters or any other persons with respect to the sale or rental of a housing accommodation. See 24 C.F.R. section 100.75(c)(2), effective March 12, 1989. This addition is necessary to clarify for the public that the prohibition extends to these communications and not just public notices, statements, and advertisements. This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law.

The Council proposes to add subdivision 12050(g)(3) to further elaborate on the situations to which the prohibition extends, specifically to the selection of media or locations for advertising for the sale or rental of dwellings. To the extent that a person’s selection of media or locations for advertising have the effect of denying particular segments of the housing market information about housing opportunities based upon their protected status, this selection constitutes an unlawful practice. See 24 C.F.R. section 100.75(c)(3), effective March 12, 1989. This addition is necessary to clarify for persons making selections concerning media or locations for housing advertisements that their choices are subject to this regulation. This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law.

The Council proposes to add subdivision 12050(g)(4) to further elaborate on the situations to which the prohibition extends, specifically that refusing to publish advertising for the sale or rental of housing accommodations or requiring different charges or terms for such advertising based upon a protected status constitutes an unlawful practice. See 24 C.F.R. section 100.75(c)(4), effective March 12, 1989. This addition is necessary to clarify for persons making decisions about publishing advertisements for housing and setting the prices and terms of such advertising that their actions are subject to this regulation. This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law.

The Council proposes to add subdivision 12050(g)(5) to further elaborate on the situations to which the prohibition extends, and specifically in the context of real estate documents, adding or including language in any declaration, governing document, deed or similar document that expresses a preference, limitation, discrimination, or prohibition based on a protected class constitutes an unlawful practice. This includes any conduct in violation of section 12956.1 of the Act regarding discriminatory covenants. Language in such documents constitutes “words or phrases” under proposed section 12050(e). And if such words or phrases express a preference, limitation, discrimination or prohibition based on a protected class, making or creating the document constitutes an unlawful practice. This addition is necessary to clarify for persons creating or modifying such real estate documents that their actions in connection with creating or modifying such documents are subject to the prohibition on discriminatory notices, statements, and advertisements.

§ 12051. Exceptions.

The purpose of this section is to articulate specific exceptions to the general rule in proposed section 12050(a) providing for liability for discriminatory notices, statements, and advertisements.

§ 12051, subd. (a).

The Council proposes to add this subdivision to identify a particular statutory exception to the prohibition on discriminatory notices, statements, and advertisements related to source of income and to explain the scope of this exception. Section 12955(p)(2) of the Act provides a statutory exception for a written or oral inquiry based upon source of income concerning the level or source of income. This proposed subdivision parallels section 12141(b) of the proposed regulations to explain that the scope of this exception extends to written or oral inquiries made in order to verify the amount and source of income stated in an application for a housing opportunity. This addition is necessary to clarify that this particular type of communication in this particular context is not a violation of the Act.

§ 12051, subd. (b).

The Council proposes to add that a “person sharing the living areas in a single dwelling unit” may advertise to “only to persons of one sex.” This exception is specified in section 12927(c)(2)(A) of the Act. This addition is necessary to clarify that this particular type of communication in this particular context is not a violation of the Act as it is a statutory exception.

§ 12051, subd. (c).

The Council proposes to add that a person may include a preference for a protected basis in a notice, statement, or advertisement “where eligibility for a government subsidized housing opportunity requires the person to consider the protected basis.” This addition is necessary to ensure that these regulations do not conflict with applicable laws and regulations by which certain governmental housing programs are operated.

§ 12051, subd. (d).

The Council proposes to add this subdivision to explain that this regulation does not apply in noncommercial personal roommate arrangements in which no money or other consideration is exchanged for the housing opportunity. This addition is necessary to ensure that this article is consistent with the holding in *Fair Housing Council of San Fernando Valley v. Roommates.com*,

LLC, 666 F.3d 1216, 1222 (9th Cir. 2012).

§ 12051, subd. (e).

The Council proposes to add this subdivision to explain that this regulation does not apply in the context of housing for older persons which meets the requirements of section 12955.9 of the Act. For purposes of those housing opportunities, it is lawful for a person to state an age-based preference because age is an eligibility criterion for such housing. However, for purposes of this subdivision, the burden of proof that the housing qualifies as housing for older persons under section 12955.9 of the Act shall be on the respondent. This addition is necessary because a complete rendering of the rule prohibiting discriminatory notices, statements, and advertisements must include Government Code section 12955.9's exception.

§ 12052. Qualifying for Exemption.

The purpose of this section is to outline Government Code section 12927(c)(2)(A)'s "roomer" or "boarder" exemption. Specifically, the Council proposes to add "an owner-occupied single-family home with a single roomer or boarder is exempt from discrimination liability. In order to qualify for this exemption from discrimination liability, the person must comply with subdivision (c) of section 12955 and this article." This addition is necessary to clarify the conditions under which this statutory exemption will apply and because a complete rendering of the rule prohibiting discriminatory notices, statements, and advertisements must include Government Code section 12955.9's exception.

Article 12. Harassment and Retaliation

§ 12120. Harassment.

The purpose of this section is to proscribe harassment in accordance with Government Code sections 12927(c)(1) and 12955(a) and (f), to describe two main types of harassment, and to provide examples of what constitutes harassment. The Council proposes to make one nonsubstantial change: updating a cross-reference in subdivision (c)(7).

Article 13. Consideration of Income

The Council proposes to add this article in order to implement two recent statutes enacted by the legislature regarding source of income discrimination: Stats. 2019, c. 600 (SB 329) and Stats. 2019, c. 601 (SB 222) which modified sections 12927.1 and 12955(p)(1) of the Act. Section 1 of SB 329 provides: "It is the intent of the Legislature in enacting this act to provide a participant in a housing voucher program an opportunity to receive a thorough and fair vetting when they seek housing." Interpreting the prior FEHA provisions regarding source of income discrimination, *Sabi v. Sterling et al*, 183 Cal.App.4th 916 (2010) concluded that the refusal of a landlord to participate in the federal Section 8 program did not constitute a violation of FEHA's prohibition against source of income discrimination for the following reasons: (1) "Section 8 assistance payments were not paid to public housing agency as a representative of the tenant" (*Id.* at 933); (2) "Section 8 payments to the landlord were not included in tenant's income" (*Id.* at 933-934); and, (3) "'Income' for purposes of FEHA's prohibition against discrimination based on source of income, is not any benefit received by a person." (*Id.* at 934). SB 329, in effect, overruled *Sabi v. Sterling et al* on these points by providing specifically that "source of income" means "lawful, verifiable income paid ... to a housing owner or landlord on behalf of a tenant," and by specifying that income paid "on behalf of a tenant" includes "federal, state, or local public assistance, and federal, state, or local housing subsidies, including, but not limited to, federal housing assistance vouchers issued under Section 8 of the United States Housing Act of 1937 (42

U.S.C. Sec. 1437f).” Thus, these revisions to FEHA’s prohibition against source of income discrimination require a landlord to provide a participant in a housing voucher program an opportunity to receive a thorough and fair vetting when they seek housing based upon other lawful factors when analyzing a rental application, including income eligibility, credit history and rental history, provided such review does not otherwise violate the Act.

§ 12140. Definitions.

The purpose of this section is to give meaning to terms used throughout the regulations.

§ 12140, subd. (a).

The Council proposes to add the definition of “lawful, verifiable income.” The proposed subdivision provides a non-exhaustive list of examples of “lawful verifiable income.” This addition is necessary to demonstrate the many types of “lawful, verifiable income” that are used to pay rent, give meaning to a term used throughout the regulations, and enable the Council to state rules succinctly rather than provide a definition mid-sentence.

§ 12140, subd. (b).

The Council proposes to add the definition of “source of income.” The proposed subdivision closely tracks the newly enacted statutory language to include three possible categories of sources of income. Section 12140, subd. (b)(1) defines any lawful, verifiable income paid directly to a tenant as a source of income. Section 12140, subd. (b)(2) defines any lawful, verifiable income paid to a representative of a tenant as a source of income. In addition, section 12140, subd. (b)(2) defines “a representative of a tenant” as “an individual or entity acting as the agent of the tenant for purposes of the tenant’s obligation to pay rent.” And, following the language of SB 222, section 12140, subd. (b)(2) also provides: “A housing owner or landlord is not considered a representative of a tenant unless the source of income is a federal Department of Housing and Urban Development Veterans Affairs Supportive Housing voucher.” Section 12140, subd. (b)(3) defines any lawful, verifiable income paid to a housing owner or landlord on behalf of a tenant as a source of income, specifically including payments to owners or landlords by public housing authorities under Section 8 of the United States Housing Act of 1937 (42 U.S.C. section 1437f). In addition, this subdivision specifies that income paid on behalf of a tenant includes third-party payments made in any form consistent with section 1947.3 of the Civil Code. This addition is necessary to enumerate some of the many types of “source of income” covered by the rule, give meaning to terms used throughout the regulations, and enable the Council to state rules succinctly rather than provide a definition mid-sentence.

§ 12141. Source of Income in Rental Housing and Examples.

The purpose of this section is to implement the Act’s prohibition of source of income discrimination and to provide examples of its application.

§ 12141, subd. (a).

The Council proposes to add this subdivision to provide the general liability rule for source of income discrimination. The proposed rule provides: “It is unlawful for a landlord or a landlord’s agent to discriminate on the basis of the source of income by which a tenant pays part or all of their rent.” This subdivision further clarifies that when analyzing whether an applicant has enough income to pay rent for a unit, a housing provider must consider all legal and verifiable sources of income paid to the tenant, to a representative of the tenant, or directly to the landlord on behalf of the tenant, including housing subsidies. This addition is necessary to state the basic rule in order to fully implement the Act and provide context for the subsequent provisions that

contain examples, exemptions, and explanations of how to analyze the existence of source of income discrimination.

§ 12141, subd. (b).

Section 12955(p)(2) of the Act provides that, for purposes of section 12955, a written or oral inquiry based upon source of income concerning the level or source of income does not constitute discrimination on the basis of source of income. Accordingly, the Council proposes to add that for “the purposes of this section, it shall not constitute discrimination based on source of income for a landlord or landlord’s agent to make a written or oral inquiry concerning the level or source of income for the purpose of verifying the level or source of income stated in an application by a prospective tenant.” This addition is necessary to fully implement the Act by incorporating Government Code section 12955(p)(2) and clarifying that the scope of this exception extends to both written and oral inquiries.

§ 12141, subd. (c).

The Council proposes to explain the relationship between this article and affordable housing developments receiving governmental assistance or subsidies. The general rule is that affordable housing developments receiving governmental assistance or subsidies are subject to the prohibition against source of income discrimination, including discrimination against voucher holders under Section 8 of the United States Housing Act of 1937 (42 U.S.C. section 1437f). However, certain affordable housing developments receive governmental assistance or subsidies in which the terms of the governmental assistance prohibit or restrict the use of a voucher in a particular unit. This subdivision explains that where such restrictions are in place in a housing development, it is also unlawful to discriminate against voucher holders in any units *not* subject to such restrictions. This addition is necessary to clarify the scope of application of this article to affordable housing developments receiving governmental assistance or subsidies.

§ 12142. Aggregate Income.

The purpose of this section is to explain the meaning and application of section 12955(n) of the Act concerning landlords’ treatment of the incomes of several persons residing together or proposing to reside together in applying a financial or income standard in the rental of housing. Specifically, the Council proposes to add that it “is unlawful for a housing provider to fail to account for the aggregate income of persons residing together or proposing to reside together, whether or not they are married, in applying a financial or income standard in the rental of housing.” This addition is necessary to fully implement the statute by incorporating Government Code section 12955(n) and clarify for landlords how to treat the incomes of several persons residing together or proposing to reside together when applying their financial or income standard in the rental of housing.

§ 12143. Financial and Income Standards Where There is a Government Rent Subsidy.

The purpose of this section is to outline the intersection of source of income discrimination and government rent subsidies. Specifically, the Council proposes to require that landlords only consider the tenant’s portion of the rent in such calculations. This subdivision implements section 12955(o) of the Act which provides: “It shall be unlawful...in instances where there is a government subsidy, to use a financial or income standard in accessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant.” In other words, if the tenant income required for a specific unit is three times the rental amount, then the tenant’s income is to be compared to the tenant’s share of the rent, not the amount of the rent paid by Section 8 vouchers or similar sources. This addition is necessary to fully implement the statute

by incorporating Government Code section 12955(o) and clarify for landlords what FEHA requires regarding their treatment of government rent subsidies in applying a financial or income standard.

Article 14. ~~Practices Related to Residential Real Estate-Related Practices Transactions~~

The Council proposes to delete the word “transactions” from the title of this article, which is necessary to more accurately reflect its scope.

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

The purpose of this section is to provide greater clarity as to specified practices relating to residential real estate-related transactions that may give rise to a claim of discriminatory effect.

§ 12155, subd. (a)(8).

The Council proposes to add subdivision (a)(8) to this section, identifying an additional residential real estate-related practice that is prohibited absent a legally sufficient justification: “Using different policies, practices or procedure in evaluating or in determining creditworthiness of any person in connection with the provision of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class.” This is necessary to provide full compliance with Government Code sections 12955(i) and (j). See also *Ramirez v. GreenPoint Mortg. Funding, Inc.*, N.D.Cal.2008, 633 F.Supp.2d 922 (Allegations of discriminatory practices of requiring minority borrowers to pay disproportionately greater amounts in non-risk-related credit charges than white borrowers was sufficient to state a claim for disparate impact.).

This subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. See 24 C.F.R. section 100.130(b)(1), revised October 14, 2016, and 42 U.S.C. section 3605. Since this type of financial assistance practice in connection with residential real estate transactions is prohibited by the FHA, FEHA must be at least as protective. See also *Auburn Woods I* at 1591.

Article 18. Disability

Throughout the article, the Council proposes to add a reference to reasonable modifications in many of the same places that reasonable accommodations are mentioned in order to make it explicit that those provisions apply both to reasonable accommodations and modifications under Government Code section 12927(c)(1). See, e.g., proposed revisions to sections 12176, 12177, 12178, and 12179.

Addition of this language to multiple sections in this article also complies with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final Rule: “Implementation of the Fair Housing Amendments Act of 1988,” 54 Fed. Reg. 3232-01 at 3232, 3234, 3245, 3247-3249, and 3288-3289 (January 23, 1989), 1989 WL 272684; and Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Modifications Under the Fair Housing Act,” March 5, 2008, https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf (“HUD DOJ Joint

Statement on Reasonable Modifications”). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176. Reasonable Accommodations and Reasonable Modifications.

The purpose of this section is to implement the sections of FEHA prohibiting discrimination against people with disabilities and set out standards for requesting, considering, and providing reasonable accommodations and reasonable modifications. Specifically, the purpose of the proposed revisions is to include the concept of reasonable modifications in addition to reasonable accommodations.

While there are many similarities between requests for reasonable accommodations and requests for reasonable modifications, they have some differences. Reasonable accommodations are changes in rules, policies, practices, and services. Reasonable modifications are changes to the physical premises. For example, if a tenant with disabilities has difficulty with doing his laundry and chooses to ask a friend to do his or her laundry in the laundry room, it would be a reasonable accommodation to waiving any rule that prohibits non-tenants from gaining access to the laundry room. If the tenant request permission to add a ramp to the laundry room, that would be a request for a reasonable modification. Both are permissible requests, as described more fully in this section.

§ 12176, subd. (a).

The Council proposes to add a definition of “reasonable accommodation” to this section. The addition of this definition effectively moves text that is already in pre-existing subdivision (c) to this new standalone subdivision (a) and is therefore not a substantial change.

§ 12176, subd. (b).

The Council proposes to define “reasonable modification” as “an exception, change, alteration or addition to the physical premises of an existing housing accommodation, at the expense of the person with a disability or their designee, when such a modification may be necessary to afford the individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity.” This addition is necessary to differentiate two often-confused concepts—reasonable accommodation and reasonable modification—by highlighting how the two concepts are similar and different. While both afford an individual “with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity,” reasonable modifications are to physical premises and the costs are borne by the individual with a disability or their designee. This addition is also necessary to define a term that is used throughout the proposed regulations and enables the Council to state rules succinctly rather than provide a definition mid-sentence.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See 24 C.F.R. section 100.203, revised November 24, 2008 (description of reasonable modifications); 42 U.S.C. sections 3604(f)(3)(A) (description of reasonable modifications); and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers No. 2 (“What is a reasonable modification under the Fair Housing Act?”). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (ac).

The Council proposes to delete text describing what a reasonable accommodation is and insert that into new subdivision (a). This is a nonsubstantial change necessary to ease readability and place an important definition up front.

§ 12176, subd. (bd).

The Council proposes to add a subdivision making it unlawful to refuse an individual with a disability the opportunity to make reasonable modifications to the premises of a housing accommodation under specified conditions and describing the circumstances under which refusals would be permissible. This addition is necessary to fully implement the statute by incorporating Government Code section 12927(c)(1), which provides for such modifications, and to provide clarity to the provision.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 16 (“A person with a disability must have the housing provider’s approval before making the modification. However, if the person with a disability meets the requirements under the [FHA] for a reasonable modification and provides the relevant documents and assurances, the housing provider cannot deny the request”). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (eb).

The Council proposes to add requests for reasonable modifications to the subdivision requiring confidentiality of information relating to requests for reasonable accommodations. This is necessary to clarify that confidential information includes information received with respect to requests for both accommodations and modifications. Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 6 (information about disabilities must be kept confidential unless the provider needs the information to make or assess a decision on a request or disclosure of the information is required by law). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (ef)(3).

The Council proposes to add language clarifying when an individual can request a reasonable accommodation and language clarifying when an individual can request a reasonable modification. In general, requests for either accommodations or modifications can be made at any time prior to or during the occupancy of the housing, since disabilities can occur or change at any time. This addition is necessary to clarify the limited circumstances in which someone may be entitled to a reasonable accommodation but not a reasonable modification, such as after a person with a disability no longer is entitled to reside in the premises.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer

rights or remedies" than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See 24 C.F.R. section 100.203(c)(2), revised November 24, 2008 (applicant for rental housing can make a request for accommodation); 24 C.F.R. section 100.204(b)(1), effective March 12, 1989 (applicant for rental housing can make a request for accommodation); HUD Notice of Final FHAA Rule, *supra* at 3248 (request for modifications can be made at any time); Joint Statement of the Department of Housing and Urban Development and the Department of Justice: "Reasonable Accommodations Under the Fair Housing Act," May 17, 2004, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf; at Question/Answer 12 (requests for reasonable accommodations need not be made in particular manner or a particular time, including applicants for housing); and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 14 (prospective tenants and buyers can make requests for reasonable modification prior to occupancy) and 15 (requests for reasonable modifications need not be made in a particular manner or at a particular time, need not use the term "reasonable modification," and can be made orally or in writing.) Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (ef)(4).

The Council proposes to make it explicit that individuals may need either or both a reasonable accommodation and a reasonable modification. For example, a person with a disability who uses a power wheelchair may need to add grab bars to their bathroom (a modification) and may also need to have a designated parking space (an accommodation.) This is necessary to clarify that the concepts are distinct.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 9 (a person with a disability may need either a reasonable accommodation or a reasonable modification, or both.) Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (ef)(8)(B).

The Council proposes to add that a "request for a reasonable modification in unlawful detainer actions can be made at any time during the eviction process up to and including during the trial." This addition is necessary to clarify that the concepts are distinct; physical modifications to premises cannot be made once an individual with a disability is no longer entitled to reside in the premises, but requests for accommodations can still be made at that time. See, e.g., subdivision 12176(f)(8)(B)(ii).

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See HUD Notice of Final FHAA Rule, *supra* at 3248 (a tenant may request reasonable modifications at any time; modifications have the purpose of allowing the tenant to live in the dwelling); HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 14 (requests for

modification can be made at any time) and 15 (requests need not be made in any particular manner or particular time). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12176, subd. (ef)(8)(B)(iii).

The Council proposes to add an example of a request for reasonable modifications during the unlawful detainer process. This addition is necessary to provide additional clarity in an area that could otherwise be confusing to users of the regulations. This example demonstrates the application of the reasonable modification provisions proposed to be added to subdivisions 12176(f)(8)(a) and (b), specifically that there can be circumstances where requests for reasonable modifications must be considered if the request is made during a pending unlawful detainer action.

§ 12177. The Interactive Process.

The purpose of this section is to implement the legal requirement that persons considering a request for reasonable accommodation or reasonable modification must engage in the interactive process and to define and set the parameters for such a process. The Council proposes to modify the last sentence in subd. (c) by adding the phrase “the individual’s preference.” This is necessary to make the predicate clear, since the sentence was previously ambiguous. The Council does not propose any other substantial revisions to this section other than adding references to reasonable modification, the necessity for which is addressed above.

§ 12178. Establishing that a Requested Accommodation or Modification is Necessary.

The purpose of this section is to establish the procedures for evaluating a request for a reasonable accommodation or reasonable modification and to identify what additional information can be requested under various circumstances.

§ 12178, subs. (a), (c), (d), (g), and (h).

The Council proposes to add “or modification” after “accommodation” throughout these five subdivisions of section 12178. This is necessary to implement Government Code section 12927(c)(1), which defines “discrimination” as refusing to make both reasonable accommodations and reasonable modifications.

§ 12178, subd. (b).

The Council proposes to add additional facts to the example in this subdivision regarding a request for a reasonable modification as well as a reasonable accommodation. This addition is necessary to provide additional clarity about the differences between reasonable accommodations and reasonable modifications.

§ 12179. Denial of Reasonable Accommodation or Reasonable Modification.

The purpose of this section is to describe the permissible circumstances under which a request for a reasonable accommodation or reasonable modification may be denied in order to concisely describe and consolidate a complex body of law into one regulation that provides adequate guidance to the public on a subject that is often misunderstood.

§ 12179, subs. (a) and (b).

The Council proposes to divide pre-existing subdivision (a) into two subdivisions: (a), and (b). The new proposed subdivision (a) addresses grounds that apply to both requests for reasonable accommodations and modifications; the new proposed subdivision (b) only addresses grounds

for denials of requests for reasonable accommodations. The new proposed subdivision (c) only addresses grounds for denials of requests for reasonable modifications (see below). While some grounds for denial apply to both accommodations and modifications, others are specific to one or the other. This addition is necessary to make specific which defenses apply to accommodation requests and which apply to modification requests, and which defenses apply to both. The Council does not propose any substantial revisions to subdivisions (a) and (b) other than adding references to reasonable modification in subdivision (a), the necessity for which is addressed above, and relettering (a) and (b).

§ 12179, subd. (c).

The Council proposes to add a new subdivision (c) to address grounds for denial of requests for reasonable modifications that are only applicable to requests for modifications, not accommodations. Proposed subdivision (c) is necessary to address a number of issues that are unique to modification requests, as opposed to reasonable accommodation requests, as addressed further below. All of these grounds arise from the specific circumstances surrounding physical modifications to premises, in order to fully implement Government Code section 12927(c)(1).

The Council proposes to add subdivision (c)(1) stating that a request for a modification may be denied if the “requestor refuses to pay for, or to arrange payment for or construction of, the modification, unless the owner is otherwise obligated to pay for the modification pursuant to section 12181(e).” This is necessary to clarify the provision in Government Code section 12927(c)(1) stating that the requestor is generally responsible for payment of the costs of the modifications, except in limited circumstances such as those set out in proposed section 12181(h) (government funding requires payment by owner). It also clarifies that payments may be made by third parties on behalf of the person requesting the modification, such as by relatives or by government programs that fund or carry out home modifications (sometimes referred to as “grants for ramps” programs). See also 24 C.F.R. section 100.203, revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 3 (who is responsible for expense), 20 (owner must pay for more costly materials or designs not required for safety or code compliance), 21 (owner cannot impose additional conditions on reasonable modifications), and 31 (payment for modifications in properties with federal financial assistance).

The Council proposes to add subdivision (c)(2) stating that a request for a modification may be denied if the “requestor refuses to provide a reasonable description of the proposed modification or reasonable assurances that the work will be done in a competent (“workmanlike”) manner and that any required building permits will be obtained, so long as the assurances meet the requirements of section 12181.” This is necessary to clarify the reasonableness requirements in Government Code section 12927(c)(1). Therefore, it provides that a denial of the modification may be appropriate if the requestor fails to provide a reasonable description of the proposed modification or reasonable assurances that the work must be done in a competent manner, and that necessary building permits must be obtained, subject to the requirements of proposed section 12181. See also 24 C.F.R. section 100.203(a), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 21 (requiring oral or written description or proposed changes, assurances of workmanlike manner, and building permits).

Subdivisions (c)(3) and (4) derive from the explicit language of Government Code section 12927(c)(1) that limit the restoration requirements to modifications “in the case of rentals” to the

“interior of the premises,” and that any restoration can only be required “where it is reasonable to do so.”

The Council proposes to add subdivision (c)(3) stating that a request for a modification may be denied if “[i]n the case of a rental, the requestor refuses to commit to restoring interior modifications to condition that existed before the modification, reasonable wear and tear excepted, if such a restoration is reasonable. This provision does not apply to modifications to the exterior or common or public use portions of the housing accommodation or non-rental situations.” This is necessary to clarify the specific provisions in Government Code section 12927(c)(1) that restorations cannot be required of exterior modifications in rental units or of any modifications to owner interests in a common interest development, but that a denial of the modification in the interior of a rental unit may be appropriate if the requestor will not agree to reasonable restorations of interior modifications at the end of the rental agreement under specified circumstances, as set out more fully in proposed section 12181. See also 24 C.F.R. section 100.203(b), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 21 (owner cannot impose additional conditions on reasonable modifications), 24 (what restorations can be required), 25 (who must pay for required restorations), 26 (reasonable modifications not required for exterior modifications), and 28 (reasonableness of required modification restorations).

The Council proposes to add subdivision (c)(4) stating that a request for a modification may be denied if “[i]n the case of a rental, the requestor refuses to pay reasonable amounts into an interest-bearing escrow account, when such an account is permitted to be required and complies with the terms of section 12181, to ensure with reasonable certainty that funds will be available to pay for restoration of interior modifications, when such restoration is required. This provision does not apply to modifications to the exterior or common or public use portions of the housing accommodation or non-rental situations. Any such payments must be negotiated between the owner and the requestor and must allow payment of reasonable amounts over a reasonable time period, in a total amount not to exceed the cost of the restorations.” This is necessary to clarify the provision in Government Code section 12927(c)(1) that requests for restoration of the modifications of the interior of the premises at the end of the rental agreement must be reasonable, and to explain when modifications can be denied due to failure to agree on such restorations. See also 24 C.F.R. section 100.203(a) and (b), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 21 (owner cannot impose additional conditions on reasonable modifications), 24 (what restorations can be required), 25 (who must pay for required restorations), 26 (reasonable modifications not required for exterior modifications), and 28 (reasonableness of required modification restorations).

Addition of this subdivision and its parts is thus also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248; and HUD DOJ Joint Statement on Reasonable Modifications, *supra*. Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12179, subd. (b)(1)-(2).

The Council proposes, in subdivisions (d)(1) and (2), to clarify the availability of the defense of undue financial and administrative burden as applied to reasonable modifications, as well as reasonable accommodations, except that the defense is not available if the person making the request is paying for the modification. This addition is necessary to clarify the scope of the defense.

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

The purpose this section is to provide additional guidance on the consideration of reasonable accommodation and reasonable modification requests. The proposed changes to this section are all nonsubstantial, either adding a reference to reasonable modification or adding a reference to where reasonable modification is discussed.

§ 12181. Other Requirements or Limitations in the Provision of Reasonable Modifications; and Examples.

The purpose this section is to provide further guidance on issues that arise specifically in the context of reasonable modifications that are not addressed in the existing regulations on reasonable accommodations.

§ 12181, subd. (a).

The Council proposes to add that “[i]n the case of a rental, the owner or owner representative may, only where it is reasonable to do so, condition permission for a reasonable modification on the tenant or applicant agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. The owner cannot require restoration of exterior modifications or modifications to public use areas or common areas.” This addition is necessary to implement Government Code section 12927(c)(1) limiting the restoration requirements to modifications to the interior of rental units and to allow the owner or owner representative to condition permission as provided in the regulation.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. The proposed language is consistent with existing federal standards for granting requests for modification. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-4349; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 24, 25, and 26. Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (b).

The Council proposes to add language providing further guidance on the types of agreements relating to payment that can be requested in regard to restoration of interior modifications in rental premises. The subdivision is necessary to ensure that any such agreements meet the reasonableness requirements of Government Code section 12927(c)(1) and are fair to all parties involved, and that the agreements comply with the language and intent of the statute. This addition is necessary to clarify the language of Government Code section 12927(c)(1) that limits the restoration requirements to modifications to the interior of rental units.

Each component of subdivision (b) is necessary to implement the reasonableness requirements of Government Code section 12927(c)(1) in one of two contexts (security deposits and escrow accounts) and to ensure that FEHA provides rights and remedies at least as protective as the federal Fair Housing Act, as follows:

- to clarify that increases in security deposits are not permitted. See also 24 C.F.R. section 100.203(a), revised November 24, 2008, and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 27 (increases in security deposits cannot be required);

- to establish that escrow accounts cannot be required in all circumstances, but only where it is reasonable and considered on a case-by-case basis; that such requirements are to be negotiated between the requestor and the person considering the request; and to set forth parameters for what conditions on the escrow account are reasonable, including that the escrowed funds be held in interest-bearing accounts with interest payable to the requestor, and that the escrowed funds not exceed the cost of the restoration. See also 24 C.F.R. section 100.203(a), revised November 24, 2008, and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers No. 21 (permitted requirements for escrow accounts), 24 (limits on when restorations can be required), and 28 (specific conditions for escrow accounts, interest must accrue to tenant, and factors to be considered in determining whether an escrow account is needed and what should be included); and

- to clarify that agreements for escrowed funds may include provisions for payment into such funds over time and to further set out the factors that should be considered in negotiating any such requirement. See also 24 C.F.R. section 100.203(a), revised November 24, 2008, and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers No. 21 (permitted requirements for escrow accounts) and 24 - 28 (further explanations of escrow accounts).

Addition of this subdivision and its components is thus also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-3249; and HUD DOJ Joint Statement on Reasonable Modifications, *supra*. Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (c).

The Council proposes to add language providing further guidance on the types of agreements that can be requested relating to the quality of the modification work. This addition is necessary to ensure that any such agreements are reasonable and fair to all parties involved, and that the agreements comply with the intent of the statute. This addition is also necessary to clarify the reasonableness requirements in Government Code section 12927(c)(1).

Each component of subdivision (c) is necessary to implement the reasonableness requirements of Government Code section 12927(c)(1) as it relates to when an owner can condition permission for a modification in certain situations and to ensure that FEHA provides rights and remedies at least as protective as the federal Fair Housing Act, as follows:

- to clarify that an owner can condition permission for a modification on provision of a reasonable description of the proposed modification and to establish parameters for what is a reasonable description. See also 24 C.F.R. section 100.203(a), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 21 (requiring oral or written description or proposed changes, assurances of workmanlike manner, and building permits);

- to clarify that an owner can condition permission for a modification on reasonable assurances that the work will be done in a competent manner and that necessary building permits will be obtained and to establish parameters for what it means to do the work in a competent manner. See also 24 C.F.R. section 100.203(a), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 21 (requiring oral or written description or proposed changes, assurances of workmanlike manner, and building permits);

- to clarify that an owner cannot condition permission for a modification on use of a particular contractor. See also 24 C.F.R. section 100.203(a), revised November 24, 2008; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 23 (cannot insist on particular contractor if the above conditions met); and

- to clarify that an owner cannot condition permission for a particular type of modification unless it is an undue burden or a fundamental alteration. See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 16 (if the request meets the requirements for a reasonable modification, request cannot be denied), 17 (undue delays in responding to reasonable modification request constitute a failure to provide reasonable modification), 20 (provider cannot insist on alternative modification or design if tenant complies with requirements for a reasonable modification), 21 (housing providers generally cannot impose conditions on a proposed reasonable modification,) and 31 (providers in certain federally subsidized housing must pay for modifications unless it is an undue financial and administrative burden or a fundamental alteration).

Addition of this subdivision is thus also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-3249; and HUD DOJ Joint Statement on Reasonable Modifications, *supra*. Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (d).

The Council proposes to add language providing further guidance on requests for modifications in common interest developments, which includes addressing some issues that are unique to such developments. Generally, reasonable modifications are required in common interest developments under Government Code section 12927(c)(1), which contains no language limiting modifications to rental situations. See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer 8 (FHA applies to homeowners and condominium associations). This addition is necessary to clarify the relationship between Government Code

section 12927(c)(1) and specific provisions of the Davis-Stirling Common Interest Development Act, Civil Code sections 4000 *et. seq.* In particular, it is necessary to clarify that owners of units in the common interest development are entitled to request reasonable modifications of interiors and exteriors of their separate interest in the common interest development, as well as public and common use areas, at their own expense, and to clarify the circumstances under which they are entitled to do so. It is also necessary to clarify, pursuant to Civil Code section 4760(a), the circumstances under which such owners may make improvements and alterations within the boundaries of their separate interest without a request for a reasonable modification, including improvements and alterations related to their disability-related needs. Furthermore, the provisions of Civil Code section 4760 are explicitly subject to FEHA per Civil Code section 4760(a) (section subject to “applicable law”) and Government Code section 12955.6. Therefore, to the extent there are conflicts between Civil Code section 4760 and Government Code section 12927(c)(1) and these regulations, the provisions most protective of people with disabilities are applicable. See Government Code section 12955.6.

In subdivision (d)(1), the Council proposes to add that members of a common interest development may “[a]s of right, make any improvement or alteration within the boundaries of the member's separate interest that does not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development.” This is necessary to clarify that owners of units in common interest developments (1) can make reasonable modifications to the areas they own in the common interest development (their “separate interest” in the development) under California Civil Code section 4760(a)(1) (a member may “make any improvement or alteration within the boundaries of the member’s separate interest that does not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development”) and (2) that any review is limited to the process and criteria as set out in these regulations, which is the only permissible “good cause” under Civil Code section 4760(a)(2)(D) and FEHA. A member’s separate interest in the common interest development may include areas outside the immediate dwelling, such as specific garage or parking spaces and storage areas that are part of that interest.

In subdivision (d)(2), the Council proposes to add that members of a common interest development may “[m]odify the member's separate interest, at the member's expense, to facilitate access for people with disabilities or to alter conditions which could be hazardous to people with disabilities in accordance with the Davis-Stirling Common Interest Development Act. However, to the extent the Davis-Stirling Common Interest Development Act requires or permits any action that would be an unlawful practice under this section, it is rendered invalid by the Fair Employment and Housing Act.” This is necessary to clarify that owners of units in common interest developments can make reasonable modifications to the areas they own (their “separate interest”) in the development and to routes from the public way to the door of the separate interest to facilitate access for persons with disabilities under California Civil Code section 4760(a)(2).

This is also necessary to clarify that certain restrictions in Civil Code section 4760(a)(2) are not applicable because they are in conflict with FEHA. See Government Code section 12955.6. For example, certain restrictions in Civil Code section 4760(a)(2) that conflict with FEHA include:

- reasonable modifications are available for *any* individual with a disability covered by FEHA, including individuals with mental health or intellectual disabilities (See definitions of individual with disabilities covered by FEHA in Government Code sections

12920, 12926 and 12926.1), not just the specific disabilities listed in Civil Code section 4760(a)(2);

- accessibility modifications are subject only to the procedures and standards in Government Code section 12927(c), not to any conflicting provisions of the governing documents that might otherwise be required under Civil Code section 4760, including provisions of governing documents, such as aesthetic requirements, that do not rise to the level of undue burden or fundamental alteration;
- reasonable modifications are not restricted to separate interests that are on the ground floor or already accessible by an existing ramp or elevator, despite the limits in Civil Code section 4760(a)(2);
- modifications need not be removed once the owner terminates their interest, despite contrary provisions in Civil Code section 4760(a)(2)(C) for exterior modifications, because Government Code section 12927(c) explicitly only requires restoration in rentals. See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 1 (reasonable restorations of modifications only required for interior of rental premises) and 26 (restoration of exteriors or to common areas are not required to be restored);
- FEHA overrides any review process or standards by the homeowner's association that go beyond what is permitted under FEHA and these proposed regulations; and
- reasonable modifications to the exterior of a separate interest are permitted under FEHA regardless of any conflicting provisions in the governing documents, despite the language of Civil Code section 4760(a)(2)(C) and (D).

In subdivision (d)(3), the Council proposes to add that members of a common interest development may “[m]odify public and common use areas at the member’s expense, subject to a request for reasonable modifications under this Article. To the extent the Davis-Stirling Common Interest Development Act requires or permits any action in regard to such modifications that would be an unlawful practice under this section, it is rendered invalid by the Fair Employment and Housing Act.” This is necessary to clarify that owners of common interest developments also can make reasonable modifications to public and common use areas outside of their separate interest, as required by Government Code section 12927(c)(1). Further, it is necessary to clarify that such changes to the public and common use areas are permitted under FEHA regardless of any conflicting provisions in the governing documents, despite the language of Civil Code section 4760 that might restrict such changes, because FEHA provides greater protections. See Government Code section 12955.6. It is additionally necessary to ensure that FEHA provides at least the same rights and remedies as the federal Fair Housing Act. See HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 8 (reasonable modifications apply to condominiums) and 10 (reasonable modifications are not limited to the interior of a dwelling, but they can be made to public and common use areas and exteriors of dwellings).

Addition of this entire subdivision and its subparts is thus also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. sections 100.1 et seq.),. . . . *Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.*” (Emphasis added.) See, e.g., 24 C.F.R. section

100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-3249; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 1 (reasonable restorations of modifications only required for interior of rental premises), 8 (reasonable modifications apply to condominiums), 10 (reasonable modifications are not limited to the interior of a dwelling, but can be made to public and common use areas and exteriors of dwellings), 22, (homeowner's association cannot condition reasonable modifications on special insurance), 24 (not all interior modifications need to be restored), and 26 (exterior and common area modifications need not be restored). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (e).

The Council proposes to add language clarifying that restoration of modifications can only be required for interior modifications in *rental premises*, not in *common interest developments*. Government Code section 12927(c)(1) does not permit restoration requirements for the exterior of dwellings in either rental or common interest developments. And, both section 12927(c)(1) and Civil Code section 4760 allow modifications of the interior of a member's separate interest with no restoration requirement. Therefore, no restoration requirements apply in common interest developments. Modifications need not be removed once the owner terminates their interest, despite contrary provisions in Civil Code section 4760(a)(2)(C) for exterior modifications, because Gov. Code Section 12927(c) explicitly only requires restoration in rentals. See Government Code section 12955.6 (FEHA overrides less protective laws). See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers Nos. 1 and 26.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. sections 100.1 et seq.) . . . Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws." (Emphasis added.) See, e.g., HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers 1 (reasonable restorations of modifications only required for interior of rental premises) and 26 (restoration of exteriors or to common areas are not required to be restored). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (f).

The Council proposes to add language that "Owners may not impose other conditions on modifications, such as liability waivers or insurance requirements." This is necessary to ensure that any agreements related to reasonable modifications are reasonable and fair to all parties involved, that the only limitations are those provided for in the Act, and that the agreements comply with the intent of the Act to facilitate reasonable modification.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: "Nothing in this part shall be construed to afford . . . fewer rights or remedies" than federal fair housing law. The proposed language is consistent with existing federal standards on reasonable modification. See 24 C.F.R. section 100.203, revised

November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-3249; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 22 (homeowner’s association cannot condition approval of modification on requestor obtaining special liability insurance). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (g).

The Council proposes to add language clarifying the relationship of the reasonable modification requirements to other laws relating to accessibility of housing. This addition is necessary to avoid confusing requests for reasonable modifications with other legal obligations related to compliance with architectural and accessibility standards, such as building codes, that apply to the construction and renovation of housing after certain dates.

First, requests for modification must be considered even if the premises already comply with other accessibility standards, such as California Building Code Chapter 11A and 11B and accessibility standards under the Americans with Disabilities Act, 42 U.S.C. sections 12101 *et seq.* and Section 504 of the Rehabilitation Act 29 U.S.C. sections 704 *et seq.* and their implementing regulations.

Second, failures to comply with applicable accessibility requirements under other laws and regulations may make the provider, not the requestor, liable for the cost of modifications required to bring the premises into compliance.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 and its implementing regulations Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.” The proposed language is consistent with existing federal standards for granting requests for modification. See HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer No. 30, Example 3 (if building lacks grab bars required by construction requirements, the owner is responsible for paying for requested grab bars since they are required under the design and construction requirements of the Fair Housing Act). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (h).

The Council proposes to add language clarifying that some federal laws or other contractual obligations may obligate owners to pay for reasonable modifications, and that in those circumstances individuals with disabilities may request reasonable modifications without an obligation to pay for the modifications. This addition is necessary to clarify which legal obligations apply under those circumstances. For example, see the Title II of the Americans with Disabilities Act, 42 U.S.C. sections 12101 *et seq.*, and Section 504 of the Rehabilitation Act 29 U.S.C. sections 704 *et seq.* and their implementing regulations. Specifically, the subdivision is necessary to make explicit that other laws may create additional obligations on owners relating to reasonable modifications. Provision of federal or other governmental financial assistance to the property may require the provider to pay for the modifications, not the requestor, even if the

building complies with applicable accessibility standards.

Addition of this subdivision is also necessary to comply with Government Code section 12955.6, which provides, in relevant part: “Nothing in this part shall be construed to afford . . . fewer rights or remedies” than federal fair housing law. The proposed language is consistent with existing federal standards on reasonable modification. See 24 C.F.R. section 100.203, revised November 24, 2008; 42 U.S.C. section 3604(f)(3)(A); HUD Notice of Final FHAA Rule, *supra* at 3248-3249; and HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answer No. 31 (structural modifications in housing receiving federal financial assistance must be paid for by provider). Since the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities.

§ 12181, subd. (i).

The Council proposes to add examples of common situations involving requests for reasonable modifications 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 modification request and provide guidance as to how the request should be considered in light of the proposed regulations in Sections 12176 through 12181. Because every reasonable modification 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. However, because the situations in the examples are fairly common, they provide general and necessary guidance as to how such requests should be evaluated.

The example in subdivision (i)(1) is necessary to demonstrate the basic principles of requests for reasonable modifications and under what circumstances it is reasonable to condition the modification on a requirement for restoration of interior modifications, which are the only modifications for which restoration may be required under FEHA. This is necessary because in the Council’s experience, the provisions regarding obtaining a reasonable modification and reasonable restoration of reasonable modifications are common issues that can create confusion. This subdivision is necessary to provide an example of one such modification request that demonstrates the required, overall analysis of what constitutes a reasonable modification and reasonable restoration requirement in this context. This example is based on Government Code section 12927(c)(1): Discrimination “includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear),” and expands on that provision and the examples in 24 C.F.R. sections 100.203(b) and (c), revised November 24, 2008, for the similar federal requirement. See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers 20 (requirements for necessary building permits and work to be performed in workmanlike manner), 21 (types of assurances required; imposing conditions not contemplated by FHA may be the same as an illegal refusal to permit the modification), 24 (not all modifications require restoration; Examples 1 and 2), 27 (no increase in security deposit allowed), 28 (circumstances where limited escrow accounts may be requested to assure payment for restoration, Examples 1, 2, and 3).

The example in subdivision (i)(2) is necessary to demonstrate the principle that reasonable modifications can be made to any part of the premises available to the person with a disability, including common areas, but that restorations are not required of modifications other than those in the interior of the dwelling unit. This is necessary because in the Council's experience, the provisions regarding restoration of reasonable modifications are a common issue that can create confusion. This example is based on Government Code section 12927(c)(1): Discrimination "includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear)," and expands on that provision and the text and examples in 24 C.F.R. section 100.203(b) and(c), revised November 24, 2008, for the similar federal requirement. See also HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Questions/Answers 10 (modifications not restricted to interior of dwelling, but may also be made to public and common use areas), 20 (requirements for necessary building permits and work to be performed in workmanlike manner), 21 (types of assurances required; imposing conditions not contemplated by FHA may be the same as an illegal refusal to permit the modification), 24 (not all modifications require restoration; Examples 1 and 2), 27 (no increase in security deposit allowed), and 28 (circumstances where limited escrow accounts may be requested to assure payment for restoration, Examples 1, 2, and 3).

The example in subdivision (i)(3) is necessary to demonstrate that the requirement to provide reasonable modifications also apply to common interest developments and how FEHA interacts with the Davis-Stirling Common Interest Development Act under proposed section 12181(d). This is necessary because in the Council's experience, the provisions regarding reasonable modifications in common interest developments raise frequent issues that can create confusion, due to conflicting provisions in the two statutes. See the provisions above in regard to section 12181(d). This example demonstrates four principles. First, reasonable modifications are required in common interest developments under Government Code section 12927(c)(1), which is explicitly not limited to rental situations. See also, e.g. HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer 8 (FHA applies to homeowners and condominium associations). Second, reasonable modifications can be paid for with third party funds under proposed section 12181, see, e.g. HUD DOJ Joint Statement on Reasonable Modifications, *supra* at Question/Answer 21 (imposing conditions not contemplated by FHA may be the same as an illegal refusal to permit the modification). Third, owners of units in common interest developments can make reasonable modifications to the areas they own (their "separate interest") under California Civil Code section 4760(a)(1) (a member may "make any improvement or alteration within the boundaries of the member's separate interest that does not impair the structural integrity or mechanical systems or less the support of any portions of the common interest development"), and any review is limited to the process and criteria as set out in these proposed regulations, which is the only permissible "good cause" under Civil Code section 4760(a)(2)(D) and FEHA. Fourth, owners of units in common interest developments can make reasonable modifications to the internal and exterior areas they own (their "separate interest"), common and public use areas, and routes from the public way to the door of the separate interest to facilitate access for persons with disabilities under Civil Code section 4760(a)(2).

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: “Reasonable Modifications Under the Fair Housing Act,” March 5, 2008, https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.
2. HUD Notice of Final Rule: “Implementation of the Fair Housing Amendments Act of 1988,” 54 Fed. Reg. 3232-01 at 3232, 3234, 3245, 3247-3249, and 3288-3289 (January 23, 1989), 1989 WL 272684.
3. Joint Statement of the Department of Housing and Urban Development and the Department of Justice: “Reasonable Accommodations Under the Fair Housing Act,” May 17, 2004, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

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

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

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

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

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

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

Because the proposed regulations provide detail about compliance with existing obligations but do not create any new liabilities or obligations, the Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs or housing within the state; the creation of new businesses or housing or the elimination of existing businesses or housing within the state; the expansion of businesses or housing currently doing business within the state; or worker safety and the environment. To the contrary, adoption of the proposed amendments is

anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.