FAIR EMPLOYMENT AND HOUSING COUNCIL

HOUSING REGULATIONS REGARDING DEFINITIONS; INTENTIONAL DISCRIMINATION; DISCRIMINATORY NOTICES, STATEMENTS, AND ADVERTISEMENTS; CONSIDERATINO OF INCOME; RESIDENTIAL REAL ESTATE-RELATED PRACTICES; AND DISABILITY

FINAL STATEMENT OF REASONS

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].
The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].
The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing FEHA.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].
The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs or housing, the creation of new businesses or housing, the elimination of existing businesses or housing, or the expansion of businesses or housing currently doing business within the State. The Council anticipates that adoption of these regulations will benefit California businesses, workers, housing providers, owners, tenants, the State's judiciary, and others by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, tenants, and others to understand their rights and obligations and reducing litigation costs.

NONDUPLICATION STATEMENT [1 CCR Section 12].
For the reasons stated below, the proposed regulations partially duplicate or overlap state or federal statutes or regulations, which are cited as "authority" or "reference" for the proposed regulations, and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code Section 11349.1(a)(3).

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

Comment: In July 2017, I see that Fair Housing changed the definition of gender identity to unlimited genders on a spectrum based on a person's (child's) feelings or perceptions, that a

person can identify as BOTH genders, NEITHER gender, anything in between, male, female or transgender.

Council Response: This comment is not responsive to the text noticed for the 45-day comment period. No further response is required as per Government Code Section 11346.9(a)(3). To the extent that this comment is a reference to Subsection 12005(aa), the proposed regulations do not propose any changes to language regarding gender identity, and the existing reference is based on the language of the statute.

Article 1 General Matters

§ 12005 Definitions

Subsection 12005(b):

Comment: The Council may also consider adding to the definition of "adverse action" in Section 12005(b) to clarify that [regarding Section 12141] "refusal to complete forms, sign documents, allow inspections, comply with program regulations, or take other necessary steps to facilitate access to the housing accommodation" is also an adverse action.

Council Response: The Council agrees with this comment and accordingly proposes to revise Subsection 12005(b) to add a new Subsection 12005(b)(1)(B): "Refusing to complete forms, sign documents, allow inspections, comply with any public assistance, rental assistance, or housing subsidy program regulations, including refusing to make repairs to a housing accommodation to meet a governmental program's habitability standards, or take other necessary steps to facilitate access to the housing accommodation."

Additional Revisions: The Council proposes to add additional examples to the definition of "adverse action" in order to clarify the scope of the definition. Specifically, the Council proposes to add the following additional language to Subsection 12005(b)(1)(A): "falsely representing to an applicant that a property is unavailable" and "applying inferior terms, conditions, or privileges, refusing to make necessary repairs, setting additional financial conditions not imposed on all tenants."

Subsection 12005(o):

Additional Revisions: The Council proposes to revise the definition of "housing accommodation" to provide that "Housing accommodation' and 'dwelling' are synonymous" in order to clarify the relationship between the terms "housing accommodation" and "dwelling."

Subsection 12005(o)(3):

Comment: Many CIDs reasonably restrict short term rentals per their governing documents.

Council Response: This comment is not asking for a change in the proposed regulation but only providing information to the Council about the practice of common interest developments. This

section only provides a definition. Nothing in the proposed language determines when short-term rentals may be permitted or prohibited. Therefore, no further response is required.

Additional Revisions: The Council proposes to move the phrase "as defined in section 22590 of the Business and Professions Code" in Subsection 12005(o)(3) from the end of the sentence to immediately after the phrase "housing platform" so that the statutory citation is modifying the term defined in the statute.

Subsection 12005(t):

Comment: First, the definition lists the Army, Marine Corps, Navy, Air Force, Coast Guard, United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines as being part of the armed forces. This definition is both over and under inclusive.

The definition provided in section 12005(t) is under inclusive because it fails to include the Space Force, the newest branch of the armed forces. 10 U.S.C. § 101(a)(4) defines the "armed forces" as "the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard."

The definition is over inclusive because it includes the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines as being part of the armed forces. The definition of "armed forces," cited above, does not list these groups as part of the armed forces. 10 U.S.C. § 101(a)(5) does list the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps. as members of the "uniformed services" – an umbrella term that also includes the armed forces. Similarly, 38 U.S.C. § 106(a)(1) recognized the service of members of the Women's Army Auxiliary Corps, who served for at least ninety days or more before October 1, 1943 and who were honorably discharged for disability incurred or aggravated in the line of duty which rendered them physically unfit to perform further service, as having "active duty" status, but does not specify that such service members are members of the "armed forces." CAA and C.A.R. are also aware that in 1987 the U.S. District Court for the District of Columbia, in *Schumacher v. Aldridge* (D.D.C. 1987) 665 F.Supp. 41, found that the Secretary of the Air Force had abused its discretion under 38 U.S.C. § 106 in denying active military service recognition to American merchant seamen who participated in World War II; however, CAA and C.A.R. are not aware of such service members being deemed to be members of the "armed forces." To be clear, CAA and C.A.R. do not object to inclusion of the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines in the definition of "military or veteran status." Rather, it's simply inaccurate to characterize such groups as being members of the armed forces.

Second, the reference to "designated members of the Merchant Marines" is confusing as it does not make clear which members of the Merchant Marines are considered to have military or veteran status. Information about which members of the Merchant Marines are considered to

have military or veteran status is not clarified in the initial statement of reasons. Assuming the Council intended to refer to those American merchant seamen who participated in World War II who were the subject of *Schumacher v. Aldridge*, the proposed amendment provided below would clarify the ambiguity. If the Council intended to refer to different members of the Merchant Marines the commentator requests that the Council provide clarification as to which members of the Merchant Marines the Council intended to include in the definition.

The commentator requests the following amendment:

> "'Military or veteran status' includes a member or former member of the United States Armed Forces (including the Army, Marine Corps, Navy, Air Force, Space Force, and Coast Guard), United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., ~~Women Airforce Service Pilots, and designated members of the Merchant Marines~~), the United States Armed Forces Reserve, the United States National Guard (including the Army National Guard and the Air National Guard), and the California National Guard (including the California Air National Guard, California Army National Guard, and California State Guard), regardless of duty status or discharge status, and any person determined to have active duty status pursuant to 38 U.S.C. § 106, including but not limited to the Women's Army Auxiliary Corps."

Council Response: The Council partially agrees and proposes to amend the definition . The Council concurs that the definition needed clarification. The Council agrees with the commentator that "Space Force" should be included within the definition of Armed Forces, and the proposed text adds "Space Force." While the Council believes the legislature intended "military and veteran status" to be interpreted broadly, the Council has removed references to the United States Uniformed Services, including the United States Public Health Service Commissioned Corps. and the National Oceanic and Atmospheric Administration Commissioned Officer Corps., the Merchant Marines, and the Women Airforce Service Pilots.
The Council concurs that the originally-proposed definition did not correctly characterize the various types of military organizations, and the definition has been reorganized to create subsections in order more correctly characterize the various organizations. As requested, components of the Armed Forces, Uniformed Services, and Armed Forces Reserve are now separately listed, and additional clarifications have been made.

Additional Revisions: The Council also proposes to adopt a slightly modified version of Subsection 12005(t) proposed by the previous commenters. The Council proposes to modify paragraphs (6) and (7) of the definition as follows:

> (6) any person determined to be on active duty or formerly on active duty status pursuant to 38 U.S.C. section 106(a)(1), including Women's Army Auxiliary Corps and Women's Army Corps; and
>
> (7) any person determined by a court to be a former or current member of active military service.

Subsection 12005(v)(2):

Comment: [Regarding Subsection 12005(v)(2)'s reference to short term rentals] Does this apply to owners of the dwelling and to persons who are renting the dwelling…Is this intended to create a right to sublet, do a short term rental, or otherwise run a boarding house?

Council Response: This comment is asking a question, not making a suggestion for a textual change. The Council responds that this provision is merely a definition of "owner" for purposes of certain kinds of transactions. It could apply to the title owners of a dwelling or to leaseholders who engage in these transactions. As a definition, it does not create any rights.

Additional Revisions: The Council proposes to move the phrase "as defined in section 22590 of the Business and Professions Code" in Subsection 12005(v)(2) from the end of the sentence to immediately after the phrase "housing platform" so that the statutory citation is modifying the term defined in the statute.

Article 3. Intentional Discrimination

§ 12040. Definitions

No Comments.

Additional Revisions: The Council proposes to add Government Code Sections 12926.1 and 12948 to the list of references for Section 12040. These FEHA sections are statutory provisions that the regulations are implementing, interpreting, or making specific through the proposed regulations. See Government Code Section 11349(e).

§ 12041 Intentional Discrimination Practices

Additional Revisions: The Council proposes to add Government Code Sections 12926.1 and 12948 to the list of references for Section 12041. These FEHA sections are statutory provisions that the regulations are implementing, interpreting, or making specific through the proposed regulations. See Government Code Section 11349(e).

Subsection 12041(a):

Comment: My comment is related to Article 3. Intentional Discrimination Sec.12041(a).
No enforcement to violations can encourage more misbehaviors that may end up personal injury to tenant(s).

Council Response: This comment is not asking for a change in the proposed regulation but rather making a statement. Therefore, no further response is required.

Subsection 12041(b):

Comment: This is very vague use of the term "consideration." for example, an association is required to consider and verify disability and the nexus in order to process a request for an accommodation. If the association is considering the disability in this context, it is committing intentional discrimination? Sounds like it is. Wouldn't the better language be "illegal or discriminatory motivation based on" a protected class be closer to the Council's intent here?

Council Response: The Council disagrees with this comment. The comment misunderstands the use of the phrase "consideration" in the context of this regulation. The proposed regulation is clear that "the consideration of a protected basis" in the context of this proposed regulation is for the purpose of determining if the person's "consideration of [the] protected basis is a motivating factor in committing a discriminatory housing practice." An owner has a duty to *consider* a request for reasonable accommodation under Government Code Section 12927(c)(1) and its implementing regulations, which require the consideration an individual's disability. Therefore, the consideration of an individual's disability for the purpose of fulfilling a duty to consider a request for a reasonable accommodation would not be the type of consideration that would be part of committing a discriminatory housing practice. For this reason, the Council does not propose any changes in response to this comment.

Comment: Commenters do not object to the draft language of this section, but are concerned with the portion of the initial statement of reasons related to subdivision (b), which states:

> "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."

The Council's assertion that the FHA is less protective than FEHA in this context notwithstanding – the difference in statutory text between the FHA and FEHA – is incorrect. The statutory differences do not support a finding that a "mixed motive" defense is inapplicable under FEHA, as explained in more detail below.

As noted in the initial statement of reasons, FEHA makes express the prohibition on intentional discrimination and provides that "[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." By contrast, the FHA provides that it is illegal to discriminate "because of" a protected basis. This difference between the text of the two statutes on this point, though, is a distinction without a difference, as the courts have applied the same "motivating factor" standard stated in FEHA to FHA disparate treatment claims. Specifically, in *Avenue 6E Investments, LLC v. City of Yuma, Ariz*. (9th Cir. 2016) 818 F.3d 493, 504, the 9th Circuit found:

> "*Arlington Heights* governs our inquiry whether it is plausible that, in violation of the FHA and the Equal Protection Clause, an 'invidious discriminatory purpose was a motivating factor' behind the City's decision to deny the zoning application. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. Under *Arlington Heights*, a plaintiff must 'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely that not motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way.' *Pac. Shores Props*., 730 F.3d at 1158(*quoting McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir.2004)). 'A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'' *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir.2015) (quoting *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555)."

This conclusion is consistent with 9th Circuit's finding in *McDonald v. Coldwell Banker* (9th Cir. 2008) 543 F.3d 498 – a case relied upon by the Council in its initial statement of reasons – that "[w]ith respect to the FHA claim, the standard of proof and analysis applied in a disparate treatment case are the same as those applied in a FEHA case."

Further supporting the conclusion that this provision of FEHA is consistent with the FHA is the California Supreme Court's filing *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 that "the Legislature added the 'motivating factor' language to the FEHA's housing provisions as part of a 1993 amendment *whose sole purpose was to bring California housing law into conformity with federal law*." [emphasis added].

In light of the above, the Council's outright rejection of the so-called "mixed motive" defense is contradicted by the case law. Because of this, the Council's adoption of such reasoning would run afoul of the Administrative Procedures Act's consistency requirements. *See* Gov. Code § 11349(d) ("'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, *court decisions*, or other provisions of law." [emphasis added].) Commenters request that the Council clarify this issue in the final statement of reasons.

Council Response: The Council disagrees with the comment. The proposed regulations are, for the first time, interpreting and implementing FEHA's specific statutory language that "[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." Gov. Code section 12955.8(a) (emphasis added). The proposed regulation is consistent with the case law together with Government Code Section 12955.6 (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"). The comment fails to give appropriate attention to this specific statutory language and misinterprets the case law. On its face, this language excludes a "mixed motive defense." While some cases have conflated the standards in FHA and FEHA, they do this only by ignoring or not giving any weight to FEHA's specific language. As the ISOR explains, the court in *Harris*, an employment case, specifically distinguished intentional discrimination in the housing context from the employment context (56 Cal.4th 203, 217-218). The comment's suggestion that the difference between the FHA standard and the FEHA standard is a "distinction without a difference" conflates the two standards and ignores FEHA's specific language. This assertion also contradicts commenters' argument because one standard excludes a "mixed motive defense" and the other allows it. Commenters' citation to *Ave. 6E Invs. v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016) supports the standard in the proposed regulation, not the less protective FHA standard. The Council cited to *McDonald v. Coldwell Banker* merely to provide a technical definition of the term "motivating factor."

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

Comment: As a preliminary matter, all references to the "burden of proof" in the title and body of this section should refer instead to either the burden of producing evidence or burden of production. The burden of proof, synonymous with the burden of persuasion, refers to the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. The burden of proof does not shift, it remains with the party who originally bears it. The burden discussed in this section, by contrast, is the burden of producing evidence or burden of production. *See Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658 for a general discussion of the distinction between burdens of proof and burdens of producing evidence.

Council Response: The Council disagrees with this comment. While commenter is correct about the distinction between burdens of proof and burdens of producing evidence, this section includes both types of burdens (e.g., Subsections 12042(a) and (d)(1) describe the complainant's burden and Subsection 12042(d)(2) describes a respondent's burden). And when referring to burdens of producing evidence, the proposed regulation makes the distinction clear (e.g., Subsection 12042(d)(2) states that the "burden shifts to the respondent to produce evidence that…"). Finally, Subsection 12042(f) of the proposed regulations states: "The complainant retains the ultimate burden of persuasion on the discriminatory motivation throughout the case." The commenter has not identified any subsections in which there is confusion about the nature of the burdens a party must carry.

Additional Revisions: The Council proposes to add Government Code Sections 12926.1 and 12948 to the list of references for Section 12042. These FEHA sections are statutory provisions that the regulations are implementing, interpreting, or making specific through the proposed regulations. See Government Code Section 11349(e).

Subsection 12042(a):

Comment: [This Subsection should be revised in the following way:] A complainant must prove ~~show~~ that the housing practice they are challenging is motivated by discriminatory intent. This

means that, in a legal proceeding, the complainant has the burden of proving that a challenged practice is motivated by discriminatory intent.

Council Response: The Council disagrees with this comment. The word "show" is used throughout the proposed regulation, and no revision is necessary for clarity. Under FEHA, a practice is defined in Subsection 12005(v) of the regulations and is not limited to a "housing practice."

Subsection 12042(c) [ultimately renumbered 12042(c) – (d)]:

Comment: We commend the Fair Employment and Housing Council's draft Section 12042(c) regarding direct evidence. We believe it accurately defines direct evidence but suggest that Section 12042(c) be revised to include a subsection describing facially discriminatory policies as a method of proving an intentional discrimination claim through direct evidence.

"A facially discriminatory policy is one which on its face applies less favorably to a protected group." *Cmty. House, Inc. v. City of Boise*, 468 F.3d 1118, 1123 (9th Cir. 2006); *see Bangerter v. Orem City Corp*., 46 F.3d 1491, 1500 (10th Cir. 1995). Facially discriminatory policies are also called express classifications. Facially discriminatory policies or express classifications are one of methods of proof that focus on direct evidence. *See* United States Department of Justice, Civil Rights Division, *Title VI Legal Manual* (September 2016) at 4 (describing the two main methods of proving intentional discrimination through direct evidence as express classifications and comments or conduct by decisionmakers) (Attached hereto as Attachment 1).

Council Response: The Council agrees with this comment and proposes to add a definition of "Facially discriminatory policy" (sometimes referred to as "express classification") in Subsection 12040(c) in order to provide a more complete rendering of the types of intentional discrimination that FEHA encompasses. In addition, the Council proposes to revise originally-proposed Subsection 12042(d) (ultimately renumbered Section 12042(e) – (f)) to provide the affirmative defense available if a respondent is found to have a facially discriminatory policy.

Comment: [Regarding Subsection 12042(c)'s reference to "takes adverse action based on a protected basis:] Again, this is very vague and likely to be misconstrued in the practical application of this section. If an association denies a request for a rattlesnake as a reasonable accommodation to a disability, it is taking adverse action against the person with the disability who wants the rattlesnake. This reasonable determination by the association should not be considered intentional discrimination since other factors are present, including the danger to the health and safety of other residents.

Council Response: The Council disagrees with the comment. Government Code Section 12927(c)(1) and Article 18 of the Council's housing regulations govern the consideration of a request for reasonable accommodation. If a person who considers such a request and rejects it in compliance with Section 12197 of the regulations (which provide the legal bases for denial of a request for reasonable accommodation), that action will not constitute "taking adverse action based on a protected basis" under this section. Therefore, the Council has not revised proposed Subsection 12042(c) in response to this comment.

Comment: We commend the Fair Employment and Housing Council's draft Section 12042(c) regarding direct evidence. We believe it accurately defines direct evidence but suggest that Section 12042(c) be revised to include a subsection describing facially discriminatory policies as a method of proving an intentional discrimination claim through direct evidence.

"A facially discriminatory policy is one which on its face applies less favorably to a protected group." *Cmty. House, Inc. v. City of Boise*, 468 F.3d 1118, 1123 (9th Cir. 2006); *see Bangerter v. Orem City Corp*., 46 F.3d 1491, 1500 (10th Cir. 1995). Facially discriminatory policies are also called express classifications. Facially discriminatory policies or express classifications are one of methods of proof that focus on direct evidence. *See* United States Department of Justice, Civil Rights Division, *Title VI Legal Manual* (September 2016) at 4 (describing the two main methods of proving intentional discrimination through direct evidence as express classifications and comments or conduct by decisionmakers).

Courts have held that a wide variety of policies violate fair housing laws using the facially discriminatory method of proof. *See Cmty. House, Inc.*, 468 F.3d at 1123 (9th Cir. 2006) (holding that policy that allowed for men only in a homeless shelter was facially discriminatory); *Bangerter*, 46 F.3d at 1500 (finding that a policy requiring group homes for people with mental disabilities must have 24 hour supervision was facially discriminatory); *Iniestra v. Cliff Warren Invs., Inc*., 886 F. Supp. 2d 1161, 1169 (C.D. Cal. 2012) (holding that apartments rules that required adult supervision and imposed a curfew on children were facially discriminatory and violated both the Fair Housing Act and the Fair Employment and Housing Act). It is important for the regulations to recognize this method of proof because facially discriminatory policies frequently arise in fair housing cases, particularly in the land use and zoning cases context, rules and regulations governing children and qualifications for housing. *See id.*

A plaintiff makes out a prima facie case of intentional discrimination under the facially discriminatory method of proof "merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." *Cmty. House, Inc*., 468 F.3d at 1125 (citing *Bangerter*, 46 F.3d at 1501)). A defendant may rebut a prima facie showing by proving "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes." *Cmty. House, Inc*., 468 F.3d at 1125 (citing *Bangerter*, 46 F.3d at 1503-04). The indirect (McDonnell Douglas) test is "inapplicable to Fair Housing Act challenges to a facially discriminatory policy." *Cmty. House, Inc*., 468 F.3d at 1124 (citing *Bangerter*, 46 F.3d at 1501 n.16). Based on the above, we suggest that Section 12042(c) be revised to reflect this method of proving facial discrimination.

Council Response: The Council agrees with this comment. The Council agrees that a "facially discriminatory policy" can violate FEHA and proposes to add a definition of "facially discriminatory policy" in Subsection 12040(c). The Council also agrees that the regulations should include the affirmative defense to a facially discriminatory policy and has added Subsection 12042(d) (ultimately renumbered Subsection 12042(e)-(f)) to articulate that defense.

Additional Revisions: The Council proposes to add Subsection 12042(c)(2) [ultimately renumbered as 12042(c)(1)] to the definition of direct evidence. This proposed regulation adds an "express condition" as an example of intentional discrimination that can be proved by direct evidence. The proposed subsection states: "Direct evidence includes an express condition stated orally or in writing that conditions a housing opportunity on a protected basis, takes adverse action based on a protected basis, or directs adverse action to be taken based on a protected basis." This provision is necessary to more completely render and implement FEHA as regards intentional discrimination.

Subsection 12042(d)(2) [ultimately renumbered as 12042(j)(2)]:

Comment: Section 12042(d)(2) provides: "If the complainant meets its burden under section 12042(d)(1), then the burden shifts to the respondent to produce evidence that the challenged practice was solely motivated by a legitimate, non-discriminatory reason."

This places an unreasonable burden on the respondent. There may be multiple legitimate reasons for the actions taken by respondent. The unreasonable burden shift to prove the action was solely motivated by a non-discriminatory reason is unnecessarily high burden. Why is "solely" motivated needed here? Can't the complainant show the alleged intentional discrimination with the respondent then required to show a legitimate non-discriminatory reason for the actions?

Council Response: The Council disagrees with this comment. As explained in the ISOR, the legal basis for this proposed regulation is FEHA's specific statutory 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." Gov. Code Section 19255.8(a). The proposed regulation is consistent with the case law together with Government Code Section 12955.6 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"). The comment fails to give appropriate attention to the specific statutory language. On a plain reading, this language excludes a "mixed motive defense." The proposed regulation articulates a respondent's burden. Therefore, the Council has not revised the proposed regulation in response to this comment.

Comment: Commenters' only substantive concern with this section is subdivision (d)(2)'s requirement that the defendant "produce evidence that the challenged practice was *solely* motivated by a legitimate, non- discriminatory reason" [emphasis added]. The initial statement of reasons explains this requirement as the "logical corollary" of Gov. Code § 12955.8, which 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." However, as discussed above with respect to section 12041, this provision of FEHA has been interpreted to be coextensive with the FHA.

The caselaw under both the FHA and FEHA have applied the *McDonnell Douglas* burden-shifting analysis to intentional discrimination claims based on indirect evidence. Commenters are aware of no cases in which the *McDonnell Douglas* burden shifting analysis has been

articulated to require the defendant to show that the challenged action was *solely* motivated by a legitimate, non-discriminatory reason.

Rather, cases routinely articulate the *McDonnell-Douglas* burden shifting analysis as requiring the defendant to "articulate *a* legitimate nondiscriminatory reason for its decision" [emphasis added]. *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1128. If the evidence shows that the case is one of mixed motives, then a limitation of remedies may be appropriate, as articulated by the California Supreme Court in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Council Response: The Council disagrees with this comment. The proposed regulations are, for the first time, interpreting and implementing FEHA's specific statutory language that "[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." Gov. Code Section 12955.8(a). The proposed regulation is consistent with the case law together with Government Code Section 12955.6 (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"). The comment fails to give appropriate attention to this specific statutory language and misinterprets the case law. While some cases have conflated the standards in FHA and FEHA, they do this only by ignoring or not giving any weight to FEHA's specific language. On a plain reading, this language excludes a "mixed motive defense." As the ISOR explains, the court in *Harris*, an employment case, specifically distinguished intentional discrimination in the housing context from the employment context (56 Cal.4th 203, 217 – 218 (2013)).

Comment: Section 12042(d) sets forth the burdens of proof in cases involving indirect or circumstantial evidence following the McDonnell Douglas (burden shifting) framework. The draft regulation accurately sets forth the burdens of proof under the indirect method of proof. However, there are also other ways to prove intentional discrimination using circumstantial evidence. We recommend revising Section 12042(d) to state that a combination of direct and circumstantial evidence can be used to prove discriminatory intent without the need to follow the burden of proof for indirect evidence (McDonnell Douglas framework) set forth in the draft regulations.

As the Ninth Circuit has held, "[a] plaintiff does not, however, have to rely on the McDonnell Douglas approach to create a triable issue of fact regarding discriminatory intent in a disparate treatment case." *Pac. Shores Props. v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (citing *Costa v. Desert Palace, Inc*., 299 F.3d 838, 855 (9th Cir. 2002)). A plaintiff may instead "'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way." *Id*. at 1158 (quoting *McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 1122 (9th Cir. 2004)).

Several different kinds of evidence – direct, circumstantial, statistical, and anecdotal – are relevant to the showing of intent and should be assessed on a cumulative basis. *Title VI Legal Manual* at 9. The Supreme Court in *Arlington Heights v. Metropolitan Housing Corp*., 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), set forth a number of factors "to determine whether the plaintiffs have created a triable issue of fact that the

defendant's actions were motivated by discriminatory intent." *Pac. Shores Props.*, 730 F.3d at 1158. The factors include: "(1) statistics demonstrating a 'clear pattern unexplainable on grounds other than' discriminatory ones, (2) '[t]he historical background of the decision,' (3) '[t]he specific sequence of events leading up to the challenged decision,' (4) the defendant's departures from its normal procedures or substantive conclusions, and (5) relevant 'legislative or administrative history.' *Id*. at 1158-59 (quoting *Arlington Heights*, 429 U.S. at 266); *Ave. 6E Invs. v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016); *see* Title VI Legal Manual at 10-15 (detailed discussion of the Arlington Heights factors).

The *Arlington Heights* factors are not exhaustive. *Pac. Shores Props.*, 730 F.3d at 1159 (*citing* Arlington Heights, 429 U.S. at 268). For example, another factor consistent with the Arlington Heights method of proof "is an inquiry into whether the discriminatory impact of the challenged action was foreseeable." *Title VI Legal Manual* at 15. "When a plaintiff opts to rely on the Arlington Heights factors to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide "very little such evidence . . . to raise a genuine issue of fact . . .; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder." *Id*. (quoting *Schnidrig v. Columbia Mach*., 80 F.3d 1406, 1409 (9th Cir. 1996). "A plaintiff need not establish any particular element in order to prevail." *Ave. 6E Invs., Ltd. Liab. Co*., 818 F.3d at 504 (citing *Pac. Shores Props*., 730 F.3d at 1156).

We therefore suggest that Section 12042(d) should be amended to state that a combination of direct and circumstantial evidence may be used to prove discriminatory intent, without the need to follow the burden of proof for indirect evidence set forth in the draft regulations.

Council Response: The Council partly agrees and partly disagrees with the comment. As regards the relative probative value of circumstantial evidence and direct evidence in proving discriminatory intent, the Council agrees with the comment that "several different kinds of evidence – direct, circumstantial, statistical, and anecdotal – are relevant to the showing of intent and should be assessed on a cumulative basis." The United States Supreme Court has held that circumstantial and direct evidence should be treated alike in intentional discrimination cases, noting: "Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). The proposed regulation implicitly already allowed for a combination of direct and indirect evidence to prove an intentional violation: Subsection (b) provides "An intent to discriminate may be established by direct evidence or indirect evidence, also known as circumstantial evidence." (emphasis added) However, for greater clarity, the Council proposes to revise Subsection 12042(b) to read: "An intent to discriminate may be established by direct evidence, indirect evidence (also known as circumstantial evidence) or a combination of direct evidence and indirect evidence."

The Council also agrees with the commentator that a combination of direct and circumstantial evidence may be used to prove discriminatory intent, and has revised Subsection 12042(c)(1) [ultimately Subsection 12042(d)] to read: "If direct evidence, or a combination of direct and indirect evidence, shows a person explicitly conditions a housing opportunity on a protected basis, takes adverse action based on a protected basis, or directs adverse action to be taken based on a protected basis, such a practice demonstrates intentional discrimination as a matter of law."

For greater clarity, the Council has also incorporated the phrase "or a combination of direct evidence and indirect evidence" into Subsection 12042(d) [ultimately Subsection 12042(e)].

The Council disagrees with the commenter's suggestion that the regulation should be revised to provide that a complainant need not "follow the burden of proof for indirect evidence set forth in the draft regulations." The comment is somewhat unclear as to whether it is suggesting: (1) the regulation be revised to eliminate the elements for a prima facie case; (2) a revision in other burden-shifting parts of the proposed regulation, *viz*. the respondent's burden if complainant meets its burden or complainant's burden if the respondent meets its burden; or (3) a test without any burden-shifting.

As regards the prima facie case, there is no necessity to revise the proposed burdens of proof for indirect evidence. The proposed regulation explicitly provides: "The specific elements of a prima facie case vary depending upon the particular facts." Recognizing the variety of cases and relevant forms of proof, the proposed regulation states the *minimum* elements of a prima facie case of intentional discrimination: (1) an individual is a member, or individuals are members, of a protected class; (2) the individual was, or individuals were, subject to adverse action regarding a housing opportunity or may be subject to such adverse action; and, (3) the member's or members' status as protected class members was or is a motivating factor for the adverse action. None of the cases cited by the commentator suggest or hold that a complainant would be able to make out a prima facie case of intentional discrimination without showing each of these elements through some admissible evidence. In fact, in the cases cited by the commentator, the court required these elements. "Where, as here, there is direct or circumstantial evidence that the defendant *has acted with a discriminatory purpose* and has *caused harm* to *members of a protected class*, such evidence is sufficient to permit the protected individuals to proceed to trial under a disparate treatment theory." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1148 (9th Cir. 2013) (emphasis added). Similarly, in *Ave. 6E Invs. v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016), the plaintiff sufficiently alleged each of the three elements articulated in the proposed regulation. (*Id*. at 1156 – 57).

The distinction the *Pacific Shores* court was making regarding the burdens of proof to show intentional discrimination by indirect evidence was whether a plaintiff was required to demonstrate that a similarly situated entity was treated more favorably than the plaintiff in order to raise an inference of discrimination. *Pac. Shores*, 730 F.3d at 1159 ("As described above, we have unambiguously rejected this position previously, and we do so again now. *McDonnell Douglas* simply *permits* a plaintiff to raise an inference of discrimination by identifying a similarly situated entity who was treated more favorably. It is not a straightjacket *requiring* the plaintiff to demonstrate that such similarly situated entities exist." (emphasis in original).) The proposed regulation does not require a complainant to demonstrate that a similarly situated entity was treated more favorably than the plaintiff, so it is already consistent with the holding of *Pacific Shores*. The proposed regulation does provide in Section 12042(g)(3) [ultimately Section 12042(i)] that "evidence that the respondent's treatment of others who are not members of the relevant protected class is different than treatment of the complainant" is relevant to show pretext, but it does not *require* such a showing.

Finally, the opinion in *Arlington Heights v. Metropolitan Housing Corp*. 429 U.S. 252 (1977) cited by commentators was deciding a claim under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution using a burden shifting framework. That opinion did not decide any statutory fair housing claim. The Court specifically remanded the case to the lower court to consider the FHA claim. (*Id*. at 271). In any case, the Council agrees that all of the factors articulated by the commentator from the *Arlington Heights* case *could* be relevant to a complainant making out a prima facie case of intentional discrimination under the proposed regulation. The Council has added additional language in proposed Subsection 12042(i) to explicitly incorporate the *Arlington Heights* factors.

Subsection 12042(d)(3) [ultimately renumbered as 12042(j)(3)]:

Comment: This seems skewed against the respondent who may be acting in good faith if the complainant can simply make a showing that the respondent didn't know about the law, and/or one other individual may have been treated differently (albeit legally) than the complainant.

Council Response: The Council disagrees with the comment. While the comment is somewhat confusing, commenter provides no legal authority for the suggestion that merely "acting in good faith" is a defense to a claim of intentional discrimination. And ignorance of the law is not a defense to a legal violation. The last sentence in this section merely points out that the respondent cannot rely on facts or evidence that did not exist or were unknown to the respondent at the time of the respondent's alleged unlawful act.

Subsection 12042(d)(4) [ultimately renumbered as 12042(j)(4)]:

Comment: Reality is more nuanced than this. For example, the association grants a request for an owner to install a ramp to his/her front door based on a disability and need to have the ramp to enter the unit. It then denies a ramp to another resident who a) has provided no reliable verification of disability b) no nexus between the ramp and the disability and c) is simply alleging that because another resident has a ramp that he/she should be able to have one without going through any verification procedures.

Council Response: The Council disagrees with this comment. The example the commentator provides does not provide any basis for revising the proposed regulation. Each request must be considered individually on its own merits in accord with the regulations.

Subsection 12042(e) [ultimately renumbered as Section 12042(g)]:

Comment: Section 12042(e) provides: "In cases involving either direct or indirect evidence, a complainant does not need to prove that the challenged practice was motivated solely by discriminatory intent. The respondent is liable if complainant proves that discriminatory intent was a factor motivating the respondent's challenged practice."
[The commentator created a comment in the margin of a redlined version of the proposed regulations linking to this proposed regulation which read in its entirety "Same concerns as expressed above."]

Council Response: The comment is unclear because there were several comments made by the commentator and it is not clear which "concerns expressed above" this comment is referring to. Therefore, the Council is unable to respond to the comment.

Additional Revisions: The Council proposes to delete Subsection 12042(e) for clarity because it is duplicative of Subsection 12041(b).

The Council also proposes to add a new Subsection 12042(e) [ultimately renumbered Subsection 12042(g)] to the regulations. This proposed regulation explains the relationship between a facially discriminatory policy or express classification and Government Code Section 12955(c) and Section 12050 of these regulations which prohibit discriminatory statements. The proposed subsection states: "A facially discriminatory policy or express classification will also violate Section 12955(c) of the Act and Section 12050 of these regulations." This provision is necessary to clarify that if a person establishes a *facially* discriminatory policy or express classification, then such a policy or express classification will also violate the Act's prohibition against discriminatory statements. See, e.g. *Iniestra v. Cliff Warren Investments, Inc.*, 886 F. Supp. 2d 1161, 1168 - 1169 (C.D. Cal. 2012); *Pack v. Fort Washington II*, 689 F. Supp. 2d 1237, 1248 (E.D. Cal. 2009).

The Council further proposes to add a definition of "indirect evidence" in Subsection 12042(f) [ultimately Subsection 12042(h)] to provide greater clarity. Specifically, this section provides: "Indirect evidence, or circumstantial evidence, is evidence that relies on an inference to connect it to a conclusion of fact. By contrast, direct evidence supports the truth of an assertion directly without need for any additional evidence or inference. Indirect evidence includes comparative evidence, statistical evidence, anecdotal evidence, and historical evidence."

Article 6. Discriminatory Notices, Statements, and Advertisements

Comment on Article: We recommend that the Council consider adding the protected bases enumerated by the Unruh Civil Rights Act, California Civil Code § 51 et seq. (e.g., citizenship, primary language, immigration status, age), throughout the article because Government Code section 12948 makes Unruh Act violations actionable under the Fair Employment and Housing Act.

Council Response: The Council agrees with this comment in part. The initial proposed regulations did not refer to "protected bases" in this Article because Section 12955(p)(2) creates a limited statutory exception for "source of income." However, in order to more clearly and accurately indicate the scope of the application of this Article consistent with FEHA and the statutory exceptions, the Council has revised the proposed regulations to: (1) add the words "any protected basis under the Act" in Sections 12050(a), (d), and (g)(1) – 4); and (2) to delete references to particular protected bases in those subsections; and (3) add the phrase "Except as specified in section 12051" to proposed subsection 12050(d).

§ 12050. Discriminatory Practices Regarding Notices, Statements, and Advertisements

Additional Revisions: The Council has substituted the term "housing accommodation" for the word "dwelling" in Subsections 12050(a), (d), (e), (g)(1) and (g)(3) – (g)(4) for greater clarity. While "dwelling" is included in the definition of "housing accommodation" in Subsection 12005(o), the Council was concerned that using dwelling in this context could cause confusion. These are non-substantial changes to the proposed text.

Subsections 12050(g)(1)(A) and (B):

Additional Revisions: The initial proposed text of Subsection 12050(g)(1)(A) included "No children permitted" as an example of a phrase that would be unlawful because it explicitly expresses a preference or limitation based upon a protected class. To add clarity and precision, the Council proposes to add the following parenthetical: "(except to state an age-based preference for housing for older persons in relation to a housing accommodation meeting the requisite criteria of Government Code section 12955.9 pursuant to section 12051(e)." This parenthetical is necessary to express a statutory exception in which the statement "No children permitted" would not be unlawful.

In addition, the initial proposed text of Subsection 12050(g)(1)(B) included the phrase "Not suitable for children" as an example of a phrase that could be unlawful because it could suggest a preference or limitation to an ordinary reader or listener which indicates discrimination based upon familial status. The Council proposes to add the following phrase after the initial proposed text: "if the housing accommodation is not housing for older persons under section 12051(e)." This proposed revision is necessary to express a statutory exception in which the statement "Not suitable for children" would not be unlawful.

Subsection 12050(g)(1)(B):

Comment: Section 12050(g)(1)(B) describes examples of "words or phrases used in real estate advertising that may convey either overt or tacit discriminatory intent." In addition to the examples listed, we suggest the inclusion of a few more that we have seen in advertisements: (1) A statement that an apartment has a master bedroom and "an extra room that would make a great office" could indicate a preference against renters with children; (2) advertisements that describe housing as "ideal for professionals who work from home" could indicate a preference based on source of income; (3) properties advertised as "luxury apartments for working professionals" could indicate a preference based on source of income, familial status, and/or disability. Additionally, advertisements that make requests such as "no felonies," may indicate discrimination based on race. As recognized in Article 24 of the Fair Housing Regulations, any admissions policy barring applicants based on criminal history may be discriminatory based on the disproportionate representation of Black and Latinx individuals in the criminal justice system. Therefore, statements that indicate a blanket policy not to rent to persons with criminal records (e.g., "no felons" or "must clear a criminal background check") may be discriminatory on the basis of race. Likewise, a statement that the housing provider describes housing as "ideal for a person who is religious" suggests a discriminatory preference based on religion.

Council Response: The Council partly agrees with and partly disagrees with the comment and its suggestions. The list in Subsection 12050(g)(1)(B) is not meant to be exhaustive; instead, it provides some examples. The Council declines to add all of the suggested additions. However,

the Council agrees to add the example "For working professionals" because this phrase may indicate discrimination based upon source of income subject to the ordinary reader or listener test.

§ 12051. Exceptions

Comment: Section 12051 outlines notices, statements, and advertisements that do not constitute unlawful discrimination. First, we recommend that Section 12051 begin with language stating that, "It shall not constitute **unlawful** discrimination under this section" (adding the word "unlawful" to qualify "discrimination).

Council Response: The Council agrees with the comment and has accordingly revised the proposed regulation to include the word "unlawful."

Subsection 12051(a):

Comment: Subdivision (a) of section 12051 provides that it is not discriminatory "for a person to make a written or oral inquiry concerning the level or source of income *in order to verify the amount and source of income stated in an application for a housing opportunity*" [emphasis added]. While the sentiment of this subdivision is correct, the exception is unnecessarily narrow. Gov. Code § 12955(p)(2) states "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." By adding a qualifier to the exception regarding the purpose for which the housing provider is using the information, the Council is limiting the statutory exception impermissibly.

This is not merely a matter of form. There are legitimate reasons for housing provider to inquire about a person's level or source of income outside of the application process. The eviction protections enacted by the Legislature and local governments in response to the COVID-19 pandemic provide an excellent example. Many of these eviction protections require the tenant to provide proof that they have lost income as a result of the pandemic to qualify for protection. If the exception regarding inquiries into a person's level or source of income was limited to those inquiries made during the application process, landlords could not ask tenants for the very thing that might prevent them from being evicted.

Commenter requests the following amendment: "For a person to make a written or oral inquiry concerning the level or source of income ~~in order to verify the amount and source of income stated in an application for a housing opportunity~~."

Council Response: The Council agrees that the initially proposed language interprets the statutory exception too narrowly. Ultimately, the Council revised the section to provide: "For a person to make a written or oral inquiry concerning the level or source of income as specified in section 12141(b)," and provided specific examples of lawful inquiries in section 12141(b). As regards the scope of this statutory exception from liability, Government Code Section 12955(p)(2) provides "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of

income." The Act is a remedial statute which is intended to be interpreted liberally; therefore, exceptions to liability under the Act should be interpreted narrowly. *Sisemore v. Master Financial* 151 Cal.App.4th 1386, 1415 (2007).

Subsection 12051(b):

Comment: [W]e do have one major concern, specifically, proposed § 12051 (b)... Neither the Fair Housing Act not its implementing regulations provide any exemption from the prohibition on discrimination because of sex, or for the advertising of a preference with regard to sex – not even in a shared living context. As such, the proposed inclusion of §12051 (b)… is highly problematic. With regard to this issue we note that California's fair housing law does not appear to compel the inclusion of these proposed exemptions.

Council Response: The Council disagrees with the comment. This provision comes directly from FEHA, specifically Government Code Section 12927(c)(2)(B), which provides: "(2) 'Discrimination' does not include either of the following:…(B) Where the sharing of living areas in a single dwelling unit is involved, the use of words stating or tending to imply that the housing being advertised is available only to persons of one sex." Thus, Subsection 12051(b) is necessary to clarify that this particular type of communication in this particular context is not a violation of FEHA as it is a statutory exception. Under Government Code Section 12955.6, FEHA "may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws." The federal Fair Housing Act does not include such an exception. However, FEHA specifically includes this exception, and so the regulations implementing FEHA must include it. And the proposed regulation tracks the statutory language. The ISOR inadvertently stated that this proposed regulation was based upon Government Code Section 12927(c)(2)(A), instead of citing to the correct provision, Government Code Section 12927(c)(2)(B).

Subsection 12051(d):

Comment: [W]e do have one major concern, specifically, proposed § 12051…(d). …With regard to this issue we note that California's fair housing law does not appear to compel the inclusion of these proposed exemptions.

Council Response: The Council disagrees with the comment. This proposed section is intended to implement AB 1497 (hosting platforms), which amended Government Code Section 12927 by revising the definition of "housing accommodation" to include: "any building, structure, or portion thereof that is occupied, or intended to be occupied, pursuant to a transaction facilitated by a hosting platform, as defined in Section 22590 of the Business and Professions Code." The purpose of this legislation was to bring short-term rentals under the scope of FEHA. (See also proposed regulation Section 12005(o)(3) modifying the definition of "housing accommodation" to comply with AB 1497.)

As explained in the ISOR, Section 12051(d) is necessary to ensure that while implementing AB 1497 this article is also consistent with the holding in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012) ("*Roommates.com*"). In that case, which binds California, the Ninth Circuit held that in order to avoid a constitutional

conflict with the right of association, certain types of shared living situations are neither subject to the federal Fair Housing Act nor FEHA. In clarifying the scope of its holding, the *Roommates.com* court stated:

> "But a *business transaction* between a tenant and landlord is quite different from an *arrangement* between two people sharing the same living space. We seriously doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA's prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s." (at 1220) (emphasis added)."

Therefore, the *Roommates.com* case makes certain types of shared living situations – those defined in the proposed regulation as a "noncommercial personal roommate arrangement" – not subject to FEHA. Because those kinds of arrangements are not subject to FEHA, it is not unlawful for persons to refer to a protected basis when seeking to offer such housing. For this reason, Section 12051(d) is necessary to both implement AB 1497 and to comply with the *Roommates.com* holding. However, in order to provide more clarity, the Council has added some additional text to the proposed regulation so that it will read: "For a person to refer to a protected basis when seeking to establish a noncommercial personal roommate arrangement, where 'noncommercial personal roommate arrangement' means an arrangement 'in which no monetary or other consideration is exchanged for the housing opportunity.' Traditional residential rental agreements, leases and short-term rentals, as covered by Government Code section 12927(d), are not included in this definition."

Comment: In Section 12051(d), it is not clear what the term "noncommercial personal roommate arrangement" means. It is unclear whether "noncommercial" is intended to be synonymous with "residential," giving the exception broad application. Alternatively, this term could mean any individual or entity that is not a private, for-profit roommate- matching service (e.g., Roommates.com). To aid comprehension, we request that the Council provide a definition of "noncommercial personal roommate arrangement" and provide examples of which arrangements would fall within this exception and which would not.

Council Response: The Council agrees that the phrase "noncommercial personal roommate arrangement" could be misinterpreted and requires clarification. This proposed section is intended to implement AB 1497 (hosting platforms), which amended Government Code Section 12927 by revising the definition of "housing accommodation" to include: "any building, structure, or portion thereof that is occupied, or intended to be occupied, pursuant to a transaction facilitated by a hosting platform, as defined in Section 22590 of the Business and Professions Code." AB 1497 is clear that it is *not* subjecting hosting platforms to FEHA liability because of their immunity from fair housing law provided by Section 230 of the federal Communications Decency Act of 1996, which pre-empts state law. Rather, AB 1497 only subjects owners of dwellings who offer their housing accommodations on a housing platform to liability under FEHA. It intends to establish that DFEH can exercise "the full range of its authority to prevent discrimination by hosts and prospective hosts." (AB 1497, Assembly Committee on Judiciary bill analysis for 4/23/2019 hearing, at page 3.)

In the ISOR, the Council defined "noncommercial personal roommate arrangement" as an arrangement "in which no monetary or other consideration is exchanged for the housing opportunity." In order to provide more clarity, the Council has added that definition to the proposed regulation so that it will read: "For a person to refer to a protected basis when seeking to establish a noncommercial personal roommate arrangement, where 'noncommercial personal roommate arrangement' means an arrangement 'in which no monetary or other consideration is exchanged for the housing opportunity.' Traditional residential rental agreements, leases and short-term rentals, as covered by Government Code section 12927(d), are not included in this definition." The Council does not believe that examples are necessary for sufficient clarity.

Subsection 12051(e):

Comment: Section 12051(e) should be revised to read: "For a person to state an age-based preference for housing for older persons in relation to housing meeting the requisite criteria of Government Code section 12955.9 and Civil Code sections 51.2, 51.3, and 51.4. For purposes of this subsection, the burden of proof shall be on the respondent to prove that the housing qualifies as housing for older persons."

It might also be appropriate to reference the Federal Fair Housing Act and HOPA Regulations here so there is no confusion about the criteria to qualify as housing for older persons.

Council Response: As regards the commenter's suggestion that the regulation refer to Civil Code sections 51.2, 51.3, and 51.4, the Council disagrees that these provisions need to be specifically listed because Government Code Sections 12955.9(b)(2) and (b)(3) already incorporate them, as well as housing provided under any state or federal program (such as the Housing for Older Persons Act (HOPA)) that is specifically designed and operated to assist elderly persons, as defined in the state or federal program.

§ 12052. Qualifying for Exemption

Comment: [Section 12052 refers to "single-family home."] Isn't this terminology discriminatory? Why create an exception which would need to be proven by meeting Adamson and other "single-family" criteria? Are you going for detached residence?

Council Response: The Council disagrees with the comment. This exception is drawn directly from the statutory language, so the Council has not "created the exception." It is true that what legally constitutes a "single family" for purposes of zoning can be a complex issue, including under *City of Santa Barbara v. Adamson* 27 Cal.3d 123 (1980) and its progeny, but the Council is not proposing in these regulations to address those issues.

Article 12. Harassment and Retaliation

No Comments.

Article 13. Consideration of Income

§**12140. Definitions**

Comment: Subdivision (a) defines "lawful, verifiable income" to include a long list of various forms of payments, including payments from employers and payments from parents, guardians, or other third parties. While many of the items listed *may* be lawful, verifiable income, the list implies that such payments are always lawful, verifiable income, which is not the case. The term "lawful, verifiable income" refers to the specific circumstances related to the income in question, which will nearly always require a case-by-case analysis. For example, "payments from employers" may be or may not be lawful and verifiable. In the case of a person earning wages who can produce documentation such as a W-2 or pay stubs, such income is clearly lawful and verifiable. On the other hand, if a person who is working "off the books" and cannot produce documentation of their income, such income is likely not lawful and verifiable.

Council Response: The Council agrees that the regulations would benefit from a definition of "lawful, verifiable income" instead of only listing examples of forms of income that may be lawful and verifiable. Accordingly, the Council proposes to add the following definition as Subsection 12040(a): "'Lawful, verifiable income' means income that is: (1) authorized or sanctioned by law, or not forbidden by law, and (2) reasonably able to be checked or demonstrated to be true or accurate." In addition, for clarity, the Council has reorganized the list of examples of possible lawful, verifiable income into six categories, included as proposed Subsections 12040(b)(1) – (6). The Council has also added additional examples of lawful, verifiable income that are common in the Council's experience and has rephrased some of the previous examples for greater clarity.

In proposing Article 13 in these regulations, the Council is interpreting and making specific three statutes regarding source of income discrimination: SB 329 (2019 – 2020 Regular Session), SB 1098 (1999 - 2000 Regular Session), and SB 1145 (2003 – 2004 Regular Session). SB 329 was focused on governmental housing programs. SB 1098 made specific provisions regarding source of income discrimination in rental housing but also included "source of income" as a protected status in Section 12955 (a), (c), (d), (g) – (m), and (p). The SB 1098 amendments, FEHA's initial definition of "source of income" included "federal, state, or local public assistance, and federal, state, or local housing subsidies." This amendment put "source of income" on the same level as other protected characteristics, such as race, national origin, or sex. SB 1145 was merely the extension of SB 1098's "source of income" as a protected status beyond the sunset date set in SB 1098 and made no substantive changes to the "source of income" status. The bill analyses of SB 1098 do not shed much light on the meaning of types of income that the legislature intended to include in the coverage of the protected basis. In interpreting the "source of income" provisions in section 12955 added by SB 1098, *Sisemore v. Master Financial, Inc*., 60 Cal.Rptr.3d 719 (App. 6 Dist. 2007) found that the statutory language was not plain on its face and that the legislative history was not sufficient to clarify its meaning. Therefore, the court went to a third step of statutory interpretation: "Third, if the clear meaning of the statutory language is not evident after attempting to ascertain its ordinary meaning or its meaning as derived from legislative intent, we will "apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], ... practical [citations], in accord with common sense and justice, and to avoid an absurd result [citations]." (*Halbert's Lumber, supra,* at pp. 1239–1240, 8 Cal.Rptr.2d 298.) FEHA is to be

liberally construed. (§ 12993; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1590, 18 Cal.Rptr.3d 669 (*Auburn Woods*); see generally *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269, 203 Cal.Rptr. 772, 681 P.2d 1340 [remedial statute should be liberally construed to promote its objectives].)" In the Council's expertise, the revised proposed regulations are necessary to fully make specific the legislature's intent in adding "source of income" as a protected basis.

Comment: Subdivision (a) also uses vague terms including "General Assistance," "General Relief," and "veteran benefits." It's unclear what these terms mean. Without a definition, commenters cannot discern whether such payments are, in fact, forms of "lawful, verifiable income." To the extent these items refer to cash assistance or rental assistance paid by a governmental entity, they would clearly be a "lawful, verifiable income." However, these terms could also be interpreted more broadly. For example, "veteran benefits" might include health care benefits or tuition assistance – these amounts would not be considered "lawful, verifiable income" as they are not "paid directly to a tenant, or to a representative of a tenant, or paid to a housing owner or landlord on behalf of a tenant" as required by Gov. Code § 12955(p)(1).

Council Response: Council partially agrees and partially disagrees with the comment. The Council agrees that the reference to "veteran benefits" was not clear. Accordingly, the Council has revised the reference in ultimately numbered Subsection 12040(b)(3) to read: "veterans benefits (including federal Veterans Benefits, Special Veterans Benefits (SVB), and California Veterans Cash Benefits (CVCG))." The Council disagrees with the comment that "General Assistance" and "General Relief" are vague terms. In proposing Article 13 in these regulations, the Council is interpreting and making specific three statutes regarding source of income discrimination: SB 329 (2019 – 2020 Regular Session), SB 1098 (1999 - 2000 Regular Session), and SB 1145 (2003 – 2004 Regular Session). SB 1098 made specific provisions regarding source of income discrimination in rental housing but also included "source of income" as a protected status in Subsection 12955 (a), (c), (d), (g) – (m), and (p). The SB 1098 amendments, the Act's initial definition of "source of income" in Section 12927 and 12955(p)(1) included "federal, state, or local public assistance." The Council believes that in the context of these sections of FEHA and Subsection 12040(b)(3) providing examples of "All federal, state, and local government assistance that is available for the payment of rent," these phrases are sufficiently clear.

Comment: The purpose of SB 329 is to expand the definition of "source of income" so that participation in a housing voucher program is no longer a basis upon which a landlord may discriminate in the rental of housing. Key to the definition of "source of income" in the Act is the term "lawful, verifiable income." (Gov. Code § 12955(p)(1).) Section 12140(a) further defines "lawful verifiable income." As drafted, the proposed regulation names specific types of public assistance and housing subsidies. We recommend that the Council define "lawful, verifiable income" to include all public assistance, housing subsidies, housing vouchers, and rental assistance from federal, state, and local governments as well as from nonprofit and charitable organizations, along with naming the specific public assistance and housing subsidy programs named in the draft regulation as a non-exhaustive list of examples. This approach will make clear that the regulations apply to all forms of public assistance and rental subsidies, even if they are not explicitly named in the regulations, and is consistent with the Legislative intent and purpose in adopting SB 329.

Council Response: The Council agrees with this comment. Subsection 12955(p)(1) provides: "For the purposes of this section, "source of income" means lawful, verifiable income…, *including* 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)." (Emphasis added.) In proposing Article 13 in these regulations, the Council is interpreting and making specific three statutes regarding source of income discrimination: SB 329 (2019 – 2020 Regular Session), SB 1098 (1999 - 2000 Regular Session), and SB 1145 (2003 – 2004 Regular Session). SB 1098 made specific provisions regarding source of income discrimination in rental housing but also included "source of income" as a protected status in Subsection 12955 (a), (c), (d), (g) – (m), and (p). The Act's initial definition of "source of income" in SB 1098 included "federal, state, or local public assistance, and federal, state, or local housing subsidies." The Council believes that the comment's suggestions are consistent with SB 1098 and therefore has revised language in proposed Subsection 12040(b)(3) – (5) to include "All federal, state, and local government assistance that is available for the payment of rent," "All federal, state, and local government housing voucher and certificate programs," and "All federal, state, and local government housing subsidies that provide rental assistance to individuals," and has provided a non-exhaustive list of examples of each type of income. In addition, the Council has added proposed Section 12040(b)(6) which provides: "All housing subsidies, housing vouchers, and rental assistance from nonprofit and charitable organizations." In addition, "source of income" specifically includes rental assistance provided by the State Rental Assistance Program designed to assist renters adversely impacted by the COVID pandemic. "For purposes of the protections against housing discrimination provided under the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), assistance provided under this chapter shall be deemed to be a "source of income," as that term is defined in subdivision (i) of Section 12927 of the Government Code." Health & Saf. Code, § 50897.1(i).

In interpreting the "source of income" provisions in section 12955 added by SB 1098, *Sisemore v. Master Financial, Inc*., 60 Cal.Rptr.3d 719 (App. 6 Dist. 2007) found that the statutory language was not plain on its face and that the legislative history was not sufficient to clarify its meaning. Therefore, the court went to a third step of statutory interpretation: "Third, if the clear meaning of the statutory language is not evident after attempting to ascertain its ordinary meaning or its meaning as derived from legislative intent, we will "apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], ... practical [citations], in accord with common sense and justice, and to avoid an absurd result [citations]." (*Halbert's Lumber, supra,* at pp. 1239–1240, 8 Cal.Rptr.2d 298.) FEHA is to be liberally construed. (§ 12993; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1590, 18 Cal.Rptr.3d 669 (*Auburn Woods*); see generally *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269, 203 Cal.Rptr. 772, 681 P.2d 1340 [remedial statute should be liberally construed to promote its objectives].)" In the Council's experience, housing subsidies, housing vouchers, and rental assistance from nonprofit and charitable organizations are intended to serve the same purposes as governmental housing subsidies, housing vouchers, rental assistance, and other programs. Therefore, applying reason, practicality, and common sense, the

Council finds that all of these types of payments and programs are also included in lawful, verifiable income. The Council has revised proposed Section 12140(a) accordingly.

Subsection 12140(b):

Comment: Subdivision (b) defines "source of income" in three sub-parts. Paragraphs (1) and (2) of subdivision (b) essentially follow the statutory definition found in Gov. Code § 12955(p)(1). However, paragraph (3) of subdivision (b) breaks from the statutory definition found in Gov. Code § 12955(p)(1) by stating that "payments by a parent or guardian on behalf of a child, and payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement" and "third-party payments made in any form consistent with section 1947.3 of the Civil Code" are sources of income. There are several problems with this language.

First, with respect to the references to payments from third parties, parents, and guardians, the language is repetitive of the definition of "lawful, verifiable income" found in subdivision (a) and suffers from the same defects identified above.

Second, the inclusion of "payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement" as one of type of payment made "on behalf of" a tenant payment is an incorrect characterization of the role of a guarantor/co-signor and impermissible expansion of statute.

A guarantor/co-signor is not making payments on behalf of a tenant, rather, they make payments pursuant to an agreement they have with the landlord to pay in the event of a tenant's default. In other words, the guarantor/co-signor essentially acts as an insurer, which has no obligation to pay except in case of default. California law makes the nature of this relationship clear in Civ. Code § 2787, which states in relevant part: "A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Case law has found that a guarantor is tantamount to a creditor of the principal (in this case, the tenant):

> "In suretyship, the risk of loss remains with the principal, while the surety merely lends its credit so as to guarantee payment or performance in the event that the principal defaults. (*Schmitt v. Insurance Co. of North America* (1991) 230 Cal.App.3d 245, 257, 281 Cal.Rptr. 261.) In the absence of default, the surety has no obligation." *American Contractors Indemnity Co. v. Saladino* (2004) 115 Cal.App.4th 1262.

To find that payments by a guarantor/co-signor are a source of income – which a landlord would then be required to accept in determining whether a tenant meets the landlord's screening criteria – would turn the nature of guarantor/co-signor relationship on its head, essentially allowing a prospective tenant to turn a creditor or surety into a source of income. It would also create a dangerous precedent that lines of credit are sources of income. This would severely undermine the housing providers' ability to use minimum income policies as part of their screening criteria to protect their business interest in ensuring full and timely payment of rent, which the California Supreme Court has recognized as a legitimate, non- discriminatory

practice. *See Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162-63 ("The minimum income policy is no different in its purpose or effect from stated price or payment terms. Like those terms, it seeks to obtain for a business establishment the benefit of its bargain with the consumer: full payment of the price. In pursuit of the objective of securing payment, a landlord has a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their sex, race, religion, or other personal beliefs or characteristics.")

In addition, the Legislature in enacting SB 329 and SB 222 did not intend to expand "source of income" to allow prospective tenants to qualify for tenancy by having a guarantor/co-signor. Review of the legislative history for these bills shows the intent of the Legislature in enacting these bills was only to expand the definition of source of income to allow tenants to use Section 8, VASH, and similar government rental housing vouchers. There is no evidence to support the conclusion that a guarantor/co-signor was intended to be a "source of income." To the contrary, the issue was debated among stakeholders and ultimately rejected because, among other reasons, guarantors may be out of state or out of the country (such as in the case of a parent of a visiting student) and a property owner would find it difficult, if not impossible, to collect from those guarantors.

These issues, together with the fact that statute already defines "source of income," make section 12140 unnecessary, lacking in clarity, and inconsistent with statute. As such, it fails to meet the criteria required by the Administrative Procedure Act. Commenters request that section 12140 be deleted in its entirety. To the extent the Council believes it is important to include a definition of "source of income," it should simply cross-refer to the existing statutory definition found in Gov. Code § 12955(p)(1).

Council Response: The Council partly agrees and partly disagrees with the comment. The Council agrees that in light of the particular legal relationship between landlords and rent guarantors or co-signer that payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement are not examples of "lawful, verifiable income" paid to a housing owner or landlord on behalf of a tenant under the Act. Accordingly, the Council has deleted the text "payments by a parent or guardian on behalf of a child, and rent guarantor or co-signers based upon a rental guarantor or co-signer agreement" from proposed Section 12140. The Council disagrees that references to certain examples of income in currently proposed Subsections 12040(b) and (c) are unnecessarily repetitive. Rather, in the Council's experience, including some examples of "legal, verifiable income" in both sections helps to clarify how each of the included examples fits into the statutory scheme of different sources of income. The Council disagrees that the statute's definition of "source of income" makes "section 12140 unnecessary, lacking in clarity, and inconsistent with statute. As such, it fails to meet the criteria required by the Administrative Procedure Act" so that it should be deleted in its entirety. In proposing Article 13 in these regulations, the Council is interpreting and making specific three statutes regarding source of income discrimination: SB 329 (2019 – 2020 Regular Session), SB 1098 (1999 - 2000 Regular Session), and SB 1145 (2003 – 2004 Regular Session). SB 329 was focused on governmental housing programs. SB 1098 made specific provisions regarding source of income discrimination in rental housing but also included "source of income" as a protected status in Section 12955 (a), (c), (d), (g) – (m), and (p). The SB 1098 amendments, the Act's initial definition of "source of income" included "federal, state, or local public assistance, and

federal, state, or local housing subsidies." This amendment put "source of income" on the same level as other protected classes, e.g. race, national origin, sex, etc. SB 1145 was merely the extension of SB 1098's "source of income" as a protected status beyond the sunset date set in SB 1098 and made no substantive changes to the "source of income" status. The bill analyses of SB 1098 do not shed much light on the meaning of types of income that the legislature intended to include in the coverage of the protected basis. In interpreting the "source of income" provisions in Section 12955 added by SB 1098, *Sisemore v. Master Financial, Inc*., 60 Cal.Rptr.3d 719 (App. 6 Dist. 2007) found that the statutory language was not plain on its face and that the legislative history was not sufficient to clarify its meaning. Therefore, the court went to a third step of statutory interpretation: "Third, if the clear meaning of the statutory language is not evident after attempting to ascertain its ordinary meaning or its meaning as derived from legislative intent, we will "apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], ... practical [citations], in accord with common sense and justice, and to avoid an absurd result [citations]." (*Halbert's Lumber, supra,* at pp. 1239–1240, 8 Cal.Rptr.2d 298.) FEHA is to be liberally construed. (§ 12993; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1590, 18 Cal.Rptr.3d 669 (*Auburn Woods*); see generally *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269, 203 Cal.Rptr. 772, 681 P.2d 1340 [remedial statute should be liberally construed to promote its objectives].)" In the Council's expertise, the revised proposed regulations are necessary to fully make specific the legislature's intent in adding "source of income" as a protected basis.

§ **12141. Source of Income Discrimination in Rental Housing**

Additional Revisions: The Council has made a non-substantive change to the title of this proposed section. The Council has changed the title from: "Source of Income in Rental Housing and Examples" to "Source of Income Discrimination in Rental Housing." The Council believes the revised title is clearer and more accurately descriptive of the content of the section.

Subsection 12141(a):

Comment: Section 12141(a) states: "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." In addition to generally prohibiting discrimination, we suggest that the Council provide examples of what constitutes source of income discrimination beyond refusal to accept a particular source of income.

In our experience, some landlords state that they will accept a housing voucher or rental subsidy, but then refuse to complete the paperwork, sign forms, or allow inspections, all necessary for the third party to issue the housing voucher. Thus, the regulations should explain that the obligation not to discriminate based on source of income includes the requirement that the housing provider timely cooperate with third parties and an affirmative obligation to facilitate tenants' use of the rental subsidy. Such cooperation includes, but is not limited to, entering into or renewing leases and contracts (such as the Housing Assistance Payments Contract under the Section 8 Voucher Program); completing and signing necessary forms such as W-9s for rental assistance, agreeing to direct deposit of

Housing Assistance Payments; providing documentation of the tenancy as required, and signing any other documents necessary to facilitate payment from the third party.

We suggest specific language in the regulations stating that it is unlawful for a housing provider to do or attempt to do any of the following:

A. Refuse to rent or lease, or to continue to rent or lease, a housing accommodation; refuse to enter into or renew a rental agreement, lease or housing assistance payment contract, for a new or existing tenant; refuse to timely execute any documents required to enter into or renew a rental agreement, lease or housing assistance payment contract; require any clause, condition or restriction in the terms of tenancy; serve a notice of termination of tenancy; commence or prosecute an unlawful detainer action or otherwise deny access to a housing accommodation, housing service, or housing amenity on the basis of source of income.
B. Apply different terms, conditions, or privileges in connection with the rental of a housing accommodation, including, but not limited to setting rates for rental or lease, establishing damage deposits or other financial conditions, or refusing or limiting access to common areas or facilities based upon a person's source of income. This includes imposing less favorable rental terms as a condition of accepting a subsidy or rental assistance.
C. Refuse to make repairs to a housing accommodation where person's source of income requires the housing accommodate to meet habitability standards.
D. Represent to any person based upon their source of income that a housing accommodation is unavailable for viewing for potential rental or rental when such housing accommodation is in fact, available.
E. Make, print, or publish, or cause to be made, printed, or published through any medium, electronic, print, broadcast or other method, any notice, statement, sign, advertisement, application or contract, with regard to a housing accommodation offered for rent, including, but not limited to accepted forms of payment for the housing accommodation, which indicates any preference, limitation, or discrimination based on a person's source of income.

Our suggested language is critical to ensure that housing providers do not avoid their obligation to accept housing vouchers by refusing to comply with Housing Voucher program requirements.…. The suggested language in subsection C, above, regarding making necessary repairs is also important because some landlords deliberately sabotage tenants' use of the Housing Choice Voucher Program by refusing to correct serious uninhabitable conditions that violate federal housing quality standards. If a landlord refuses to repair a major deficiency, the housing authority will eventually be forced under federal regulations to cancel the contract, requiring the tenant to move. Thus the landlord's refusal to make repairs effectively denies the tenant's ability to use their voucher.

Council Response: The Council agrees with this comment. In enacting SB 329, the legislature revised a protected basis and gave it all of the same types of protections from discrimination as other protected bases, such as race and religion. At the time of enactment, the legislature was aware of the administrative and other burdens that may accompany the use of certain governmental housing programs, and therefore must have intended that formal acceptance of governmental sources of income but practical denial would be a violation of the statute.

Specifically, as regards SB 329, the Senate Judiciary Committee 2/15/2019 bill analysis included a substantial description of the expected consequences for landlords (pp. 9 – 10) entitled "Landlord requirements associated with housing vouchers." That discussion included the following: "Those requirements may include: applying to the local public housing authority to be put on the list of approved properties; attending an informational session regarding the landlord's rights and responsibilities as a participant in a housing voucher program; scheduling and passing a HUD Housing Quality Standards inspection to ensure the property meets minimum residential housing codes; and executing a lease that complies with the housing voucher program's lease requirements." (p. 9) The discussion stated: "…[T]his represents some additional administrative burdens for a landlord and the possibility of lost rental income if the process delays a tenant's move-in date." (p. 9) And, as regards housing quality inspections, the bill analysis states: "Thus, participating in subsidized housing programs does not impose any additional legal requirements about the conditions in which landlords must maintain the rental property, but it does subject them to greater accountability for doing so." (p. 10) The discussion also referenced potentially different lease terms, specifically the length of the lease and termination notice requirements: "In addition to the annual inspection requirement, the required lease terms for Section 8 tenancies also differ from ordinary private market tenancies in at least two respects. Leases that do not involve a voucher can be for any length. The initial lease term for a Section 8 lease generally must be for one year, though local housing authorities have discretion to permit shorter initial lease terms. Similarly, in the absence of a local ordinance to the contrary, California landlords can terminate a standard month-to-month tenancy without cause on 30 days' notice within the first year, and 60 days' notice after that. In the case of Section 8 tenancies, by contrast, the landlord must give 90 days' notice. (Civ. Code § 1954.535.)" (p. 10) Similar descriptions of the expected consequences for landlords are included in the following bill analyses of SB 329: Senate Rules Committee 5/17/19 bill analysis (pp. 4 – 5); Assembly Committee on Judiciary 6/25/19 bill analysis (pp. 6 – 7); Senate 5/17/19 Third Reading bill analysis (pp. 1 – 2); and Senate Rules Committee 9/6/19 Floor Analysis (pp. 4 – 5). In addition, similar descriptions are included in the bill analyses of SB 222, which primarily added veteran or military status to the protected bases under FEHA, but also defined HUD-VASH vouchers as a source of income protected from discrimination under FEHA. As regards SB 222, similar descriptions of "landlord requirements" that would be the consequence of bill passage are included in: Senate Judiciary Committee bill analysis prepared for the April 9, 2019 hearing on SB 222 (pp. 7 – 9); the 2/2/19 and 9/9/19 Senate Rules Committee Floor Analyses of SB 222 (pp. 4 – 5); Assembly Committee on Judiciary SB 222 bill analysis (pp. 6 – 7). Based upon these bill analyses, it is clear that in considering *both* SB 329 and SB 222 *both* houses of the legislature were well aware of the practical requirements for landlords in complying with this revised protected basis. Therefore, the legislature must have intended that landlords perform the expected tasks to enable a prospective or current tenant to use these housing programs, and that the refusal or failure to perform such tasks would constitute a violation of FEHA.

Other states with source of income discrimination provisions have come to a similar conclusion. Courts in Connecticut, Washington D.C., Maryland, and New Jersey have upheld laws prohibiting source of income discrimination against challenges alleging the laws posed administrative burdens on landlords, holding that such challenges would thwart the purposes of the statutes and read unstated exceptions into remedial statutes. *Commission on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 248, 250 (Conn. 1999) (permitting an exception

based on program requirements would thwart purpose and constitute an unstated exception to a remedial statute); *Feemster v. BSA Ltd Partnership*, 548 F.3d 1063, 1070-71 (D.C. Cir. 2008) (permitting owner to refuse vouchers based on program requirements would vitiate intended legal safeguards); *Montgomery County v. Glenmont Hills Assocs*. 936 A.2d 325, 340-41 (Md. App. 2007)("Most of the courts that have addressed an administrative burden defense have rejected it"); *Franklin Tower One v. N.M.*, 725 A.2d 1104, 1114 (N.J. S.C. 1997) (permitting a landlord to decline participation in the voucher program to avoid "bureaucracy" would leave no section 8 housing available).

Accordingly, the Council has revised proposed Subsection 12141(a) to include the following paragraphs, which are similar to those suggested by the comment:

> (a) 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 by taking an "adverse action" as defined in section 12005(B). For purposes of this section, examples of "adverse action" include:
>
> (1) A refusal to comply with the requirements of any public assistance, rental assistance, or housing subsidy program;
> (2) Applying inferior terms, conditions, or privileges in connection with the rental of a housing accommodation, including, but not limited to setting rates for rental or lease, establishing damage deposits or other financial conditions, or refusing or limiting access to common areas or facilities based upon an individual's source of income. This includes imposing less favorable rental terms as a condition of accepting a rental subsidy, rental assistance or a housing voucher;
> (3) A refusal to make repairs to a housing accommodation where an individual's source of income requires the housing accommodation to meet a governmental program's habitability standards;
> (4) Representing to any individual based upon the individual's source of income that a housing accommodation is unavailable for potential rental or rental when such housing accommodation is, in fact, available;
> (5) To make, print, or publish, or cause to be made, printed, or published through any medium, electronic, print, broadcast or other method, any notice, statement, sign, advertisement, application or contract, with regard to a housing accommodation offered for rent, including, but not limited to accepted forms of payment for the housing accommodation, which indicates a preference, limitation, or discrimination based on an individual's source of income; or
> (6) To otherwise make unavailable or deny a dwelling based on a person's source of income.

Comment: [T]he Council should also consider adding language to the regulation explicitly recognizing that source of income discrimination under FEHA prohibits a housing provider from refusing to accept a co-signer when necessary to meet income qualifications for a housing opportunity. Being able to have a co-signer to qualify for housing increases access to housing for people with limited incomes.

Council Response: The Council disagrees with the comment. Providing a guarantor or co-signer is an alternative way for landlords to ensure payment, but those relationships are not a source of income to the tenant. Rather, they provide an alternative recovery source to a landlord, which requires the landlord to pursue legal remedies against those individuals not just the tenants in the case of default. The particular legal relationship between landlords and rent guarantors or co-signers has the effect that payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement are not examples of "lawful, verifiable income" paid to a housing owner or landlord "on behalf of a tenant" under the Act. Accordingly, the Council deleted references to rent guarantor or co-signers from proposed Subsection 12141(c)(3).

Subsection 12141(b):

Comment: Subdivision (b) of this section has the same defect as section 12051(a). Namely, the exception is unnecessarily narrow. Gov. Code § 12955(p)(2) states "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." By adding a qualifier to the exception regarding the purpose for which the housing provider is using the information, the Council is limiting the statutory exception impermissibly.

Council Response: The Council agrees that the initially proposed language interprets the statutory exception too narrowly. The Council ultimately revised the section to provide: "For a person to make a written or oral inquiry concerning the level or source of income as specified in section 12141(b)," and provided specific examples of lawful inquiries in Subsection 12141(b). As regards the scope of this statutory exception from liability, Government Code Section 12955(p)(2) provides "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." The Act is a remedial statute which is intended to be interpreted liberally, and exceptions to liability under the Act should be interpreted narrowly. *Sisemore v. Master Financial* 151 Cal.App.4th 1386, 1415 (2007).

Comment: Section 12141(b) states that it is permissible for a landlord or their agent to make a written or oral inquiry about a prospective tenant's level or source of income for the purpose of verifying the same. Here, we suggest qualifying this by cross referencing Section 12143, which states that a landlord shall not consider an applicant's income related to financial eligibility beyond what the tenant would be required to pay.

Council Response: The Council disagrees with this comment. The limits on landlord's or the agent's inquiries about a prospective tenant's level or source of income under Subsection 12141(b) are distinct from the limits under Section 12143 regarding consideration whether the tenant or applicant meets financial or income eligibility standards where there is a government rent subsidy. Section 12143's limitations do not apply to all rentals. The comment provides no explanation or legal authority for linking the two issues.

§ 12142. Aggregate Income

Comment: This section states that a landlord must consider aggregate income of persons seeking to reside together, whether or not they are married. This section impermissibly expands Gov. Code § 12955(n)'s prohibition on using a "financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together."

Gov. Code § 12955(n) merely requires that landlords apply the same standards regarding aggregate income to married and unmarried persons. Section 12141 goes further by requiring that landlords consider aggregate income *in all circumstances*. There is no basis for this expansion in statute.

Commenters request that this section either be deleted in its entirety or made consistent with Gov. Code § 12955(n).

Council Response: To more closely track the statutory language, the Council ultimately revised the section to provide: "If a housing provider accounts for the aggregate income of any married persons residing together or proposing to reside together in applying a financial or income standard in the rental of housing, the housing provider must also do so for all unmarried cohabitants residing together or proposing to reside together."

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

Comment: This section seeks to implement Gov. Code 12955(o)'s requirement that "[i]n instances where there is a government rent subsidy, [it is prohibited for a landlord] to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant." This section largely tracks Gov. Code 12955(o)'s but adds a requirement that the landlord's financial or income standard be "solely based on the portion of the rent to be paid by the tenant."

This addition could be interpreted to expand the effect of Gov. Code § 12955(o) beyond what was intended by the Council or the Legislature. Specifically, this language could be interpreted to prohibit landlords from considering financial criteria that are not based on the amount of rent and which are applied equally to all applicants, regardless of source of income. For example, it is typical for landlords to require applicants to have both a minimum income (typically a multiplier applied to the monthly rent) and a track record of timely payments. Commenters agree that the minimum income policy must be based on the rent to be paid by the tenant – so in the case of a tenant using a housing voucher, the minimum income would be a multiple of the tenant portion of rent, not the portion paid by the government. However, Gov. Code § 12955(o) would not prohibit the landlord from also examining the applicant's payment history, as the landlord would for any other applicant – but the second sentence of section 12143 suggests that doing so is prohibited since the payment history inquiry is not "solely based on the portion of the rent to be paid by the tenant."

Commenters request that the second sentence of section 12143 be deleted.

Council Response: The Council agrees with the comment that the initially proposed subsection does not clearly state the landlords' duties under Section 12955(o) of the Act. Accordingly, the Council has deleted the second sentence of Section 12143. In addition, the Council has revised a part of the first sentence for clarity. It now reads: "…a housing provider is only permitted to consider the portion of the rent to be paid by the tenant when considering…" The Council agrees with the commenter that Section 12955(o) of the Act at least provides "that the minimum income policy must be based on the rent to be paid by the tenant – so in the case of a tenant using a housing voucher, the minimum income would be a multiple of the tenant portion of rent, not the portion paid by the government." In the Council's experience landlords often use financial and income standards that have multiple elements in addition to minimum income policies. The Council believe that Section 12955(o) of the Act may have some application beyond minimum incomes, but at this time is not proposing any additional regulation.

Article 14. Residential Real Estate-Related Practices

No Comments.

Article 18. Disability

§ 12176. Reasonable Accommodations and Reasonable Modifications.

Subsection 12176(b):

Comment: "Proposed amendments to Section 12176 add regulations regarding the duty to allow reasonable modifications. Section 12176(b) describes reasonable modification. The commentators recommend that the language in Section 12176(b) be edited to remove the clause "at the expense of the person with a disability or their designee," as that does not capture the significant exception of federally assisted housing, where the owner is required to cover the cost of the modification. However, this issue of who covers the expense is covered in section 12181(h), so the issue of expense need not be covered in defining "reasonable modification." Thus, per our recommendation, Section 12176(b) should read as follows: (b) A reasonable modification is a 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."

Council Response: The Council agrees with the comment. The proposed reasonable accommodation/modification regulations have been revised to more clearly separate the standards and obligations of housing accommodations generally from those where the housing is federally assisted or part of a government housing program. The proposed regulations accept this specific proposed change and have deleted language as suggested by the commentator.

These proposed changes comply with Government Code Section 12955.6, Construction with other laws, which provides: "Nothing in this part shall be construed to afford to the classes

protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100- 30) and its implementing regulations (24 C.F.R. 100.1 et seq.) [collectively "FHA"] ….. 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." See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com*. (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed. Therefore, the Council has reviewed applicable statutes, regulations, and guidance under the federal Fair Housing Act, carefully considered the relationship of the proposed regulations to the federal Fair Housing Act and ensured that these regulations provide equal or greater rights than the federal Fair Housing Act in a manner consistent with the statutory language. Specifically, minimum standards for granting reasonable modifications have been established under the federal Fair Housing Act, and these regulations meet or exceed the requirements of 42 U.S.C. section 3604(f)(3)(A), 24 C.F.R. section 100.203, revised November 24, 2008, HUD notice of Final FHAA Rule,54 Fed. Reg. 3232-01 et seq., and the Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Modifications Under the Fair Housing Act," Question 31 (March 5, 2008), https://www.hud.gov/sites/dfiles/FHEO/documents/reasonable_modifications_mar08.pdf] hereinafter: "Joint Statement on Reasonable Modifications").

Subsections 12176(f)(3) and (f)(8)(B):

Comment: "Subsections (3) and (8)(B) of Section 12176(f) limit when a person with a disability can request a reasonable modification, arguably in a manner that contravenes the statute. While a person with a disability may request a reasonable *accommodation* at any time, "including at or after trial, and in certain circumstances after eviction," a request for a reasonable *modification* can only be made "up to and including during the trial." We recognize that in many cases, it may be an undue financial and administrative burden to allow a modification right before a tenant vacates and therefore unreasonable. However, many modifications are simple, and may be necessary to allow the person with a disability full access to use and enjoyment of the property while they continue to occupy it. In some cases, a tenant may retain possession of their home for a lengthy period after an unlawful detainer trial, so modifications should be allowed if otherwise reasonable.

The following example illustrates why "up to and including during the trial" is unnecessarily restrictive: A tenant in an unlawful detainer loses at trial, but is granted a stay pending appeal of the trial court's decision. Immediately after trial, the tenant sustains an injury or illness that requires the use of grab bars in the bathroom. The tenant is willing to cover all costs of the modification, including the cost of removal. Read literally, the draft regulations indicate that the tenant would not be entitled to this modification because the request was made after trial. If the draft regulations state that the modifications, like accommodation, may be made "at or after trial, and in certain circumstances after eviction," in this circumstance, the tenant would likely be permitted to install the needed grab bars and safely use the bathroom for the remainder of their occupancy of the premises.

The commentators suggested textual changes to these provisions are as follows (in bold):

(3)A request for a reasonable accommodation or modification need not be made in a particular manner or at a particular time. An individual makes a reasonable accommodation or modification request at the time they request orally or in writing, or through a representative, an exception, change, or adjustment to a practice, or a modification to an existing housing accommodation, because of a disability, regardless of whether the phrase "reasonable accommodation" or "reasonable modification" is used as part of the request. A request for a reasonable accommodation **or modification** may be made at any time, including during the inquiry or application process, while seeking or enjoying a housing opportunity, during the tenancy or occupancy of an accommodation, during litigation, or at or after trial **and after judgment**. ~~A request for a reasonable modification may be made during the inquiry or application process, while seeking or enjoying a housing opportunity, during the tenancy or occupancy of a housing accommodation, or during litigation.,~~

(8)(B)[*in relevant part*] A request for a reasonable accommodation in unlawful detainer actions can be made at any time during the eviction process, including at or after trial, and in certain circumstances after eviction. A request for a reasonable modification in unlawful detainer actions can be made at any time during the eviction process **including at or after trial, and in certain circumstances after judgment**. A reasonable accommodation request that is made during a pending unlawful detainer action is subject to the same regulations that government reasonable accommodation requests at any other time."

Council Response: The Council agrees with the comment. The commentators have correctly pointed out there are circumstances where modifications are appropriate after judgment. The Council has modified proposed Subsection 12176(f)(3) to be clearer that requests for accommodations and modifications are both appropriate and must be considered at any time, including after judgment in some circumstances. The Council has also added an example to the proposed regulations in Subsection 12176(f)(8)(B)(iv), similar to that suggested by the commentators, to identify at least one circumstance where a modification could be reasonable after judgment. See Joint Statement on Reasonable Modifications, Question/Answer 15 (reasonable modification requests not required to be made at a particular time). As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6.

§ 12177. The Interactive Process

No Comments.

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

Subsection 12178(e):

Comment: "Section 12178(e) is an existing regulation that describes the categories of information about which a person considering a request for an accommodation may not seek

information. This existing regulation should be amended to include modification as well as accommodation, i.e.:
(e)A person considering a request for an accommodation **or modification** may not seek information about: [subsections omitted].”

Council Response: The Council agrees with the comment. Reasonable modifications should have been included in this section, because the same standards apply regarding information that should not be considered. The proposed revisions make the recommended insertion. See Joint Statement on Reasonable Modifications, Question/Answer 6 (“In most cases, an individual’s medical records or detailed information about the nature of a person’s disability is not necessary for this inquiry,” and describing limits on and methods of obtaining additional information”). As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6.

§ 12179. Denial of Reasonable Accommodation or Reasonable Modification.

Subsection 12179(c)(1):

Comment: “Section 12179(c)(1), describing denial of modification where the requestor refuses to bear responsibility for payment unless the owner is otherwise obligated to pay for the modification, appears to mistakenly cross-reference Section 12181(e); it should instead reference Section 12181(h).”

Council Response: The Council agrees with the comment. The cross-reference is incorrect, and the Council proposes to revise the cross-reference accordingly.

Comment: “[T]he Council should elaborate on the obligation of housing providers receiving federal financial assistance to pay for modifications.”

Council Response: The Council agrees with the comment. Proposed revisions to clarify the obligation of housing providers receiving federal financial assistance to pay for modifications have been made to Subsections 12179(c)(1), (c)(4)(ii), (d)(1), (d)(2), (d)(5), 12180(a)(1) and 12181(h) and (n)(3). See Joint Statement on Reasonable Modifications, Questions/Answers 12 and 31. As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6.

Subsection 12179(e):

Comment: “Section 12179(e) is an existing regulation that describes “fundamental alteration,” and the proposed amendment adds “or modification” after accommodation in the first sentence. Reference to modification is missing in the second sentence; the following change is therefore necessary to the text (in bold): ‘A fundamental alteration under subsection 12179(a)(3) is a requested accommodation <u>or modification</u> that would change the essential nature of the services or operations of the person being asked to provide the accommodation **or modification**. For

example, if a landlord does not normally provide shopping for residents, a request to shop for an individual with a disability could constitute a fundamental alteration.'"

Council Response: The Council agrees with the comment. Reasonable modifications should have been included in this section because the same standards apply regarding fundamental alteration. The proposed revisions make the recommended insertion.

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

No Comments.

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

Subsection 12181(c):

Comment: "Among the requirements of subdivision (c) is a prohibition on owners insisting that modifications be "accomplished by a particular contractor or builder" and a statement that "modifications may be accomplished by any party reasonably able to complete the work in a competent manner." While these statements are generally correct, an owner is permitted to insist that the contractor or builder be licensed where required by California law. *See* Bus. & Prof. Code § 7027.2 and 7028. Being licensed where required by law is one factor in determining whether a party is "competent," but the use of unlicensed contractors is one of the most common issues individuals face when dealing with reasonable modification requests. The commentators believe it would be very helpful for all parties if the regulations clarified that a landlord may require the work to be performed by a licensed contractor where required by law. The commentators request the following amendment: 'Owners shall not insist that modifications be accomplished by a particular contractor or builder <u>but may require that the modifications be made by a licensed contractor where required by law.'"</u>

Council Response: The Council disagrees with the comment. Whether the work must be performed by a contractor, or a licensed contractor, is a fact specific inquiry that is encompassed in the concept "reasonably able to complete the work in a competent manner." There is no need to impose further requirements.

Subsection 12181(h):

Comment: "Section 12181 (h) should be amended to clarify the obligation of owners to cover the cost of reasonable modifications when the housing project is part of a program or activity of government entity that receives federal financial assistance. The following change is therefore necessary to the text (in bold): (h)In some instances, owners may also be subject to contractual obligations, or federal or state laws or regulations that require the owner to install and pay for the reasonable modifications, such as when the owner is a government entity, **part of a government entity's program to provide housing,** or the recipient of federal or state funding for affordable

housing. In those instances, requests for reasonable modifications shall be handled as requests for a reasonable accommodation."

Council Response: The Council agrees with the comment. The proposed regulations include the recommended addition. See Joint Statement on Reasonable Modifications, Question/Answer 31. As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6.

Subsection 12181(i):

Comment: "Section 12181(i) provides several examples of reasonable modification. Because this obligation under the Act is often misunderstood, we suggest the following additional examples:

> '(4) A person who uses a wheelchair and who lives in federally subsidized housing needs a roll-in shower in order to bathe independently. Under Section 504 of the Rehabilitation Act of 1973, the housing provider is obligated to pay for and install the roll-in shower as a reasonable modification unless doing so was an undue financial and administrative burden.
>
> (5) A person with a mobility disability requires the use of grab bars in their bathroom. If the 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 and the Fair Employment and Housing Act.'"

Council Response: The Council agrees that additional examples in these situations are useful. Proposed revisions to clarify the obligation of housing providers receiving federal financial assistance to pay for modifications have been made to Subsections 12179(c)(1), (c)(4)(ii), (d)(1), (d)(2), (d)(5), 12180(a)(1) and 12181(h) and (n)(3) and an example added in Subsection 12181(h). Proposed revisions to clarify the obligation of housing providers to pay for modifications that were required under the design and construction requirements of the FHA and FEHA Act have been made to Subsections 12179(d)(6) and an example added at Section 12179(d)(6)(ii). See Joint Statement on Reasonable Modifications, Questions/Answers 12, 30 and example 3, and 31 and example 2. As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6.

PUBLIC HEARING COMMENTS MADE SEPTEMBER 25, 2020 [Government Code Section 11346.9(a)(3)].

Janet Powers of Fiore, Racobs & Powers, Whitney Prout of the California Apartment Association, and Matthew Warren of Western Center on Law and Poverty submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE DECEMBER 4, 2020 [Government Code Section 11346.9(a)(3)].

Whitney Prout of the California Apartment Association submitted written comments that included all of her oral comments, which are summarized and responded to above.

COMMENTS RECEIVED DURING THE FIRST 15 DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)] AND ADDITIONAL REVISIONS

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

General Comments

Comment: Enforcement of the Housing Regulations is extremely important and priority. It just like to make the high quality dress. If we have good quality material, good designer, good cutting, good tailor, but without a sewing machine to put all together, all become useless.

The regulations/rules are established and modified. However, if no enforcement to violations by residence manager, by government agencies, the laws become useless.

Therefore, training about the Housing Regulations and enforcement for HUD employees are important and necessary, especially about intentional discrimination and compliance with the ADA and reasonable accommodation a because the baby boomers are aging and retiring.

I will send you in separate emails for the high-lighted areas in the Text of modification related to the intentional discrimination to me by the residence manager and the DFEH's new resigned investigator in my appeal case.

Council Response: This comment does not need to be responded to because it does not specify any particular provision or make a particular request for a change.

Subsection 12042(c):

Comment: The definition of direct evidence of intentional discrimination does not seem to encompass the use of a racial epithet while engaging in the prohibited conduct. For example, it sometimes happens that a landlord uses a racial slur against a tenant who requests repairs, but the failure to repair is not expressly conditioned on the tenant's protected class. In such a case, the discriminatory intent is clear, but section 12042(c) fails to include this conduct in its definition of direct evidence of discriminatory intent, making the definition incomplete. It should be amended accordingly.

Council Response: The Council agrees with the comment and has added a new subsection, Section 12042(c)(2) providing: "Direct evidence also includes an express bias stated orally or in writing that is related to a protected basis."

Subsection 12042(d) [renumbered as 12042(f)]:

Comment: Section 12042(d) should make clear that a respondent can defend against a facially discriminatory policy claim of intentional discrimination only if (1) it is the least restrictive means of achieving the identified purpose and (2) either condition (A) or condition (B) is met. Laying out the elements of this defense by listing the "least restrictive" element first clarifies at the outset that this element is required in addition to either condition (A) or (B).

Council Response: The Council disagrees with the comment. The proposed language of Section 12042(d) already makes clear that the test is conjunctive, i.e. that a respondent can defend against a facially discriminatory policy claim of intentional discrimination only if (1) either condition (A) or condition (B) is met and (2) it is the least restrictive means of achieving the identified purpose. In addition, the current proposed language promotes clarity by stating the requirement of the required purpose of a policy before it states the means by which that purpose must be effectuated in order to qualify for the defense (i.e. be the least restrictive means of achieving the purpose). The proposed revision is unnecessary and would not add any clarity.

Subsection 12042(g) [renumbered as 12042(h)]:

Comment: Section 12042(g) should be revised to make clear that there are two ways of proving intentional discrimination using indirect evidence: (1) by applying the factors identified in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) ("Arlington Heights") and (2) by applying the burden shifting scheme established under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ("McDonnell Douglas"). Section 12042(g) should also make clear that the McDonnell Douglas burden-shifting framework does not apply to the method of proof required under Arlington Heights.

Council Response: The Council partially agrees and partially disagrees with the comment. The Council agrees that the factors identified in *Arlington Heights* can be relevant to proving intentional discrimination using indirect evidence, either as part of a prima facie case or to rebut an affirmative defense. Therefore, the Council has added proposed new Subsection 12042(i) which articulates the factors identified in *Arlington Heights*. In drafting this new Subsection, the Council moved the language "evidence that the respondent's treatment of others who are not members of the relevant protected class is different than treatment of the complainant" from Subsection 12042(g)(3) to the new Subsection 12042(i). The Council disagrees with this comment to the degree that it is suggesting that the *Arlington Heights* case provides a different method of proving intentional discrimination using direct evidence that is not a burden shifting scheme. The court in *Arlington Heights* was applying a burden shifting framework similar to what is provided in Section 12042(g) (ultimately renumbered as Section 12042(j).

Subsection 12042(g)(3) [ultimately renumbered as Section 12042(j)(3)]):

Additional Revisions: The Council proposes to revise Section 12042(g)(3) (ultimately renumbered as Section 12042(j)(3)) by adding the underlined text: **"**If the respondent meets the burden under section 12042(j)(2), the complainant must show that the non-discriminatory reason asserted by the respondent is pretextual, ~~or~~ false, or not the only reason. For example, persuasive

evidence of a discriminatory reason in addition to, or other than, the non-discriminatory reason asserted by the respondent would defeat or bar the defense…." These revisions are necessary to ensure that the provision accurately states the law.

§ 12050. Discriminatory Practices Regarding Notices, Statements, and Advertisements.

Subsection 12050(a):

Additional Revisions: The Council proposes to revise Section 12050(a) by adding the underlined text to read: "Except as specified in section 12051, 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 housing accommodation which indicates any preference, limitation or discrimination, or an intention to make that preference, limitation or discrimination, because of any protected basis under the Act. These revisions are necessary to ensure that the provision accurately states the law.

Subsection 12050(b)(2):

Additional Revisions: The Council proposes to revise Section 12050(b)(2) by adding the underlined text and deleting the strikethrough text to read: "the statement was made with respect to the sale or rental of a housing accommodation~~; and~~, or with respect to the housing accommodations of current or former homeowners or renters; and…" This revision is necessary to ensure that the provision accurately states the law.

Subsection 12050(g)(A):

Additional Revisions: The Council proposes to delete the "u" before the word "is" in this subsection. This is a non-substantive change.

Subsection 12050(g)(5):

Additional Revisions: The Council proposes to revise Section12050(g)(5) by adding the underlined text to read: "Adding or including language in any declaration, governing document, deed, lease, rental policy, tenant policy or rule, homeowner association policy rule,…"

The Council also proposes to revise Section12050(g)(5) by adding the underlined text and deleting the strikethrough text to read: "…or similar document, that expresses a preference, limitation, discrimination or prohibition based on any protected basis under the Act ~~protective class~~, including any conduct in violation of section 12956.1 of the Act regarding discriminatory restrictive covenants."

These revisions are necessary to ensure that the provision accurately states the law.

§ 12051. Exceptions

Section 12051(a):

Additional Revisions: The Council proposes to revise this subsection to read: "For a person to make a written or oral inquiry concerning the level or source of income as specified in section 12141(b)." This revision is necessary to create consistency between this section and revised Section 12141(b).

Article 12. Harassment and Retaliation

No comments.

Article 13. Consideration of Income

§ 12140. Definitions

Subsection 12140(b):

Comment: This section defines "source of income" and "lawful, verifiable income." Commenters thank the Council for revising this section to make clear that income must be lawful and verifiable and to remove the reference to guarantors and co-signors as sources of income. The modified version of this section is a substantial improvement over the previous version. However, one additional change would remove any remaining ambiguity.
Specifically, subdivision (b) defines "lawful, verifiable income" to include a long list of various forms of payments, including payments from employers and payments from parents, guardians, or other third parties. As discussed in commenters' previous comments, while many of the items listed may be lawful, verifiable income, the list implies that such payments are always lawful, verifiable income, which is not the case. To make clear that the list of types of income is merely illustrative, commenters request that the section be revised to read as follows:
"'Lawful, verifiable income' may include~~s~~[sic]:"
This revision will ensure that the section still serves the purpose of showing that many sources of income may be lawful and verifiable, while still making clear that the determination of whether a source of income is, in fact, lawful and verifiable occurs on a case-by-case basis.

Council Response: The Council agrees with the comment that any specific source of income must meet the "lawful" and "verifiable" requirements of Section 12140(a). In the Council's expertise, the sources of income listed are lawful. To make it clear that any particular source of income must meet both parts of the definition, the Council has revised the proposed Section 12140(b) as follows: "Provided it meets the requirements of §12040(a)(2), 'lawful, verifiable income' includes:…"

Subsection 12140(b)(2):

Additional Revisions: The Council proposes to substitute "family members" for the word "parents" in this subsection. This revision is necessary to improve clarity.

Subsection 12140(b)(3):

Additional Revisions: The Council proposes to change the phrase "…including benefits for youth up to age 21," to "age 26." This revision is necessary to ensure that the provision accurately states the law.

§ 12141. Source of Income Discrimination in Rental Housing

Subsection 12141(a):

Additional Revisions: The Council proposes to add two subsections to provide additional examples of "adverse action" in the source of income discrimination in rental housing context. Specifically, the Council proposes to add the following text: "(1) A refusal to negotiate in good faith with the provider of any public assistance, rental assistance, or housing subsidy program; (2) Imposing different procedures for the consideration of any public assistance, rental assistance, or housing subsidy program as payment for rent, unless in response to a request for a reasonable accommodation;" These revisions are necessary to provide more clarity and completeness to the identification of possible adverse actions.

Subsection 12141(b):

Comment: The proposed change to 12141(b) deletes "for the purpose of verifying the level or source of income stated in an application by a prospective tenant" and adds "unless such inquiry would violate section 12141." This change makes the exception less clear, since the section now reads, essentially, that the inquiry is not a violation unless it is a violation. The deleted language provides clarity about when and for what purpose such inquiries can be made without their being unlawful discrimination.

Council Response: The Council agrees with the comment. In response to earlier comments, the Council revised the proposed regulation to read: "For a person to make a written or oral inquiry concerning the level or source of income unless such inquiry would violate section 12141." The Council believed this revision would more clearly and accurately interpret the scope of the statutory exception because the exception does not apply to intentional discrimination. However, upon further consideration, the language adding "unless such inquiry would violate section 12141" was not sufficiently clear or legally accurate. The Council ultimately revised Section 12141(b) to clarify the scope of the exception from liability by articulating several lawful specific purposes and a catchall provision for landlords or their agents to may make written or oral inquiries concerning the level or source of income without incurring liability for source of income discrimination. The revised section deletes the phrase "unless such inquiry would violate section 12141," and provides: "(b) 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: (1) For the purpose of verifying the level or source of income stated in an application by a prospective tenant; (2) For the purpose of verifying the level or source of income to confirm eligibility for subsidized housing; (3) For the purpose of verifying the level or source of income to confirm eligibility for rental assistance or other tenancy protections, including those related to a public health emergency or natural disaster, and only if verification of such income is legally required to qualify for the rental assistance or tenancy protections; or (4) If required by law." As regards the legal basis for the

scope of this statutory exception from liability, Gov. Code § 12955(p)(2) provides "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." The Act is a remedial statute which is interpreted liberally. *Sisemore v. Master Financial* 151 Cal.App.4th 1386, 1415 (2007). Therefore, exceptions to liability under the Act should be interpreted narrowly. *Id*. Additionally, for purposes of consistency, the Council revised section 12051(a) to read: "[f]or a person to make a written or oral inquiry concerning the level or source of income as specified in section 12141(b)."

§ 12142. Aggregate Income.

Comment: This section states that a landlord must consider aggregate income of persons seeking to reside together, whether or not they are married. Commenters raised concern with this provision in its previous comment letter because this section expands on Gov. Code § 12955(n), which merely requires that landlords apply the same standards regarding aggregate income to married and unmarried persons. [Commenter then quoted Gov. Code § 12955(n).]

To create a new standard that requires landlords to always allow all cohabitants to aggregate income, rather than simply prohibiting discrimination against unmarried persons runs afoul of the most basic rule of statutory interpretation: to give meaning to the plain language of the statute. Case law is very clear, the language of the words of the statute should be given their ordinary, everyday meaning with significance given to every word. Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238; Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230. A construction making some words surplusage is to be avoided. Moyer at 230. Words in a statute must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Id. If the meaning is without ambiguity, doubt, or uncertainty, then the language controls as there is nothing to interpret or construe. Halbert's Lumber, Inc. at 1239. If the plain language of the statute is unclear, only then should the next step of looking to legislative history be taken. Id.

To adopt Section 12142 in its current form would be to disregard these long-standing rules of statutory interpretation in multiple ways. First, it would put the cart before the horse by relying on legislative history over the text of the statute itself. Second, it would render the entire second half of the sentence surplusage. If the Legislature intended that the landlord be required to always consider the aggregate income of persons residing together, it could have simply said "[t]o use a financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together or proposing to reside together," there would be no need to include "on the same basis as the aggregate income of married persons residing together or proposing to reside together."
Third, to interpret Gov. Code § 12955(n) to require landlords to always consider the aggregate income of persons residing together ignores the context in which Gov. Code § 12955(n) appears. Namely that Gov. Code § 12955(n) is part of an anti-discrimination law. To give Gov. Code § 12955(n) the construction proposed in the draft regulations would untether the purpose of the requirement from any antidiscriminatory purpose. Instead, it would simply be a housing affordability measure. By contrast, interpreting the statute consistent with the plain language of

the statute – i.e., ensuring that married and unmarried persons are subject to the same standards – does serve an anti-discriminatory purpose.

Disregarding these rules of statutory construction puts Section 12142 in direct conflict with the Administrative Procedure Act's consistency requirements. Commenters request that this section either be deleted in its entirety or made consistent with Gov. Code § 12955(n).

Council Response: The Council agrees with the comment that the prior version of the section was not consistent with the statute and has revise the proposed regulation to read: "If a housing provider accounts for the aggregate income of any married persons residing together or proposing to reside together in applying a financial or income standard in the rental of housing, the housing provider must also do so for all unmarried cohabitants residing together or proposing to reside together."

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

No comments.

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

No Comments.

Article 18. Disability

General Comments

Comment: Article 18 should make clear that individuals associated with a person with a disability are protected from discrimination on the basis of that association. We suggest the following hypothetical to illustrate this protection:
Jane, a person who does not have a disability, resides in a residential motel. Her father, a person with cognitive and physical disabilities has a dog that provides him with companionship. When he visits Jane at the residential motel, he brings the dog over and sometimes spends the night. One day, Jane's landlord sees a dog coming out of her unit, and he serves her with a three-day notice to perform covenant or quit and demands that Jane remove the dog from the premises. Jane requests a reasonable accommodation to rescind the notice and waive the policy of no pets, since it would mean that her father would no longer be allowed to visit or stay with her at the residential hotel. The owner must consider the request under these regulations, including whether the requested accommodation would result in an undue financial and administrative burden as defined in section 12179, and engage in the interactive process under section 12177 as needed.

Council Response: While the Council agrees with the comment about associational disability, the Council declines to add another example. This issue is already addressed in existing hypothetical in Section 12180(c)(5).

Section 12179. Denial of Reasonable Accommodation or Reasonable Modification

Subsection 12179(c)(4):

Comment: This section requires a commitment by the requestor to restore internal modifications to the condition that existed before the modification (reasonable wear and tear excepted) if such a restoration is reasonable. It is unclear what makes a restoration reasonable. Furthermore, examples provided under subsequent sections suggest that a tenant does not have to restore the property if the modification does not affect the owner's or subsequent tenant's use or enjoyment of the property. (See, e.g., §§12180(b)(2) & 12181(o)(1)-(2).) At minimum, section 12179(c)(4) should be amended to expressly state that the owner/subsequent tenant's use and enjoyment is at least one factor in determining whether the restoration of a proposed modification is reasonable for purposes of this section.

Council Response: The Council concurs and has modified the draft regulation to provide more specificity about when restoration may or may not be required.

Subsection 12179(d):

Comment: The proposed change to section 12179(d) reads in relevant part, "[t]he determination of whether a modification poses an undue financial or administrative burden . . ." "Or" should be replaced with "and", consistent with section 12176(c)'s and 12179(b)'s language regarding undue burdens in the context of reasonable accommodations.

Council Response: The Council concurs and has modified the draft regulation accordingly.

Comment: The cross-reference for reasonable modifications in this section should be to section 12179(c)(2)(i), not section 12179(b)(1)-(2).

Council Response: The Council concurs. The correct cross reference is section 12179(c)(2)(i) for undue burden as a defense to a reasonable modification defense, and the proposed regulation has been modified accordingly.

Comment: The hypothetical at 12179(d)(6)(i) should be clarified to avoid confusion. It says "assuming the modification is reasonable" while also acknowledging that the landlord is responsible for repairing the handrail because the landlord has a duty to maintain the premises as safe. The modification is therefore by definition reasonable because failing repair the broken handrail also violates the landlord's duty to provide habitable premises. We would therefore ask for this hypothetical to be revised.

Council Response: The Council concurs and has modified the draft regulation accordingly.

Comment: We suggest changing the hypothetical at 12179(d)(6)(iii) from "Han would be responsible for paying for the cost of the reasonable modifications," to "The owner can require Han to pay to widen the doors as a condition of granting the reasonable modification." The owner can require Han to pay but does not have to do so.

Council Response: The Council concurs and has modified the draft regulation accordingly.

PUBLIC HEARING COMMENTS MADE MARCH 19, 2021 [Government Code Section 11346.9(a)(3)].

Comment: Paul Dumont commented that the use of the words "available only to persons of one sex" in section 12051 may raise gender identity concerns.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code Section 11346.9(a)(3).

Comment: Connie Arnold commented that many newly constructed units do not have accessible roll-in showers and that this is very discriminatory to the disabled community because disabled tenants cannot afford the construction to make the showers accessible.

Council Response: We agree that there is a need for accessible roll-in showers, however this is not within the scope of these regulations and is handled generally by the State Architect and the Department of Housing and Community Development (HCD), not DFEH.

Comment: Whitney Prout of the California Apartment Association, Tina Rosales with Western Center on Law and Poverty, Matthew Oglander of the San Francisco Human Rights Commission, and Karim Drissi of the California Association of Realtors, submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

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

No Comments.

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

No Comments.

COMMENTS RECEIVED DURING THE SECOND 15 DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)] AND ADDITIONAL REVISIONS

Article 1. General Matters

§ 12005. Definitions

Subsection 12005(b)(1)(A):

Comment: In order to incorporate SB 91's protections against source of income discrimination, the definitions section should make clear that a housing provider's refusal to accept rental assistance payments constitutes an adverse action based on source of income. Specifically,

Section 12005(b)(1)(A) should be amended by adding "refusing to accept rental assistance payments."

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12005(b)(1)(A):

Comment: Furthermore, two clarifying changes should be made regarding the housing rights of survivors of domestic and sexual violence. First, § 12005 (b)(1)(A) should add the following edit: "...unlawfully locking an individual out of, or otherwise unlawfully restricting, access to all or part of the premises…" Having "unlawfully" modify "restricting" ensures that owners are able to, through appropriate legal measures, restrict a perpetrator of domestic or sexual violence from accessing the premises where a survivor resides.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12005(o)(2):

Comment: Second, § 12005 (o)(2) should be amended to read "shelters for individuals surviving domestic violence, sexual violence, human trafficking, or other forms of gender-based or interpersonal violence" to be more inclusive of the types of accommodations that serve survivors of various types of violence, not just domestic violence.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Article 3. Intentional Discrimination

§ 12040. Definitions

No Comments.

§ 12041. Intentional Discrimination Practices

No Comments.

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

Subsection 12042(f):

Comment: This seems very broad and is placing an unrealistically high burden on the

respondent. Why the "least restrictive means"? How can that ever be shown by the respondent? This is an unfair burden that is setting the respondent up to fail since it would be unlikely to ever show a policy is the "least restrictive." This seems unreasonable and designed to make it impossible for the respondent to avoid liability.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3). However, the Council notes its explanation above regarding the affirmative defense of a facially discriminatory policy.

Comment: We suggest minor revisions to Section 12042(f) to ensure that it clearly articulates the available affirmative defenses:

> (f) To avoid liability for a facially discriminatory policy, a respondent must show that the policy fulfills the standards set forth in both subsection (1) and subsection (2), below:
>
> (1) The policy either:
>
> (A) Objectively benefits the ~~a~~ protected class; or
> (B) Responds to legitimate safety concerns raised by the individuals affected by the facially discriminatory policy, rather than being based on stereotypes about them;
>
> and (2) The policy is the least restrictive means of achieving theidentified purpose of the policy.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsections 12042(h) and 12042(i):

Comment: We further suggest that Section 12042(h) and 12042(i) be revised to more accurately encompass the types of evidence that can be used to prove discrimination under the indirect or circumstantial method of proof.

A plaintiff's burden to establish a prima facie case is "'not onerous.'" *Guz v. BechtelNat'l, Inc*., 24 Cal. 4th 317, 355, 100 Cal. Rptr. 2d 352, 379, 8 P.3d 1089, 1113 (2000) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1094 (1981). A plaintiff's burden is to show some circumstance that suggests a discriminatory motive. *See Burdine*, 450 U.S. at 253; *Dep't of Fair Emp't & Hous. v. Superior Court*, 99 Cal. App. 4th 896, 902, 121 Cal. Rptr. 2d 615, 618 (2002) (holding that a plaintiff must "provide other circumstantial evidence of discriminatory motive in refusing her the housing accommodation.") (citing *Gamble v. City of Escondido*,104 F.3d 300, 304-305 (9th Cir. 1997); *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir. 2009) (requiring "the existence of

circumstantial evidence which creates an inference of discrimination.")

The elements of a prima facie case vary depending upon the facts of the particular case. *Gilligan v. Jamco Development Corp*., 108 F.3d 246, 250 (9th Cir. 1997) (citing *Ring v. First Interstate Mortg., Inc*., 984 F.2d 924, 927 (8th Cir. 1993). In fair housing cases, typical circumstantial evidence of discriminatory motive includes that housing remained available after the plaintiff attempted to obtain the housing or, as set forth in the draft regulation, the defendant rented or sold the housing to a person not in the plaintiff's protected class. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007) (housing remained available); *Lindsay*, 578 F.3d at 415 (same); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir. 2003) (housing opportunity made available to person outside protected class); *Dep't of Fair Emp't & Hous*., 99 Cal. App. 4th at 902 (same).

Section 12042(i) sets forth a list of evidence that may be relevant to establishing a prima facie case or rebutting an affirmative defense. First, we suggest that the list of types of evidence be amended to include "evidence that the housing opportunity remained available." *See Cmty. House, Inc*., 490 F.3d at 1053 (9th Cir. 2007); *Lindsay*, 578 F.3d at 415. Second, we recommend that the list of types of evidence include a "catch-all" phrase such as "or some other circumstantial evidence that reflects a motivating factor." *See Burdine*, 450 U.S. at 253; *Dep't of Fair Emp't & Hous*., 99 Cal. App. 4th at 902. The catch-all phrase reflects the case law holding that the elements of a prima facie case vary according to the facts of the case. *Gilligan*, 108 F.3d at 250.

Council Response: The Council partially agrees and partially disagrees with the comment. The Council will revise Section 12042(i) to include the following language: "evidence that the housing opportunity remained available or the unit was rented or sold to a person who is not a member of the complainant's protected class." The Council declines to add a "catch-all" phrase at the end of Section 12042(i) because it is unnecessary since the provision is a non-exhaustive list that is introduced by the word "includes." The comment does not propose a specific revision to Section 12042(h), so the Council will not revise that section.

Subsection 12042(j):

Comment: Regarding the proposed text of the regulation: "Evidence that the reason a respondent proffers for a defense under this section did not exist or was not known to the respondent at the time of the alleged violation is relevant to show that the proffered reason is false."

This is unreasonable. Many respondents act in good faith and without benefit of legal counsel. Once legal counsel is involved in the complaint process, counsel may assert legal defenses that the respondent could not articulate previously or lacked the knowledge to assert. Why is it necessary to include this? It seems skewed to create a presumption of falsity when that may not factually be the case. Seems like this regulation is trying to infer that the respondent will always be lying if they didn't initially know about a defense.

Council Response: This comment is not responsive to the text noticed for the second 15-

day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12042(j)(1)(C):

Comment: Section 12042(j)(1) describes the elements of the complainant's burden of proof in cases involving indirect evidence of discrimination. As drafted, § 12042(j)(1)(C) requires a showing that "[t]he member's or members' status as protected class members was or is a motivating factor for the adverse action." We believe that this element as drafted could be misconstrued to require direct evidence of a motivating factor or could be interpreted as requiring a more stringent showing than necessary under the indirect method of proof. *See Guz*, 24 Cal. 4th at 355 (proof of a prima facie case is not onerous). We therefore suggest that § 12042(j)(1)(C) be revised to require "some circumstantial evidence that reflects the member's or the members' status was or is a motivating factor for the adverse action."

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Article 6. Discriminatory Notices, Statements, and Advertisements

§ 12050. Discriminatory Practices Regarding Notices, Statements, and Advertisements

Subsection 12050(c):

Comment: We request that Section 12050(c) be amended to also state that "proof of adverse action or economic harm is not required to establish liability under section 12050(a)." This change would clarify that establishing liability for a discriminatory statement, notice, or advertisement does not depend on also proving that an adverse action occurred or that the complainant suffered monetary damages. This clarification is warranted because DFEH has refused to accept complaints in cases where there was clear evidence of a discriminatory statement in violation of the Act, on the basis that the complainant could not also prove that an adverse action occurred and caused monetary damages. Advocates report that conversations with DFEH staff have often indicated confusion between the elements required to prove a discriminatory statement claim and the elements of a claim based on an adverse action (such as refusal to rent). Nothing in the language of the statute requires proof of adverse action or economic harm as an element of a violation of Government Code Section 12955(c). And the statutory scheme demonstrates that liability for a discriminatory notice, statement, or advertisement may exist independent of liability for an adverse action or other violation of the Act, as reflected in sections 12050(f) and 12052 of these regulations.

This clarification would help to emphasize the independent viability of claims for discriminatory notices, statements, or advertisements, which are often overlooked as complainants and enforcement agencies focus on claims of disparate treatment or intentional discrimination. See Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187,

315 (2001) (noting that often, "litigants and judges ignore the independent significance of discriminatory statements in fair housing cases,") and at 263 (noting that "inattentiveness to the independent and important role Congress envisioned for [the provision of the federal fair housing act prohibiting discriminatory statements] undermines the proper enforcement of the FHA and is no doubt one of the reasons the ultimate goals of this statute remain unrealized").

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: We recommend adding another subsection to Section 12050 to state that

1) neither psychological nor economic harm must be demonstrated to prove that a discriminatory notice, statement, or advertisement was unlawful and that
2) evidence of psychological or economic harm is not required to establish liabilityfor discriminatory notices/statements/advertisements, but such evidence may be relevant in determining the amount of damages to which an aggrieved person may be entitled as the result of a discriminatory notice, statement, or advertisement.

This new subsection would be comparable to the language and purpose of Section 12120(a)(3)(ii), which clarifies the role that evidence of certain kinds of harm may play in hostile environment harassment cases.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: We also suggest adding another subsection to Section 12050 to state that:

> Remedies which may be awarded to an aggrieved person in cases of unlawful discriminatory statements, notices, or advertisements include, but are not limited to, injunctive relief, compensatory damages for psychological harm or monetary costs, nominal damages, punitive damages, civil penalties, and/or attorney's fees.

This clarification is warranted because DFEH has declined to investigate complaints involving clear evidence of unlawful discriminatory statements, where it did not appear that the complainants could prove they were entitled to recover significant compensatory damages.

Apart from its compensatory function, FEHA aims "to provide effective remedies that will ... prevent and deter" future violations." Gov. Code § 12920.5. This forward-looking goal of preventing and deterring discrimination goes beyond merely compensating an aggrieved person for the effects of wrongs done in an individual case. For this reason, remedies under FEHA are not limited to monetary compensation for past harm; other remedies are appropriate and necessary to deter future discriminatory notices, statements, or advertisements. This new subsection would clarify that several types of remedies can be appropriate in cases involving discriminatory notices, statements, or advertisements. It is important to clarify the range of

potential remedies for discriminatory statements because emotional or psychological harm can be difficult to quantify, and economic harm may not be evident in all discriminatory-statement cases. The availability of other remedies is therefore crucial to advance the goals of FEHA. See Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29Fordham Urb. L.J. 187, 249-251 (2001) (noting that the goals of the federal Fair Housing Act prohibition against discriminatory notices, statements, and advertisements include broadeninghousing markets, protecting against psychic injury, and educating the public).

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12050(g):

Comment: We suggest amending Section 12050(g) to reflect that the use of racial slurs, or of other derogatory language that references any protected basis under the Act or is directed to certain individuals because of their actual or perceived characteristics that are protected under the Act, also constitutes a discriminatory statement - even if it is not accompanied by a specific statement that housing is not available because of that protected basis. For example, using a racial slur in speaking to a tenant or in written communication to a tenant is a discriminatory statement, even if that communication does not also explicitly say that the housing is unavailable to that tenant because of race.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12050(g)(1)(a):

Comment: I don't think preference is the correct word choice here. In age-restricted housing, the term should probably be "requirement" since the housing for older persons requires there be specific age requirements to occupy a residence.

Council Response: The Council partially agrees with the comment. The housing for older persons exemption in Govt Code Section 12955.9 applies both to housing that is legally restricted for older persons, and to some programs which restrict some percentage of units for older persons, but allow some younger persons. Therefore, the Council revised sections 12050(g)(1)(a) and 12051(e) to state “preference or requirement.”

§ 12051. Exceptions

Subsection 12051(c):

Comment: We recommend adding a reference to “military or veteran status” in subsection (c).

Council Response: The Council agrees with the comment and added the phrase “military or veteran status” to the subsection.

Subsection 12051(e):

Comment: Same concern as previous comment about the word "preference" since it is not a preference for an association which is age-restricted to require at least one occupant be age 55 or above. I recommend it be changed to "requirement."

Council Response: The Council partially agrees with the comment. The housing for older persons exemption in Govt Code Section 12955.9 applies both to housing that is legally restricted for older persons, and to some programs which restrict some percentage of units for older persons, but allow some younger persons. Therefore, the Council revised the proposed regulation to state “preference or requirement.”

§ 12052. Qualifying for Exemption

No Comments.

Article 12. Harassment and Retaliation

No Comments.

Article 13. Consideration of Income

§ 12140. Definitions

Subsections 12140 (a) and (b):

Comment: Subdivision (a) defines “lawful, verifiable income” to mean income that is (1) authorized or sanctioned by law, or not forbidden by law, and (2) reasonably able to be checked or demonstrated to be true or accurate. Subdivision (b) then states “Provided it meets the requirement of Section 12140(a)(2), “lawful, verifiable income” includes…” Commenters believe that this reference should be to Section 12140(a) in its entirety, rather than just subdivision (b). Income must be both lawful, as provided in subdivision (a) and verifiable, as in subdivision (b). Under the current proposal, income that is verifiable and taxable, but unlawful, would qualify for protection as a “source of income.” (See *U.S. v. Sullivan*, 274 U.S. 259 (1927) (Illegally earned income is subject to income tax).

Council Response: The Council partially agrees and partially disagrees with the comment. The statute does require that income be both lawful and verifiable. The case cited by the comment holds that unlawful income made by illicit traffic in liquor during Prohibition was subject to federal income tax. Accordingly, the Council modified the proposed regulation Section 12140(b)(1) to provide that payments that are “income” for federal or state tax purposes must also be lawful. Specifically, the subsection now reads: “Employment-related income, income from wages, interest payments and distributions from investments, payments from employers

subsidizing housing, pensions, alimony, child support, payments from trust accounts, and any other payments recognized as "income" for federal or state tax purposes that are also lawful". The Council disagrees that the reference in Section 12140(b) should be to the entirety of Section 12140(a) rather than only Section 12140(a)(2). Section 12140(b) correctly references only Section 12140(a)(2) because, in the Council's expertise, all of the sources of income listed are lawful.

Subsection 12140(a)(2):

Comment: Section 12140(a) is somewhat confusing. Subpart (a)(1) appears to be intended to exclude income from illegal enterprises, but subpart (2) could be interpreted to exclude people who work for cash, which is necessarily hard to verify. While verification of the amount of income is a legitimate concern, verifiability of income is a separate question from whether something constitutes a protected source of income. Furthermore, subpart (2) does not translate well to the Section 8 Housing Choice Voucher context because the monetary value of a voucher for an individual household changes over time. It is therefore unclear what "accurate" would mean in the voucher context. Additionally, subpart (2) includes two very different standards for verifiability ("reasonably able to be checked" versus "demonstrated to be true or accurate"). Finally, the language "demonstrated to be true or accurate" could inadvertently allow discriminatory treatment of someone receiving income from a Special Needs Trust. A person experiencing a disability should not be required to prove the accuracy of trust payments. We therefore suggest omitting subpart (2) from the definition.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12140(b):

Comment: Commenters do not object to the replacement of the word "parent" with the term "family member." In addition, there is no meaningful difference between "family member" or "relative." Either term is acceptable as an example of a potential source of income for a tenant.

Council Response: The Council appreciates the comment.

Comment: Section 12140(b) should more explicitly add sources of income, referencing SB 91 and the newly enacted Health and Safety Code Section 50897.1(i), which provides that rental assistance is a source of income under FEHA. The current language in subsection (4) says that it applies to government "housing subsidies that provide rental assistance' but should also say just "rental assistance" like the nonprofit section below. A new subsection should be created within Section 12140(b) that includes rental assistance as defined by the Health and Safety Code and also, more broadly, any "emergency rental assistance" available to tenants through federal, state, or local programs. On a federal level, there are several new funding streams for this type of emergency rental assistance and proposals to continue to appropriate funds to them. Emergency rental assistance must be distinguished in the regulations from housing vouchers to ensure that recipients of such assistance receive the protection they are afforded under the statute.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12140(c)(2):

Comment: The last sentence of Section 12140(c)(2) is confusing in light of Section (c)(3). VASHvouchers would be covered under subsection (3) so it's fine to leave out.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12140(c)(3):

Comment: Section 12140(c)(3) should clearly include government rental assistance that is not a housing subsidy. The first sentence could be modified to state "Lawful, verifiable income paid to a housing owner or landlord on behalf of a tenant, including federal, state or local public assistance, or rental assistance, and federal…."

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

§ 12141. Source of Income Discrimination in Rental Housing

Subsection 12141(a)(1):

Comment: Paragraph (1) provides that "refusal to negotiate in good faith with the provider of any public assistance,rental assistance, or housing subsidy program" constitutes "adverse action." Commenters believe this provision goes too far. The Section 8 housing choice voucher program allows the Public Housing Authority to negotiate on a tenant's behalf for a lower rent. The proposed addition to the regulations would require the landlord to enter this negotiation in good faith – in other words, to be willing to give something up. This would entitle that Section 8 voucher holder to special treatment – which was not intended by SB 329. Landlords are not required to negotiate a rent decrease or other terms of tenancy with non-voucher holding tenants. Senator Holly Mitchell expressly stated that "under this proposal, landlords would still be able to screen tenants for suitability and would not lose the power to set rents for their units; they simply would not be allowed to refuse a tenant solely on the basis that the tenant intends to use housing assistance to help pay their rent." (SB 329 Assembly Floor Analysis, 9/6/19, Bill Analysis (ca.gov)). In addition, the final Senate Floor Analysis states "Landlords would also remain free to charge rents as allowed under law and would not be required to reduce rents even if chosen rent levels would make a unit too expensive for a voucher holder." (SB 329 Senate Floor Analysis, 9/10/19 Bill Analysis (ca.gov)).

Commenters propose that Subdivision (1) instead be revised as follows:

(1) A refusal to cooperate ~~negotiate~~ in good faith with the provider of any public assistance, rentalassistance, or housing subsidy program;

Council Response: The Council disagrees with the comment. Requiring persons subject to the Act to negotiate in good faith in the context of source of income discrimination does not provide any "special treatment" to members of this protected basis. Both the federal Fair Housing Act and FEHA require that persons subject to these laws negotiate in good faith as part of the prohibition against discrimination on any protected class. See, Govt Code 12927 (c)(1) "'Discrimination' includes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations." (emphasis added) And see HUD's regulation at 24 C.F.R. § 100.60: Unlawful refusal to sell or rent or to negotiate for the sale or rental. (a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a bona fide offer, because of race, color, religion, sex, familial status, or national origin or to refuse to negotiate with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap. (emphasis added). The proposed regulations comply with Government Code section 12955.6, Construction with other laws, which provides: "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.).

Comment: Section 12141 lists multiple methods of discrimination called "adverse actions." We recommend a number of changes and additions to this Section. The addition of language regarding compliance with program requirements is very helpful. However, this section does not include the most basic form of income discrimination, which is a refusal to accept payment from a source of income. This should be the first subpart under (a). This section should specify that it is discriminatory to refuse payment from a source of income whether or not the person seeking to use that source of income is an applicant or an existing tenant who subsequently applies for and receives assistance.

We recommend modifying Section 12141(a) as follows:

(1) A refusal to accept payment from a "source of income", including but not limited toaccepting public assistance, rental assistance, or a housing voucher and negotiating ~~negotiate~~ in good faith with the provider of any public assistance, rental assistance, or housing subsidy program;, whether or not the person seeking to use that source of income is an applicant or an existing tenant.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsections 12141(a)(1) and (2):

Comment: With respect to the application process, it would also be helpful if Section 12141(a)(1) and (2) would specifically address the types of disparate treatment experienced by applicants using housing vouchers. Housing providers who are aware that it is unlawful to state that they do not accept housing subsidies often use other tactics to make it very difficult for an applicantwith a voucher to lease up a unit. One tactic is approving an applicant with a housing voucher for a unit conditioned upon completion of the paperwork, inspection, and approval by the housing subsidy program, and then *intentionally delaying sending the paperwork* (i.e. request for tenancy approval), counting on a non-voucher holder applying to rent the unit before that paperwork is received or completed by the housing subsidy program. In addition, housing providers have been known to increase the rental asking price after a person with a voucher inquires about renting a unit to an amount over the payment standard, so that the individual is unable to rent the unit. Another tactic is insisting that the applicant provide written verification of the maximum rent amount that a housing subsidy program will pay or approve *before* allowing a person utilizing a voucher to apply, knowing that the program will not provide such written documentation. Because that is not how housing subsidy programs typically operate, this requirement makes housing unavailable to all persons trying to rent with a voucher. Another example is when a housing provider refuses to accept deposits to hold units for applicants with housing vouchers, but does so for applicants without vouchers. By the time the housing subsidy program approves the unit, it has already been rented to someone else. Thus, Section 12141(a)(1) and (2) could be amended to address these subversive tactics.

We also recommend moving the following language in Section 12141 (a)(4) to (a)(2):"setting rates for rental or lease, establishing security deposits or other financial conditions" because this example relates more to the application process.

> (2) Imposing different or more onerous terms, conditions, or application procedures for the consideration of any public assistance, rental assistance, or housing subsidy program as payment for rent, including, but not limited to, setting rates for rental or lease, establishing the amount and terms of security deposits or other financial conditions[~~INSERT SPECIFIC EXAMPLE~~] ~~"However, it is not an~~ "adverse action" to apply different terms, conditions, or application procedures in response to a request for a reasonable accommodation or a reasonable modification."
> (4) Applying inferior terms, conditions, or privileges in connection with the rental of a housing accommodation, including, but not limited to ~~setting rates for rental or lease, establishing damage deposits or other financial conditions, or~~ refusing or limiting access to common areas or facilities based upon an individual's source of income. This includes imposing less favorable rental terms as a condition of accepting a rental subsidy, rental assistance or a housing voucher;

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12141(a)(3):

Comment: In addition, since some sources of income, like housing vouchers and rental

assistance, require the landlord to take affirmative steps and complete forms in order for the tenant to receive assistance, 12141(a)(3) should be amended to prohibit refusal to complete required forms.

> (3) A refusal to complete forms or comply with the requirements of any public assistance, rental assistance, or housing subsidy program; including, but not limited to, completing and signing documents required by the program such as Housing Assistance Payments Contracts, W-9 forms, application forms, direct deposit forms etc;

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12141(a)(6):

Comment: Next, we propose adding language to subsection (a)(6) to clarify that a housing provider is not permitted to maintain separate lists or databases for applicants using vouchers.

6) Representing to any individual based upon the individual's source of income that a housing accommodation is unavailable for potential rental or rental when such housing accommodation is, in fact, available; including maintaining separate lists, inventories, databases or other separate collections of information on the basis of source of income regarding the availability of housing;

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: Finally, we suggest adding one more subsection to make it an "adverse action" for a housing provider, or a successor housing provider, to seek to terminate participation in a housing subsidy program or to terminate a tenancy based on a desire to no longer participate in the program; or, to seek to terminate a tenancy because the tenant has not paid the housing subsidy program's share of the rent. This new subsection would be labelled (a)(8) and the existing (a)(8) (the catch-all section) would be relabeled (a)(9).

> (8) Terminating participation in a housing subsidy program;
> (9) Terminating a tenancy
> (10) Seeking to evict a tenant for nonpayment of the housing program's share of the rent, so long as the tenant is still participating in the subsidy program and the subsidy program is contractually obligated to pay the rent

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12141(b):

Comment: Government Code Section 12955 (p)(2) provides that "it does not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." The law does not specify the purpose for which such an inquiry can be made or limit the provision to inquiries made by landlords or their agents. The prohibitions based on source of income apply to many different entities and not just in the landlord/tenant context. For this reason, commenters propose that this section be revised as follows to omit the reference to landlords and to provide examples of when an inquiry can be made, rather than exclusive list.

> (b) 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 lev~~el or so~~urce of income. income: This may include inquiries:

Council Response: The Council partially agrees and partially disagrees with this comment. The comment is correct that "The prohibitions based on source of income apply to many different entities and not just in the landlord/tenant context." This was one of the holdings of Sisemore v. Master. Fin. Inc., 151 Cal.App. 4th 1386, 1410 – 17 (2007). However, the provision that is the focus of the comment is part of Section 12141 which is entitled "Source of Income Discrimination in Rental Housing," (emphasis added), and therefore this subsection only refers to how the exemption for liability from discrimination based on source of income applies to "a landlord or a landlord's agent." The Council declines to follow the comment's suggestion "to provide examples of when an inquiry can be made, rather than exclusive list." The Council believes that the list provided, which includes an open-ended "if required by law" is both clear and sufficient to provide landlords and their agents guidance.

§ 12142. Aggregate Income

Subsection 12142:

Comment: Commenters appreciate that the Council has revised Section 12142 to address the concern regardingmandating consideration of the aggregate income of persons seeking to reside together. The revised text is now consistent with Gov. Code § 12955(n), which requires that landlords apply the same standards regarding aggregate income to married and unmarried persons.

Council Response: The Council agrees with and appreciates this comment.

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

No Comments.

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

Subsection 12155(a):

Comment: We offer the following suggested changes to Section 12155(a):

(5) Determining the price or other terms or conditions, such as an appraisal, in connection with a residential real estate-transaction in a manner that results in a discriminatory effect based on membership in a protected class;

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: Subsection (5) should acknowledge how real estate appraisals have been utilized in a discriminatory manner, particularly against people of color. [FN: See Black Homeowners Face Discrimination in Appraisals, *The New York Times* (Debra Kamin),August 25, 2020, available at www.nytimes.com, last visited on April 6, 2021.]

(6) Subjecting a person to harassment or retaliation that affects a residential real estate related transaction, in a manner that results in a discriminatory effect based on membership in a protected class;

(7) Conditioning the availability of a residential real estate-related transaction,or the terms and condition thereof, based on a person's response to harassment or retaliation in a manner that results in a discriminatory effect based on membership in a protected class."

We have seen cases where tenants or prospective homebuyers (in Common Interest Developments for instance), are subjected to retaliation (reduction or refusal in services) for challenging illegal real estate practices.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: We suggest the creation of subsection (9) to highlight issues specific to source of income discrimination:

(2) Refusing to accept payment from a "source of income", including but not limited to:

(A) Refusing to accept public assistance, rental assistance, or a housing voucher;

(B) Refusing to negotiate in good faith with the provider of any public assistance,rental assistance, or housing subsidy program; or

(C) Failing to timely complete or process forms required by the provider oradministrator of the source of income

in a manner that results in a discriminatory effect based on membership in a protected

class.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Article 18. Disability

§ 12176. Reasonable Accommodations and Reasonable Modifications

Subsection 12176(f)(8)(B)(iii):

Comment: We suggest the following minor changes to section 12176(f)(8)(B)(iii) to make it clearer:

> (iii) Example demonstrating that a reasonable accommodation and a reasonable modification can be requested while an unlawful detainer action is pending. Angelique is an individual with a mobility disability. The owner has filed an unlawful detainer action, alleging that she has violated the lease because her wheelchair is damaging the carpets and door frames in her unit. Angelique requests both an accommodation dismissing the unlawful detainer ~~withdrawing her eviction~~, since thedamage was unavoidable as a result of her disability, and a reasonable modificationallowing her, at her own expense, to widen the door frames in her unit and put in a hard-surface floor covering. The owner must consider the requests under these regulations, including engaging in the interactive process under section 12177 as needed, and considering whether there ~~are~~ **is** any ~~defenses to~~ lawful reason to deny either request pursuant to section 12179, and whether the requests for reasonable modifications are otherwise outside the scope of section 12181.

"Withdrawing the eviction" is ambiguous with respect to the specific action Angelique is requesting.Since the unlawful detainer action is pending, the request would likely be to dismiss the unlawful detainer lawsuit, or to dismiss the unlawful detainer and withdraw the underlying notice. Similarly, because the example takes place in the context of an unlawful detainer lawsuit where Angelique, the tenant, could assert the owner's denial of a reasonable accommodation or modification as an affirmative defense, using "defenses" to describe the potential bases for denying the requests is confusing.

Council Response: The Council agrees that changing "withdrawing her eviction" to "dismissing the unlawful detainer action and withdrawing the underlying notice" provides greater clarity and will revise the proposed regulation accordingly. The Council also agrees that changing "whether there are any defenses to either request" to "whether there are any lawful reasons to decline either request" more closely tracks the language in section 12179 and provides greater clarity, and has revised the proposed regulation accordingly.

Subsection 12176(d)(6)(i):

Comment: We recommend the following addition to § 12176(d)(6)(i)[sic]:

> [...] Because the California housing codes generally require proper maintenance of accessibility and structural features, the modification is reasonable because failing to repair the railing also violates the duty to maintain the property, and the modification is not an undue burden on the owner because it is identical to a pre-existing duty the owner had. ~~therefore,~~Because the requested modification amounts to a request that the owner comply with their duty under laws not related to the reasonable accommodation/modification process, the owner is responsible for repairingor replacing the handrail at the owner's expense.

Council Response: The Council partially agrees with the comment, and has modified section 12179(d)(6)(i) to say: "Because the California housing codes generally require proper maintenance of accessibility and structural features, the modification is reasonable because failing to repair the railing also violates the duty to maintain the property. Therefore, the owner is responsible for repairing or replacing the handrail at the owner's expense." The Council declines to make the other requested change as it does not provide needed clarification.

Subsection 12176(d)(6)(ii):

Comment: We suggest striking "Assuming the request is reasonable" from the last sentence of 12179(d)(6)(ii). The requested modifications are necessary to bring the building into compliance with statutory requirements that applied to it at the time of construction. Thus, as discussed in the introductory language of 12179(d)(6), "the defenses of fundamental alterationand undue financial burden do not apply." Accordingly, the request is, by definition, reasonable.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

§ **12177. The Interactive Process**

Comment: Section 12177 is entitled "The Interactive Process." We recommend adding language to this section to make it clear that a housing provider can be independently liable for discriminationbased on disability under the Act when it fails to engage in the interactive process. Ignoring reasonable accommodation and reasonable modification requests, without considering or responding to them, constitutes discrimination. Doing so would be contrary to the plain language of the FEHA and the housing provider's affirmative duty to accommodate. See *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578,1598 ("If Auburn Woods needed additional information...it was obligated torequest it. It could not simply sit back and deny a request for reasonable accommodation because it did not think sufficient information had been presented ")

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

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

No Comments.

Section 12179. Denial of Reasonable Accommodation or Reasonable Modification

Subsection 12179(c)(1):

Comment: We suggest striking "otherwise" from section 12179(c)(1). In many cases, the owner or landlord will give permission for the modification, but thetenant is the person who actually provides the modification.

Council Response: The Council agrees with the comment and has revised the proposed regulation language accordingly.

Subsection 12179(c)(4):

Comment: In Section 12179(c)(4), it is unclear why the phrase "it is reasonable to do so" is in quotation marks. We recommend removing the quotation marks because the phrase is not a defined term.

Council Response: The Council agrees with the comment and has revised the proposed regulation language accordingly.

Subsection 12179(c)(4)(1):

Comment: The "or" at the end of 12179(c)(4)(1) appears to be misplaced.

Council Response: The Council agrees with the comment and has amended the proposed regulation language to make the section clearer.

Subsection 12179(c)(4)(i):

Comment: I have previously provided comments to the Council on this issue. There is no support under FEHA for the premise that restoration is not required for the modifications made to common areas after the person with the disability is no longer a resident. Under the ADA, the modifications would remain since the property owner made the modifications at its expense to common areas. However, here, under FEHA there is no requirement that an association keep modifications made once the person with the disability is no longer a resident. If no other residents would benefit from the modification to common area, the modification should be removed at the expense of the person with the disability.E.g. wheelchair ramps, chair lifts, etc.

Council Response: The Council disagrees with the comment. FEHA specifically provides that requirements for the person with a disability to restore the premises to the conditions prior to modifications *only* apply to rentals and *only* to restoration of interior modifications. Government

Code Section 12927(c)(1) states: "…*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. . . ." [Emphasis added.] This is also consistent with the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(a); 24 C.F.R. § 100.203 (language substantially identical to FEHA.) *See also* Joint Statement on Reasonable Modifications, Question/Answer 26 ("providers may only require restoration of modifications made to interiors….reasonable modifications to [common areas] are not required to be restored."); 24 C.F.R. § 100 (definitions of "interior," "exterior," "common use areas," and "premises"); 54 Fed. Reg. 3232-01, 3247 – 3249, 1989 WL 272684 (HUD, "Implementation of the Fair Housing Amendments Act of 1988," January 23, 1989) (rejecting proposed modifications to regulations to require restoration of common areas and noting that "reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps"); *Garza v. Raft*, 1999 WL 33882969 (N.D. Cal. 1999) (citing *U.S. v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y 1994)) (conditioning approval of an exterior ramp upon restoration by tenant at end of tenancy is a violation of FHA.) Nothing in this provision prohibits a property owner from removing the modifications to the common areas at their own expense once the person with the disability no longer resides on the premises.

Subsection 12179(c)(4)(ii):

Comment: It is unclear whether this language exempts persons with disabilities from having to remove modifications when they no longer need the modifications (or move out of the association). See comment above. See also comments below regarding possible contradictions and need for clarification on this.

Council Response: The Council disagrees with the comment. FEHA specifically provides that requirements for the person with a disability to restore the premises to the conditions prior to modifications *only* apply to rentals and *only* to restoration of interior modifications. Government Code Section 12927(c)(1) states: "…*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. . . ." [Emphasis added.] This is also consistent with the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(a); 24 C.F.R. § 100.203 (language substantially identical to FEHA.) *See also* Joint Statement on Reasonable Modifications, Question/Answer 26 ("providers may only require restoration of modifications made to interiors….reasonable modifications to [common areas] are not required to be restored."); 24 C.F.R. § 100 (definitions of "interior," "exterior," "common use areas," and "premises"); 54 Fed. Reg. 3232-01, 3247 – 3249, 1989 WL 272684 (HUD, "Implementation of the Fair Housing Amendments Act of 1988," January 23, 1989) (rejecting proposed modifications to regulations to require restoration of common areas and noting that "reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps"); *Garza v. Raft*, 1999 WL 33882969 (N.D. Cal. 1999) (citing *U.S. v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y 1994)) (conditioning approval of an exterior ramp upon restoration by tenant at end of tenancy is a violation of FHA.) Nothing in this provision prohibits a property owner from removing the modifications to the common areas at their own expense once the

person with the disability no longer resides on the premises.

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

Subsection 12180(b)(2):

Comment: We recommend the following change to § 12180(b)(2):

> (2) "**Example of circumstances where removal of carpeting ~~may~~ constitute<u>s</u> a reasonable modification required to be paid for by owner:**
>
> [...]
>
> Since the property is part of a federally subsidized housing program, the modifications will be made at the owner's expense pursuant to 12181(h) and the requirements of federal law. If the finished floor installed by the tenant doesnot affect the owner's ~~or subsequent tenant's~~ use or enjoyment of the premises, the tenant would not have to restore the carpeting at the conclusion of the tenancy."

Here, the cost to the tenant of a reasonable modification should not be made to rely on the opinion of a person whom it is impossible to identify when the reasonable modification request is made. Since while Clarita is living there in this example, no one knows who the next tenant will be.

Council Response: The Council partially agrees with the comment. If modifications are required to be paid for by the owner, no restoration requirements apply pursuant to 12179(c)(4)(ii) and has revised the proposed regulation language accordingly by deleting the last sentence in the above example.

Subsection 12180(c)(7):

Comment: The phrase "assessing whether the request is necessary pursuant to section 12178, and section 12176" should not be added to section 12180(c)(7) because the example has already affirmed that the accommodation is necessary. Because the need for the accommodation is apparent, further assessment of the nexus between the disability and therequested accommodation is neither necessary nor permissible. See § 12178(b).

Council Response: The Council agrees with the comment and has revised the proposed regulation language to delete the quoted phrase.

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

Subsection 12181(d):

Comment: Since the Davis-Stirling Act refers to homeowners as "owners" or "members," the references in the Regulations should probably be consistent and use the term "owners" not homeowners.

Council Response: The Council agrees with the comment and will change the word "homeowners" to "owners" in this subdivision.

Subsection 12181(e):

Comment: As I commented in previous commentary to earlier versions of the proposed Regulations, this makes no sense. Restoration should be done to the common areas since the modifications/accommodation may not be needed, wanted or useful to others. E.g. ramps, chairlifts, etc. See comments to Section 12179(c)(4)(i) and (ii). I think this is possibly contradictory to the previous sections, and recommend at least it be clarified so there is no misunderstanding that common areas need to be restored at the expense when the modifications are no longer needed or the person is no longer a resident in the association. Further, if the association believes that other residents can benefit from the modification, then the modification can remain with the approval of the common interest development.

Council Response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

PUBLIC HEARING COMMENTS MADE MAY 27, 2021 [Government Code Section 11346.9(a)(3)].

Subsection 12141(a)(1):

Comment: Heidi Palutke of the California Apartment Association commented that the phrase "negotiate in good faith" in section 12141(a)(1) could be read to require a landlord to negotiate a rent decrease or other terms in order to negotiate in good faith, which would go against the legislative intent. She also asked that the council provide examples of what negotiate would mean in this context.

Council Response: "Negotiate" does not mean that a landlord is required to get to any particular outcome. It does mean that they must consider the alternatives and think about what changes they may be willing to make. The language of the regulations is appropriate and does not conflict with the legislative intent.

Subsection 12141(b):

Comment: Heidi Palutke of the California Apartment Association also commented that FEHA contains a broad statement that "it does not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." This section does not specify the purpose for which such an inquiry can be made or limit the provision to inquiries

made by landlords or their agents. The prohibitions based on source of income apply to many different entities and not just in the landlord/tenant context. For this reason, she requested that this section be revised to omit the reference to landlords and to provide examples of when an inquiry can be made, rather than exclusive list.

Council Response: It is true that "source of income" discrimination applies to many different contexts, but Section 12141 applies only to "Source of Income Discrimination *in Rental Housing*." The Council may address the other types of relationships in other regulations. FEHA is a remedial statute and should be interpreted broadly, and exceptions should be construed narrowly, so the examples are meant to clarify these narrow exceptions.

Heidi Palutke of the California Apartment Association and Renee Williams from the National Housing Law Project submitted written comments that included their oral comments and additional comments, which are summarized and responded to above.

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

General Comments

Comment: The undersigned organizations write to express our sincere appreciation to the Fair Employment and Housing Council for its continued work on these crucial fair housing regulations. We urge the Council to finalize and adopt the above referenced regulations as expeditiously as possible. The Fair Employment and Housing Act (FEHA) regulations provide clarity for the Department, housing providers, tenants, homeowners, real estate professionals, advocates, and courts, and promote consistency in interpretation of the rights and obligations conferred by the Act. Again, we thank the Council for all of its efforts regarding these regulations and urge the Council to finalize and adopt these regulations.

Council Response: The Council appreciates the comment.

Article 1. General Matters

§ 12005. Definitions

No Comments.

Article 3. Intentional Discrimination

§ 12040. Definitions

No Comments.

§ 12041. Intentional Discrimination Practices

No Comments.

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

Subsection 12042(f)(2):

Comment: Per my previous comments, this is an unrealistically high standard and unreasonable burden to show that any policy is the least restrictive means of achieving the identified purpose.

Council Response: This comment is not responsive to the text noticed for the third 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Subsection 12042(j)(3):

Comment: This is unreasonable. Many respondents act in good faith and without benefit of legal counsel. Once legal counsel is involved in the complaint process, counsel may assert legal defenses that the respondent could not articulate previously or lacked the knowledge to assert. Why is it necessary to include this? It seems skewed to create a presumption of falsity when that may not factually be the case. Seems like this regulation is trying to infer that the respondent will always be lying if they didn't initially know about a defense.

Council Response: This comment is not responsive to the text noticed for the third 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Article 6. Discriminatory Notices, Statements, and Advertisements

§ 12050. Discriminatory Practices Regarding Notices, Statements, and Advertisements

Subsection 12050(g)(1)A):

Comment: Thank you for adding this wording on "requirement" per my previous comments. I think this will be helpful for community associations in addressing this new Regulation.

Council Response: The Council appreciates the comment.

§ 12051. Exceptions

Subsection 12051(d):

Comment: Since AB 1497 was chaptered in 2019, this reference should probably be changed to Government Code Section 12927.

Council Response: DFEH has made this non-substantial change.

Subsection 12051(e):

Comment: Thank you for making this change to add the word requirement per my previous comments. This will assist community associations in interpreting and implementing this Regulation.

Council Response: The Council appreciates the comment.

§ 12052. Qualifying for Exemption

No Comments.

Article 12. Harassment and Retaliation

§ 12120. Harassment

No Comments.

Article 13. Consideration of Income

§ 12140. Definitions.

No Comments.

§ 12141. Source of Income Discrimination in Rental Housing

Subsection 12141(a):

Comment: Paragraph (1) provides that "refusal to negotiate in good faith with the provider of any public assistance, rental assistance, or housing subsidy program" constitutes "adverse action." As previously commented, commenters believe this provision goes too far. The Section 8 housing choice voucher program allows the Public Housing Authority to negotiate on a tenant's behalf for a lower rent. The proposed addition to the regulations appears to require that the landlord enter this negotiation in good faith – in other words, to be willing to give something up. This would entitle that Section 8 voucher holder to special treatment – which was not intended by SB 329. Landlords are not required to negotiate a rent decrease or other terms of tenancy with non-voucher holding tenants. Senator Holly Mitchell expressly stated that "under this proposal, landlords would still be able to screen tenants for suitability and would not lose the power to set rents for their units; they simply would not be allowed to refuse a tenant solely on the basis that the tenant intends to use housing assistance to help pay their rent." (SB 329 Assembly Floor Analysis, 9/6/19, Bill Analysis (ca.gov)). In addition, the final Senate Floor Analysis states "Landlords would also remain free to charge rents as allowed under law and would not be required to reduce rents even if chosen rent levels would make a unit too expensive for a voucher holder." (SB 329 Senate Floor Analysis, 9/10/19 Bill Analysis (ca.gov)). Commenters propose that Subdivision (1) instead be revised as follows:

(1) A refusal to cooperate ~~negotiate~~ in good faith with the provider of any public assistance, rental assistance, or housing subsidy program;

At the May 27, 2021 Council meeting, a couple comments were made by Councilmembers that commenters request confirmation and clarification of.

First, Councilmember Dara Schur indicated that, while the landlord may need to be involved in the Housing Authority's process where a tenant is seeking exception rents, this provision of the regulation does not mean the landlord has to accept a lower rent than advertised for the unit. Commenters request that this statement be confirmed in the final statement of reasons, if not in the regulation itself.

Second, Councilmember Schur also stated that FEHA itself imposes an obligation on landlords to negotiate. Commenters request that the Council provide citations for this requirement. While commenters agree that it would be unlawful discrimination to, for example, refuse to engage in the interactive process in the case of a reasonable accommodation or modification request, there is no general affirmative duty in the law to negotiate a landlord's policies or rent.

Council Response: The Council disagrees with the comment. There is a general affirmative duty in FEHA to negotiate. In fact, both FEHA and the federal Fair Housing Act require that persons subject to these laws negotiate in good faith as part of the prohibition against discrimination on *any* protected class. See Gov. Code Section 12927(c)(1) "'Discrimination' includes refusal to sell, rent, or lease housing accommodations; includes *refusal to negotiate* for the sale, rental, or lease of housing accommodations." (emphasis added) HUD's regulation at 24 C.F.R. § 100.60 provides "Unlawful refusal to sell or rent *or to negotiate* for the sale or rental. (a) It shall be unlawful for a person to refuse to sell or rent a dwelling to a person who has made a bona fide offer, because of race, color, religion, sex, familial status, or national origin or *to refuse to negotiate* with a person for the sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin, or to discriminate against any person in the sale or rental of a dwelling because of handicap." (emphasis added). The proposed regulations comply with Government Code section 12955.6 (Construction with other laws) which provides: "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.). Therefore, requiring persons subject to the Act to negotiate in good faith in the context of source of income discrimination does not provide any "special treatment" to members of this protected basis. The proposed regulation is not inconsistent with the legislative history quoted in the comment. This provision of the regulation does not mean the landlord is required to accept a pre-determined outcome, but they must consider alternatives in good faith. For example, depending on the circumstances, negotiating in good faith could include allowing a tenant with a disability who has a Section 8 Voucher extra time to seek an exception rent (higher rent) from a public housing authority before the landlord rents the unit to someone else.

Subsection 12141(b):

Comment: Government Code Section 12955(p)(2) provides that "it does not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." The law does not specify the purpose for which such an inquiry can be made by landlords or their agents.

At the May 27, 2021 Council meeting, commenters commented that there are many other entities that are regulated by FEHA's fair housing provisions that make inquiries with respect to level and source of income. Councilmember Tim Iglesias indicated that this section only addresses rental housing. With that understanding, commenters withdraw their request from April 7, 2021 that the words "landlord or landlord's agent" be struck from this provision.

Commenters, however, disagree with Councilmember Iglesias' statement that the remedial nature of FEHA allows the Council to "construe" a clearly drafted broad exemption in a way that significantly narrows its scope. The limitations in the proposed regulation are not supported by the plain text of the statute or the legislative history. There is nothing in the legislative history that suggests the California Legislature was less than sincere when it stated in Government Code Section 12955(p)(2) that "it does not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income."

For this reason, commenters propose that this section be revised as follows to indicate that the list of examples is not exclusive – and that landlords and their agents may make such inquiries where allowed by law, rather than just where required. For example, verification of a tenant's disability for the purpose of a reasonable accommodation request may involve seeking information about level and source of income. With respect to verification of a disability – the law allows a landlord to verify disability when the disability is not obvious but does not require verification.

(b) 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. ~~income:~~ This may include inquiries:
…
(4) If otherwise required or allowed by law.

Council Response: The Council partially agrees and partially disagrees with this comment. The Council agrees with and appreciates the part of the comment that withdraws the commenter's prior request from April 7, 2021, that the words "landlord or landlord's agent" be struck from this provision. The Council disagrees with and declines to follow the comment's suggestion to revise the provision. It is a general principle of statutory construction that exceptions to the basic purpose of a law are to be read narrowly. *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 20) (Generally, exceptions to a statute are construed narrowly to cover only situations that are "within the words and reason of the exception.") This principle is particularly applicable to remedial statutes, including FEHA. *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999) ("…[U]nder California law, exemptions from statutory mandatory overtime provisions are narrowly construed."); *Auburn Woods I Homeowners Assn. v. Fair Employment & Hous. Com.*, 121 Cal. App. 4th 1578, 1590–91 (2004) (FEHA is to be "construed liberally"); *Sisemore v. Master Financial* 151 Cal.App.4th 1386, 1415 (2007) ("FEHA [as a remedial

statute] is to be liberally construed."). The remedial nature of FEHA requires the Council to construe an exemption narrowly to maximize the remedial effect of the statute for members of the protected classes. Subsection 12955(p)(2) states an exception to liability for source of income discrimination. It provides: "For the purposes of this section, it does not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." However, the statute does not specifically state the scope of this exception, and, to this extent, the exception is ambiguous. In particular, it does not provide "it does not constitute discrimination based on source of income to make any written or oral inquiry concerning the level or source of income." This is similar to the situation considered in *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.*, 4 Cal. 5th 1082 (2018) in which the court was interpreting the scope of a statutory exception ("Spurred by late payment problems in the construction industry, the Legislature established statutory payment deadlines and imposed penalties on owners who delay paying their direct contractors, and on direct contractors who delay paying their subcontractors. But these strict deadlines include an exception relevant to this case: Direct contractors can withhold monies from subcontractors in circumstances where a dispute has arisen between the parties. (Civ. Code, § 8814, subd. (c).) What we must decide is whether this exception allows withholding when there is *any* dispute between the parties, or only when there is a dispute directly relevant to the specific payment that would otherwise be due. The Court of Appeal adopted the narrower construction. We agree.") *Id*. at 1085. The Council believes that the list of examples provided in the proposed regulation, together with the open-ended "if required by law" provision, is both clear and sufficient to provide landlords and their agents appropriate guidance.

Commenters' example regarding verifying a disability for purposes of responding to a request for reasonable accommodation is inaccurate and not persuasive. Verification of a tenant's disability or disability-related need for an accommodation for the purpose of responding to a request for accommodation does not include inquiries about level and source of income. Rather, Section 12178 allows the person considering the request, under specified circumstances, to seek limited additional information about the disability or the disability-related need for the requested relief. It does not permit the person considering the request to seek financial information of any kind. Nor is the person with a disability required to provide any such financial information. A person with a disability may choose to provide some financial information, such as the receipt of disability benefits or the timing of those benefits, as one way of responding to the request (rather than providing other information), but that is a voluntary choice by the person with a disability. *See, e.g.*, Subsection 12178(f) (option to provide receipt of disability benefits to establish existence of disability). In that circumstance, the person considering the request may seek corroboration of the provided information, within the limits of the regulatory language, but cannot inquire further about other income or financial information. For example, if the person with a disability chooses to rely on the receipt of disability benefits to establish that they have a disability, it would be within the scope of the verification provisions for the person considering the request to confirm with the source that such benefits are provided (but not the amount).

§ 12142. Aggregate Income

No Comments.

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

No Comments.

Article 14. Residential Real Estate-Related Practices

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

No Comments.

Article 18. Disability

§ 12176. Reasonable Accommodations and Reasonable Modifications

No Comments.

§ 12177. The Interactive Process

No Comments.

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

No Comments.

§12179. Denial of Reasonable Accommodation or Reasonable Modification

Subsection 12179(c)(4)(i):

Comment: I have previously provided comments to the Council on this issue. There is no support under FEHA for the premise that restoration is not required for the modifications made to common areas after the person with the disability is no longer a resident. Under the ADA, the modifications would remain since the property owner made the modifications at its expense to common areas. However, here, under FEHA there is no requirement that an association keep modifications made once the person with the disability is no longer a resident. If no other residents would benefit from the modification to common area, the modification should be removed at the expense of the person with the disability. E.g. wheelchair ramps, chair lifts, etc.

Council Response: The Council disagrees with the comment. FEHA specifically provides that requirements for the person with a disability to restore the premises to the conditions prior to modifications *only* apply to rentals and *only* to restoration of interior modifications. Government Code Section 12927(c)(1) states: "…*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. . . ." [Emphasis added.] This is also consistent with the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(a); 24 C.F.R. § 100.203 (language substantially identical to FEHA.) *See also* Joint Statement on Reasonable Modifications, Question/Answer 26 ("providers may only require restoration of

modifications made to interiors….reasonable modifications to [common areas] are not required to be restored."); 24 C.F.R. § 100 (definitions of "interior," "exterior," "common use areas," and "premises"); 54 Fed. Reg. 3232-01, 3247 – 3249, 1989 WL 272684 (HUD, "Implementation of the Fair Housing Amendments Act of 1988," January 23, 1989) (rejecting proposed modifications to regulations to require restoration of common areas and noting that "reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps"); *Garza v. Raft*, 1999 WL 33882969 (N.D. Cal. 1999) (citing *U.S. v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y 1994)) (conditioning approval of an exterior ramp upon restoration by tenant at end of tenancy is a violation of FHA.) Nothing in this provision prohibits a property owner from removing the modifications to the common areas at their own expense once the person with the disability no longer resides on the premises

Subsection 12179(c)(4)(ii):

Comment: It is unclear whether this language exempts persons with disabilities from having to remove modifications when they no longer need the modifications (or move out of the association). See comment above. See also comments below regarding possible contradictions and need for clarification on this.

Council Response: The Council disagrees with the comment. FEHA specifically provides that requirements for the person with a disability to restore the premises to the conditions prior to modifications *only* apply to rentals and *only* to restoration of interior modifications. Government Code Section 12927(c)(1) states: "…*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. . . ." [Emphasis added.] This is also consistent with the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(a); 24 C.F.R. § 100.203 (language substantially identical to FEHA.) *See also* Joint Statement on Reasonable Modifications, Question/Answer 26 ("providers may only require restoration of modifications made to interiors….reasonable modifications to [common areas] are not required to be restored."); 24 C.F.R. § 100 (definitions of "interior," "exterior," "common use areas," and "premises"); 54 Fed. Reg. 3232-01, 3247 – 3249, 1989 WL 272684 (HUD, "Implementation of the Fair Housing Amendments Act of 1988," January 23, 1989) (rejecting proposed modifications to regulations to require restoration of common areas and noting that "reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps"); *Garza v. Raft*, 1999 WL 33882969 (N.D. Cal. 1999) (citing *U.S. v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y 1994)) (conditioning approval of an exterior ramp upon restoration by tenant at end of tenancy is a violation of FHA.) Nothing in this provision prohibits a property owner from removing the modifications to the common areas at their own expense once the person with the disability no longer resides on the premises.
Furthermore, nothing in the FEHA allows a landlord or common interest development to make further inquiries as to whether the disability needs continue in order to require removal prior to the end of the tenancy or ownership of the unit. Restorations are only required when the person with a disability moves out. *See* Joint Statement on Reasonable Modifications, Question/Answer 24 (not all modifications must be restored *when a tenant moves out.*) [Emphasis added];

Question/Answer 28 (discussing restoration obligations *at the end of the tenancy*.) [Emphasis added]. As explained fully above, because the FHA establishes standards for granting reasonable modifications, FEHA must be at least as protective of people with disabilities pursuant to Government Code Section 12955.6. Allowing owners to ask if people still need the modifications and require interim removals would be invasive and inefficient. Disabilities are not fixed in time and modifications may be needed some of the time, but not all of the time. For example, arthritis may flare up periodically, so there may be some periods where someone can manage a few stairs and other periods where they cannot. Once a modification is granted, further inquiries into the continuing need for the modification are an intrusion into the tenant's right to privacy and are not permitted. *See also* 24 C.F.R. section 100.202(c): "It shall be unlawful to make an inquiry to determine whether an applicant for a dwelling, a person intending to reside in that dwelling after it is so sold, rented or made available, or any person associated with that person, has a handicap or to make inquiry as to the nature or severity of a handicap of such a person." (with limited exceptions not relevant here.)

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

No Comments.

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

Subsection 12181(d):

Comment: Thank you for making this change per my previous comments. This will now be consistent with the Davis-Stirling Common Interest Development Act.

Council Response: The Council appreciates the comment.

Subsection 12181(e):

Comment: As I commented in previous commentary to earlier versions of the proposed Regulations, this makes no sense. Restoration should be done to the common areas since the modifications/accommodation may not be needed, wanted or useful to others. E.g. ramps, chairlifts, etc. See comments to Section 12179(c)(4)(i) and (ii). I think this is possibly contradictory to the previous sections, and recommend at least it be clarified so there is no misunderstanding that common areas need to be restored at the expense when the modifications are no longer needed or the person is no longer a resident in the association. Further, if the association believes that other residents can benefit from the modification, then the modification can remain with the approval of the common interest development.

Council Response: The Council disagrees with the comment. FEHA specifically provides that requirements for the person with a disability to restore the premises to the conditions prior to modifications *only* apply to rentals and *only* to restoration of interior modifications. Government Code Section 12927(c)(1) states: "…*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. . . ." [Emphasis added.] This is also consistent with the federal Fair Housing Act. 42 U.S.C. § 3604(f)(3)(a); 24 C.F.R. § 100.203 (language substantially identical to FEHA.) *See also* Joint Statement on Reasonable Modifications, Question/Answer 26 ("providers may only require restoration of modifications made to interiors….reasonable modifications to [common areas] are not required to be restored."); 24 C.F.R. § 100 (definitions of "interior," "exterior," "common use areas," and "premises"); 54 Fed. Reg. 3232-01, 3247 – 3249, 1989 WL 272684 (HUD, "Implementation of the Fair Housing Amendments Act of 1988," January 23, 1989) (rejecting proposed modifications to regulations to require restoration of common areas and noting that "reasonable modifications to public and common use areas will not detract significantly from the public and common use areas modified, and may be of benefit to other persons with and without handicaps"); *Garza v. Raft*, 1999 WL 33882969 (N.D. Cal. 1999) (citing *U.S. v. Freer*, 864 F. Supp. 324, 326 (W.D.N.Y 1994)) (conditioning approval of an exterior ramp upon restoration by tenant at end of tenancy is a violation of FHA.) Nothing in this provision prohibits a property owner from removing the modifications to the common areas at their own expense once the person with the disability no longer resides on the premises.

PUBLIC HEARING COMMENTS MADE JULY 7, 2021 [Government Code Section 11346.9(a)(3)].

Janet Powers of Fiore, Racobs & Powers submitted written comments that included all of her oral comments and additional comments, which are summarized and responded to above.