

Attachment F

Fair Employment & Housing Council Proposed Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 3. Discrimination in Housing

TEXT

ARTICLE 1. GENERAL

MATTERS ~~§§ 11098.1–~~

~~11098.2.~~ [Reserved]

11098.1 – Statement of Purpose

§ 11098.2 – Authority and Scope

§ 11098.3. Exemptions

§ 11098.43. Definitions.

1. As used in this chapter, the following definition shall apply unless the context otherwise requires:

a. “Aggrieved Person” includes any person who claims to have been injured by a discriminatory housing practice or believes that the person will be injured by a discriminatory housing practice that is about to occur.

b. ~~“Ancestry”~~

c. ~~(a)~~ “Assistive animal” means an animal that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

Commented [DS1]: Please ignore section numbers, they don't make sense right now. Also, some formatting in here (copied from the other doc) that I couldn't fix. I have tried to provide a revised outline format that shows where the proposed provisions would fit.

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Commented [DS2]: I've included drafts for some, but not all of the definitions that are necessary for the proposed regulations to make sense, since the terms are used in the proposed regulations.

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Commented [DS3]: Gov. Code 12927(g), 42 USC 3602(i), 24 CFR 100.20. Note that the italicized language is in the HUD statute and regs but not the state statute. We should determine which phrasing we believe provides more protection to protected classes.

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Commented [DS4]: I recommend we define consistent with employment regs, where possible, along with definitions for all other protected classes?

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Commented [DS5]: This is the recommendation of the 1st subcommittee. I believe it needs some modifications, as it is somewhat circular as drafted. .

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(A) "Guide dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

Commented [DS6]: While Civil Code Section 54.1 overlaps with both FEHA and the FHA, in some ways it provides stronger protections (for example, protecting persons who are training guide dogs or signal dogs to be used by individuals who are blind or deaf).

(B) "Signal dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

Commented [DS7]: This overlaps but is not the same as the federal definition of a service animal.

(C) "Service dog," as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

Commented [DS8]: I believe this definition should be consistent with the definition for an assistance animal under federal law, and it is not. Under federal law and FEHA, individuals with any type of disability are entitled to a reasonable accommodation for an emotional support animal on the same basis as other accommodations, not just "in certain circumstances." The last sentence seems correct.

(D) "Support dog" or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. A "support animal" may constitute a reasonable accommodation in certain circumstances. As in other contexts, whether a support animal constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

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(E) An assistive animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability.
(D)

Commented [DS9]: The 1st subcommittee recommends adding this provision. I agree important to stress that assistive animals are not pets. I think the language needs additional clarity and probably belongs in the assistive animal section, not in the definitions.

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d. "Broker or Agent"

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e. "Building"

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f. "Disability" =

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g. "Dwelling"

"Housing Accommodation" or "Dwelling" includes:

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(1) any building, structure, or portion thereof that is used or occupied as, or designed or intended to be used or occupied as, a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household, and includes all public and common use areas associated with it, if any, or

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(2) any vacant land that is offered for sale or lease for the construction of any building, structure or portion thereof intended to be used or occupied as a residence.

Commented [DS10]: Did not have time to draft but we need something here for the disability section to be complete. Perhaps the employment definitions will work, assuming they are consistent or more protective than FHA or 24 CFR 100.201. Includes physical and mental disabilities and having a record of or being perceived of as having a disability.

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Dwelling includes but is not limited to all dwellings covered by the FHA, single family homes, apartments, condominiums, rooms, single room occupancy hotel rooms, transitional housing, supported housing, residential motels or hotels, boardinghouses, shelters, cabins and other structures housing migrant farmworkers, hospices, manufactured homes, mobile homes and mobile home spaces, floating homes and floating home spaces, communities and liveaboard marinas, bunkhouses, recreational vehicles used as a home or residence.

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Commented [DS11]: FEHA uses the term "Housing Accommodation" and FHA uses the term "Dwelling. We should decide which term we want to use. I have some ... [3]

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Sources: Gov't Code 12927, 42 U.S.C. 3602(b), 24 CFR 100.20, Civil Code (c), H&S Code 17008, Lakeside Resort Enterprises, et al v. Bd of Supervisors of Palmyra Township, et al (3rd Cir. 2006) 455 F.3d 154, 156-57 (test for what is a dwelling; hospice is a dwelling.)

(g) "Familial Status":

(h) "Housing Provider" means a Person (as defined in Section XX), or a governmental agency or entity involved in:

- (1) the provision or governance of dwellings,
- (2) the provision of housing related services, or
- (3) the provision of land.

Housing Provider includes, but is not necessarily limited to, property owners, housing managers, homeowner and condominium associations, lenders, real estate Brokers and Agents, and state and local governments.

(i) "Housing-related Services" means services related to Dwellings, including:

- (1) services provided by or arranged by a Housing Provider;
- (2) providing insurance related to Dwellings, including homeowner's and renter's insurance, fire insurance, hazard insurance, earthquake insurance, liability insurance, and title insurance;
- (3) making loans, grants, lines of credit, or providing other financial assistance related to Dwellings;
- (4) brokerage services related to Dwellings;
- (5) advertising related to Dwellings; or
- (6) appraisal services for Dwellings.

(j) "Modification" means any change to the public or common use areas of a building or any change to a dwelling unit.

(j) "Owner" includes the lessee, sublessee, assignee, managing agent, real estate broker or salesperson, trustee, receiver, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof.

(k) "Person" includes:

(1) all individuals and entities that are described in Section 3602(d) of Title 43 of the United States Code (FHA definition of "person");

Commented [DS12]: To be defined later

Commented [DS13]: Proposed by the 1st Housing Subcommittee, I am not sure if this is intended to be similar to HUD's definition of "person in the business of selling or renting dwellings"? 24 CFR 100.20? It seems to overlap but not be the same? Trying to understand before editing.

Commented [DS14]: Proposed by the 1st housing subcommittee. I may some minor revisions but not sure I understand how it fits in .

Commented [DS15]: From 24 CFR 100.201 – need it for reasonable modification provision

Commented [DS16]: This subsection is based on Gov. Code 12927(e), with some proposed additions italics.

Commented [DS17]: This could be drafted in 2 ways. First, to directly include all of the terms that are referred to. Second, to cross reference the other sections. I have proposed to use cross references for brevity and to insure consistency if other sections are amended. However, the other way would provide greater ease of use.

Commented [DS18]: Italicized phrases are explanations simply for discussion purposes. This subsection is based on Gov. Code 12927(f).

Commented [DS19]: This includes "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 (bankruptcy?), receivers and fiduciaries.

(2) all individuals and entities that are described in Sec. XX of these regulations (*the definition of "owner"*);

(3) all individuals and entities that are described in Sec. XX of these regulations (*the definition of "housing provider"*);

(l) "Premises" means the interior or exterior rooms, spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of the building.

(m) "Protected Classes" includes all classes of persons protected under federal and state fair housing laws, including [list]

(n) "Public Use Areas" means interior or exterior rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, 1255.6 (Construction with other laws) ~~Government Code.~~

§ 11098.5 Liability for Discriminatory Housing Practices

1) Direct Liability.

a) A person is directly liable for:

- i) The person's own conduct that results in a discriminatory housing practice.
- ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct.
- iii) Failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by third-party can derived from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium or cooperative), or by federal, California, or local law.

(a) A housing provider who directs his or her employees, agents, or contractors to engage in sexual harassment, or who knows or should have known about harassment perpetrated by such persons but fails to take prompt corrective or remedial action, is directly liable for any resulting harm.

b) For purposes of determining liability under paragraphs (a)(ii) and (iii) of this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person.

2) Vicarious Liability. A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the

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Commented [DS21]: See above

Commented [DS22]: Proposed by the 1st subcommittee, but not found in federal or state statutes. See note above. Should also include or reference person in the business of selling or renting dwellings"? 24 CFR 100.20?

Commented [DS23]: From 24 CFR 100.201 – need it for reasonable modification provision

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Commented [DS24]: I'm suggesting we add this definition, which needs to be fleshed out, for ease of drafting and to avoid having to change multiple sections of the regulations when new protected categories are added. The list would include all classes covered by FEHA, FHA, and Civil Code 51 (pursuant to Gov. Code 12921(b)). We may prefer to use the term "on a protected basis."

Commented [DS25]: From 24 CFR 100.201 – need it for reasonable modification provision

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Commented [DS26]: While it is difficult to draft one definition that will apply to all regs without including the related definitions, I propose an alternative definition aimed at accomplishing a similar purpose – ensuring that the regulation applies to all individuals providing housing or housing related services. "Housing Provider" is some... [4]

Commented [DS27]: As did HUD, I have suggested that we make this provision applicable to all discriminatory... [5]

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Commented [DS28]: Because this section applies to all individuals covered by the Regulation, I have used the... [8]

Commented [DS29]: Generally, I suggest we closely track the proposed federal regulatory language except where... [9]

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Commented [DS30]: I recommend that, like the HUD regulations, this section on liability cover all discrimi... [11]

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Commented [DS31]: This subparagraph addresses conduct by those other than contractors/agents. Using... [12]

Commented [DS32]: This section was added by the subcommittee, but I need further clarification as to ho... [13]

Commented [DS33]: Subsection (b) is from the proposed HUD regulations, and was not included in the subcom... [14]

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conduct that resulted in a discriminatory housing practice. *if the discriminatory housing practice is committed within the scope of the agent or employee's employment.*

a) Whether a discriminatory housing practice occurs within the scope of employment is a question of fact. However, a discriminatory housing practice can be found to occur in the scope of employment even if it violates an employee's official duties, does not benefit the employer, is willful or malicious, or disregards the employer's express orders.

b) An agent or employee shall be considered to be acting within the course and scope of the employment relationship if his or her discriminatory housing practice not occurs incidental to the agent's or employee's job-related tasks. This includes, but is not limited to, being on the premises of a dwelling for work-related reasons such as conducting repairs.

3) A person may be directly liable for a discriminatory housing practice, regardless of whether the person's employer knew or should have known of the conduct or failed to take appropriate corrective action.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.6.

NEW Section in Article 1 – Discriminatory Effect

§ 11098.6-104. [Reserved]

ARTICLE 2. DISCRIMINATORY HOUSING PRACTICES

§ 11098.10 Real Estate Practices Prohibited

§ 11098.20 Unlawful Refusal to Sell or Rent or to Negotiate for the Sale or Rental

(b) Prohibited actions under this section include, but are not limited to:

(6) Conditioning the availability of a dwelling, including the price, qualification criteria, or standards or procedures for securing the dwelling, on a person's response to harassment because of membership in a protected class.

(7) Subjecting a person to harassment because of membership in a protected class that causes the person to vacate a dwelling or abandon efforts to secure the dwelling.

NEW subsection Insert Use of Criminal History Here

§ 11098.20 Discrimination in Terms, Conditions and Privileges and in Services and Facilities

(b) Prohibited actions under this section include, but are not limited to: ...

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Commented [DS34]: The HUD proposed regulation does not include this last limiting phrase, nor the italicized subsections. I did not have an opportunity to review either California or federal law on vicarious liability or determine whether there were any fair housing cases that imposed a separate or additional standard. I have made no changes to the 1st subcommittee's language except to change "harassment" to "discriminatory housing practice" in accord with the rest of my proposed recommendations.

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Commented [DS35]: I would note that this paragraph and the next refer to employers, but the HUD language is broader than employers, since it covers agents of any individual.

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Commented [DS36]: I think this needs to be limited to dwellings, to be included in the regulatory scope. Dwelling needs to be defined, see above.

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Commented [DS37]: This subsection proposed by the subcommittee is not in the HUD regs, but I believe it is an accurate statement of the law and provides some clarification..

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Commented [DS38]: The 2d housing subcommittee is working on several sections. The section on criminal histories could be a new section under Article 1 or a new article.

Commented [DS39]: A fundamental question we need to determine is whether we will have separate sections under the regulations for the different activities (rental; real estate transactions, lending, blockbusting, land use) and address harassment separately in each of those or whether we want to just have subsections for harassment on each topics. I recommend following the HUD model, with a separate section (here Article 6) that describes the various forms of prohibited harassment, and the specific language under ... [16]

Commented [DS40]: I have inserted the specific harassment provisions from HUD in the sections where ... [17]

Commented [DS41]: The 2d housing subcommittee is working on several sections. The section on criminal ... [18]

Commented [DS42]: I have inserted the specific harassment provisions from HUD in the sections where ... [19]

(6) Conditioning the terms, conditions, or privileges relating to the sale or rental of a dwelling, or denying or limiting the services or facilities in connection therewith, on a person's response to harassment because of membership in a protected class.

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7) Subjecting a person to harassment because of membership in a protected class that has the effect of imposing different terms, conditions, or privileges relating to the sale or rental of a dwelling or denying or limiting service or facilities in connection with the sale or rental of a dwelling.

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§ 11098.20 Other Prohibited Sale and Rental Conduct

(b) Prohibited actions under this section include, but are not limited to: ...

Commented [DS43]: I have inserted the specific harassment provisions from HUD in the sections where I believe they will ultimately go, and modified them to refer to membership in the protected class rather than using HUD's list, since FEHA covers a broader list.

(6) Representing to an applicant that a unit is unavailable because of the applicant's response to a request for a sexual favor or other harassment because of race, color, religion, sex, handicap, familial status, or national origin.

§ 11098.20 Discriminatory Advertisements, Statements, and Notices

§ 11098.20 Discriminatory Representations on the Availability of Dwellings

(b) Prohibited actions under this section include, but are not limited to:

Commented [DS44]: I have inserted the specific harassment provisions from HUD in the sections where I believe they will ultimately go, and modified them to refer to membership in the protected class rather than using HUD's list, since FEHA covers a broader list.

(6) Representing to an applicant that a unit is unavailable because of the applicant's response to a request for a sexual favor or other harassment because of membership in a protected class.

§ 11098.20 Blockbusting

§ 11098.20 Discrimination in the Provision of Brokerage Services

(b) Prohibited actions under this section include, but are not limited to: ...

Commented [DS45]: I have inserted the specific harassment provisions from HUD in the sections where I believe they will ultimately go, and modified them to refer to membership in the protected class rather than using HUD's list, since FEHA covers a broader list.

(5) Conditioning access to brokerage services on a person's response to harassment because of membership in a protected class.

(6) Subjecting a person to harassment because of membership in a protected class that has the effect of discouraging or denying access to brokerage services.

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ARTICLE 3. DISCRIMINATION IN RESIDENTIAL REAL ESTATE TRANSACTIONS

§ 11098.20 Discriminatory Practices in Residential Real Estate Transactions

Commented [DS46]: DLS review and insert a comparable harassment subsection in all appropriate places, check current HUD reg structure..

§ 11098.20 Residential Real Estate Transactions

§ 11098.20 Discrimination in the Making of Loans and in the Provision of Other Financial Assistance

(b) Prohibited actions under this section include, but are not limited to:

...

(3) Conditioning the availability of a loan or other financial assistance on a person's response to harassment because of membership in a protected class.

(4) Subjecting a person to harassment because of membership in a protected class that affects the availability of a loan or other financial assistance.

§ 11098.20 Discrimination in the Purchasing of Loans

§ 11098.20 Discrimination in the Terms and Conditions for Making Available Loans or Other Financial Assistance

§ 11098.20 Unlawful Practices in the Selling, Brokering, or Appraising of Residential Real Property

(b) Prohibited actions under this section include, but are not limited to:

...

(1) Using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration membership in a protected class.

(2) Conditioning the terms of an appraisal of residential real property in connection with the sale, rental, or financing of a dwelling [or housing accommodation] on a person's response to harassment because membership in a protected class.

ARTICLE 4. PROHIBITION AGAINST DISCRIMINATION BECAUSE OF DISABILITY

§ 11098.20 Purpose

[definitions]

§ 11098.20 General Prohibitions against Discrimination Because of Disability

Commented [DS47]: I have inserted the specific harassment provisions from HUD in the sections where I believe they will ultimately go, and modified them to refer to membership in the protected class rather than using HUD's list, since FEHA covers a broader list.

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Commented [DS48]: I have inserted the specific harassment provisions from HUD in the sections where I believe they will ultimately go, and modified them to refer to membership in the protected class rather than using HUD's list, since FEHA covers a broader list.

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Commented [DS49]: Included in the main definition section above rather than here, unlike HUD regs, for clarity and ease of use.

§ 11098.20 Reasonable Modifications of Existing Premises

§ 11098.20 Reasonable Accommodations

(a) A housing provider person has an affirmative duty to make reasonable accommodations when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit and public and common use areas. Such accommodations include, but are not limited to, exceptions to standard rules, policies, practices, or services because of the person’s disability.

(1) For example:

(A) A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of this section for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

(B) Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John has a mobility disability and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of this section for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

(C) A person with a mental health disability requests to her pay rent through a third-party payee rather than pay her rent directly from her checking account.

(b) A housing provider person may only deny a requested accommodation if, after engaging in the interactive process as outlined in section 11098.28:

- (1) The applicant or resident person on whose behalf the accommodation was requested is not a person with a disability;
- (2) There is no disability-related need for the requested accommodation; or
- (3) The accommodation is not reasonable, meaning it would impose an undue hardship as defined in section 11098.27.

§ 11098.28. The Interactive Process

Commented [DS50]: I believe it is clearer to separate out the general reasonable accommodation provision from the assistance animal subsection. This section has language from the 1st subcommittee, which I believe generally reflects federal law and FEHA but needs some changes.

Commented [DS51]: We need to be consistent in terminology. The section covers a wide variety of conduct, not just landlords, including lenders and brokers.

Commented [DS52]: I have provided definitions for “dwelling” and “public and common use areas” in the definition section. The dwelling/housing accommodation definition needs further refinement. We need to define disability.

Commented [DS53]: Examples are good, I think they come at least in part from the HUD guidance. I suggest these can be condensed and recommend that we treat assistance animals in a separate subsection.

Commented [DS54]: Not sure we need to specify mental health disability. There may be many reasons why a person with a disability uses a third party payee to assist. I think we should include a financial example as well.

Commented [DS55]: I like the inclusion of the interactive process, but am not sure the third subsection is correctly framed. Also, we may need to explore some other defenses developed in the case law which may be grounds to deny a requested accommodation. Cross reference will need updating.

Commented [DS56]: The person might be an applicant, a resident, a family member or a visitor.

Commented [DS57]: Cross reference needs updating. Also, I do not know that reasonableness and undue hardship are equivalent or interchangeable.

Commented [DS58]: I think the 1st subcommittee language is generally good. It may need some adjustments, and see notes above about terms and definitions. I suggest we reorder the section to start with the provisions regarding the request itself, then discuss the process.

(a) When needed to identify or implement an effective, reasonable accommodation for a person with a disability, ~~the FEHA~~the law requires a timely, good faith, interactive process between ~~a housing provider~~the person considering the requested accommodations and ~~an applicant or resident~~the person with a disability, or the individual's representative, who is requesting the accommodation. ~~An applicant or resident makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of a disability, regardless of whether the words "reasonable accommodation" are used as part of the request.~~

Commented [DS59]: See note above re terms

Commented [DS60]: Consistent with federal law but may need some clarification. I think it belongs in (b) and have moved it there.

~~(b) A person responsible for responding to accommodation requests~~The housing provider may not require that the request for accommodation be made in a particular manner or at a particular time. An person makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of a disability, regardless of whether the words "reasonable accommodation" are used as part of the request. Adopting a formal procedure may aid persons with disabilities in making requests for reasonable accommodations or modifications and may ~~make in easier to aid housing providers in assessing~~ those requests and ~~in keeping~~ records of the considerations given the requests. However, a person responsible for responding to accommodation requests~~housing provider~~ may not refuse a request or refuse to engage in the interactive process because the requester did not use the housing provider's preferred forms or procedures or because the requester did not present sufficient proof of disability. A person responsible for responding to accommodation requests may assist someone in completing a form.

Commented [DS61]: Consistent with federal law but may need some clarification. I think it belongs in (b) and have moved it there.

Commented [DS62]: Owners and providers may also be obligated to ensure effective communications (such as ASL or materials in alternate formats.)

~~(c)~~
~~(d) (1) The request for a reasonable accommodation or modification may be made by the applicant or resident with a disability, a family member or someone else acting on behalf of the person with a disability.~~

Commented [DS63]: Moved.

~~(e)~~(f) All parties to the interactive process must make reasonable efforts to participate in the interactive process in good faith. Direct communication between the housing provider person responsible for responding to accommodation requests and the resident or applicant person with a disability requesting the accommodation is not required, but any indirect communication must alert the resident or applicant that the person responsible for responding to accommodation request~~housing provider~~ is considering various accommodations or modifications and that the resident or applicant person requesting the accommodation has the right to participate in the discussion or interaction.

Commented [DS64]: This imposes a duty on the person with a disability that must be carefully framed to avoid imposing obligations that are not required by the law.

Commented [DS65]:

Commented [DS66R65]: See note below.

Commented [DS67]: Not sure I understand the last sentence.

~~(1) The request for a reasonable accommodation or modification may be made by the applicant or resident with a disability, a family member or someone else acting on behalf of the person with a disability.~~

~~(d)~~(g) The housing provider person responsible for responding to an accommodation request must engage in the interactive process upon receipt of a request for accommodation or modification. The time necessary to complete the interactive process depends on many factors, including, but not necessarily limited to, the nature of the accommodations or modifications under consideration and whether it is necessary to obtain supporting information if the need for the accommodation or modification is not obvious or known to the housing provider.

Commented [DS68]: We have not yet addressed requests for modifications (physical changes to the unit). I concur that they are generally treated the same and we may want to include them both in the interactive process section. However, we don't yet have any language for modifications and this phrase is only in a few places and not consistently included.

Notwithstanding such variables, the duration of the process should not exceed thirty calendar days from the date of the start of the interactive process. Any delay by the person responsible for responding to accommodation request ~~housing provider~~ beyond the thirty calendar day timeline in completing the interactive process establishes a rebuttable presumption that the housing provider individual failed to engage in a good faith interactive process. In some cases, thirty calendar days may be unreasonable.

Commented [DS69]: 30 days may be too long for some accommodation requests, particularly around communications (such as need for an ASL interpreter or information in alternative formats.)

Commented [DS70]: While I agree with principles expressed, I think the paragraph is a little confusing.

~~(e)~~(h) When, after engaging in the interactive process, a housing provider refuses a requested accommodation because it is not reasonable, the housing provider must consider all alternative accommodations of which it is aware or that are brought to its attention by the applicant or resident. If an alternative accommodation would effectively meet the requester's disability related needs and is reasonable, the housing provider must grant it. In cases where a housing provider believes that, while the accommodation requested by the applicant or resident is reasonable, there is an alternative accommodation that would be equally effective, the housing provider should discuss with the individual if she is willing to accept the alternative accommodation. However, a person with a disability is not obligated to accept an alternative accommodation if she believes the alternative accommodation will not meet her needs and her preferred accommodation is reasonable.

Commented [DS71]: This language is generally consistent with federal law, but see notes above re terminology.

11098.29. Proof of Disability

(a) If the need for the requested accommodation or modification is not readily apparent, the housing provider may request that the applicant or resident provide documentation from a qualified health care provider, as defined in subdivision (e) below, verifying that an accommodation or modification is necessary because the person has a disability and because the request for accommodation or modification would afford the person with a disability equal opportunity to use and enjoy a dwelling.

Commented [DS72]: This provision, as proposed by the 1st subcommittee, I believe needs some major revisions. I recommend it start with clarifying that it is normally impermissible to enquire whether someone has a disability. I think the use of the term medical provider as a catchall term is very misleading, as federal law is explicit that verifications need not come from medical providers. The section goes back to focusing on landlords, and not all covered persons, which I recommend revising.

(1) The person with the disability is not required to reveal a particular diagnosis. The person with a disability should provide only information about how the disability restricts or limits the resident in one or more major life activities, as compared to most people in the general population, and how the requested accommodation will enable the resident to have an equal opportunity to use or enjoy the housing.

Commented [DS73]: While the principle is good, this puts the burden on the person with a disability and it should be the other way around.

(b) If a person's disability is obvious, or otherwise known to the housing provider, and the need for the requested accommodation or modification is also readily apparent or known, then the housing provider may not request any additional information. However, if the disability is known but the disability-related need for the assistive animal is not, the housing provider may ask the individual to provide documentation of the disability-related need for an assistive animal.

Commented [DS74]: Again, this conflates service animals with all other accommodations, and I recommend keeping them separate.

(c) All information concerning a person's disability, request for an accommodation, or medical verification or information must be kept confidential and must not be shared with other persons unless disclosure is required to either make or assess the decision to grant or deny the request for accommodation or modification, or disclosure is required by law.

Commented [DS75]: I concur that information about a person's disability should be kept confidential, but recommend putting that in a separate section .

(d) If the requested accommodation is for an assistive animal, the proof of disability must identify the specific species of animal needed for the reasonable accommodation.

Commented [DS76]: Federal law prohibits restrictions based on breed, and there is no basis for prohibiting certain species across the board.

(e) A qualified health care provider, who can provide information verifying disability or the necessity of an accommodation or modification, includes, but is not limited to:

Commented [DS77]: See note above

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or resident; or

Commented [DS78]: Unduly restrictive

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations that became effective March 8, 2013 (29 C.F.R. § 825.125), including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a peer support group, a non-medical service agency, social worker, or a reliable third party who is in a position to know about the individual's disability.

Commented [DS79]: Good, this is where the focus should be. The rest puts too much emphasis on medical professionals, with no basis in statute.

(f) A qualified health care provider must have specific knowledge of the patient's medical condition based on an individualized examination and not operate primarily to provide certifications for assistive animals.

(1) If medical information is provided by a qualified health care provider who does not have specific knowledge based on an individualized examination and operates primarily to provide certifications for assistive animals, then the housing provider may request information verifying the need for an accommodation from a qualified health care provider and continue to engage in the interactive process.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.

§ 11098.27. Defenses

(a) A housing provider may deny a requested accommodation as not reasonable if the accommodation would impose an undue hardship on the housing provider. An undue hardship would impose significant difficulty or expense or would constitute a fundamental alteration in the program or service. A fundamental alteration is a modification that alters the essential nature of a provider's operations, such as shopping or cleaning for a resident. The determination of whether an accommodation poses undue hardship must be made on a case-by-case basis involving various factors including, but not limited to:

Commented [DS80]: This section conflates ADA defenses with FHA defenses. The primary defense in FHA is 42 USC 100.202(d), which says "nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." While accommodations must be reasonable, neither FEHA nor FHA specifically contain an undue burden or Fundamental alteration defense like the ADA does.

(1) the nature and cost of the requested accommodation;

(2) the financial resources of the housing provider;

- (3) the benefits that the accommodation or modification would provide to the applicant or resident with a disability;
- (4) the availability of alternative accommodations or modifications that would effectively meet the applicant's or resident's disability-related needs; and
- (5) the existence of conflicting good faith requests for accommodations that cannot be reconciled through the interactive process.

(b) A housing provider cannot claim undue hardship based on the housing provider's or another resident's fears or prejudices toward the individual's disability, nor can undue hardship be based on the fact that provision of a reasonable accommodation or modification might be considered unfair by other residents.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.

Commented [DS81]: Good, but needs terminology changes.

§ 11098.20 Assistance Animals

(4) If the requested accommodation is for an assistive animal, the request may also be denied if:

(A) the specific assistive animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or

(B) the specific assistive animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. Breed, size, and weight limitations may not be applied to an assistive animal.

(C) A determination that an assistive animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct – not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused. No species, breed, size, number, or other universal restrictions may be applied. The assessment of direct threat must consider:

Commented [DS82]: These proposed provisions from the 1st subcommittee misstate the law in some key ways, but include good provisions . I would note that Civil Code 54 et seq may provided even stronger protections that FHA for guide and signal dogs and other service animals, since they authorize certain dogs to be present as of right, without requiring a reasonable accommodation analysis.

(i) the nature, duration, and severity of the risk of injury;

(ii) the probability that injury will actually occur; and

Commented [DS83]: (a)-(c) are good, but the subsections of 3 are unclear and duplicative.

(iii) whether there are any reasonable accommodations that will eliminate the direct threat.

(c) A person who is granted accommodation of an assistive animal shall not be required to pay any pet fee, rent, or other additional fee, including additional security deposit or liability insurance, to have the animal in his or her residence. However, a person who is granted accommodation of an assistive animal may be required to cover the costs of repairs for damage the animal causes to the dwelling unit or the common areas, excluding reasonable wear and tear, if it is the housing provider's practice to assess such damages.

Commented [DS84]: This last section needs revision.

(d) Any state and local requirements regarding animals apply equally to assistive animals including, but not limited to, requirements that an animal be licensed, vaccinated, and/or sterilized. A housing provider is permitted to request verification that an assistive animal is in compliance with any applicable requirements.

Commented [DS85]: I believe the provisions of the subsection are at least partially in conflict with Civil Code 54 and federal law. There is no basis in law to allow sterilization. While there may be a basis to require vaccinations, I don't believe that inquires as to other licensing provisions are permissible.

(e) A housing provider may impose other reasonable conditions on an assistive animal to ensure it is under the control of the applicant or resident. These conditions may not be more restrictive than those imposed upon other animals on the property.

Commented [DS86]: I don't think this is the right standard.

~~(e)(f)~~

~~(f)(g)~~ Invitees to the property shall be granted accommodation for assistive animals, in accordance with the restrictions above.

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~~(g)(h)~~ If someone requests an accommodation, including, but not limited to, use of an assistive animal, then the housing provider may require verification of disability pursuant to section 11098.29 of these regulations.

Commented [DS87]: I think the intent is correct, but the statement of law is not completely accurate or clear. Furthermore, visitors in common areas are also covered by the ADA, which has somewhat different standards for service animals.

Commented [DS88]: This is an oversimplification of the law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.20 Design and Construction Requirements

ARTICLE 5 QUID PRO QUO AND HOSTILE ENVIRONMENT HARASSMENT

§ 11098.5. Harassment.

~~It shall be unlawful for a housing provider to harass any person in connection with the sale or rental of a dwelling on account of a person's membership in a protected class. Harassment includes conduct which deprives or interferes with the right to live in a discrimination free housing environment. Harassment includes both quid pro quo harassment and hostile environment harassment.~~

Commented [DS89]: Moved to appropriate article

§ 11098.5 Quid pro quo and hostile environment harassment.

~~(a) General. Quid pro quo and hostile environment harassment because of membership in a protected class may violate various provisions of FEHA, depending on the conduct. The same conduct may violate one or more of these provisions.~~

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Commented [DS90]: We may prefer to use "on a protected basis." See note above.

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~~(1) Quid pro quo harassment. Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to: the sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.~~

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Commented [DS91]: I propose to revise the language in this section to more closely mirror the HUD draft regulation, so it is slightly reworded and is somewhat more detailed than the language proposed by the 1st subcommittee, but captures the same principles. I tentatively propose to delete the language proposed by the 1st subcommittee about a "reasonable person" standard, I think we need further discussion as to whether we want to rely on case law to develop the standard or whether we want to provide more guidance here. The subcommittee language is shown in strikeouts below the HUD provisions in this section.

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~~Quid pro quo harassment. When submission to unwelcome requests or demands for favors, and other verbal or physical conduct based on a protected class is made a term or condition, whether explicitly or implicitly, to the provision of a housing accommodation, service, or benefit. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.~~

~~(2) Hostile environment harassment. Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, or conditions of a residential real estate-related transaction. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.~~

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Commented [DS92]: The subcommittee did not include this subsection from the HUD regulations, but I recommend we retain it.

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Commented [DS93]: The subcommittee language was identical to HUD's language here.

~~Hostile environment harassment. When unwelcome requests, demands, and other verbal or physical conduct has the effect of creating an environment which a reasonable person in the aggrieved person's position would consider intimidating, hostile, or offensive. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real estate transaction.~~

~~(i) Totality of the circumstances. Whether hostile environment harassment exists depends upon the totality of the circumstances.~~

~~(A) Factors to be considered to determine whether hostile environment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.~~

~~(B) Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, as well as the amount of damages to which an aggrieved person may be entitled. However, neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists.~~

Commented [DS94]: The subcommittee did not include this subsection from the HUD regulations, but I recommend we retain it.

~~(ii) Title VII affirmative defense. The affirmative defense to an employer's vicarious liability for hostile environment harassment by a supervisor under Title VII of the Civil Rights Act of 1964 does not apply to cases brought pursuant to the Fair Housing Act.~~

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~~(b) Type of conduct. Harassment can be written, verbal, or other conduct, and does not require physical contact.~~

Commented [DS95]: The subcommittee did not include this subsection from the HUD regulations, but I recommend we retain it.

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~~(c) Number of incidents. A single incident of harassment because of a protected class may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo.~~

~~(1) Quid pro quo harassment. When submission to unwelcome requests or demands for favors, and other verbal or physical conduct based on a protected class is made a term or condition, whether explicitly or implicitly, to the provision of a housing accommodation, service, or benefit. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.~~

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~~(2) Hostile environment harassment. When unwelcome requests, demands, and other verbal or physical conduct has the effect of creating an environment which a reasonable person in the aggrieved person's position would consider intimidating, hostile, or offensive. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real estate transaction.~~

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~~(A) Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.~~

~~(b)(a) Harassment in housing includes but is not limited to:~~

Commented [DS96]: The 1st subcommittee added a number of examples that are discussed in the HUD Notice of Rulemaking but are not incorporated in the actual rule. I have no objection to their inclusion, as long

~~(1) Verbal harassment, e.g. epithets, derogatory comments or slurs on in a protected basisclass;~~

Commented [DS97]: I defined the term "protected class" above, but have no objection to changing the definition to refer to a "protected basis."

~~(2) Physical harassment, e.g. assault, impeding or blocking movement, or any physical interference with normal movement, when directed at an individual on a protected basis;~~

~~(3) Visual forms of harassment, e.g., derogatory posters, cartoons, drawings, writings, or other documents on a protected basis related to membership in a protected class;~~

- (4) Unwelcome sexual conduct, or other unwelcome conduct, linked to the person’s sex;
- (5) Any coercion, intimidation, threats, or interference with an individual’s exercise or enjoyment of a housing benefit, ~~on a protected basis~~related to membership in a protected class;
- (6) Imposing different terms, rules, conditions, privileges, facilities, or services in connection with a housing benefit or accommodation ~~because of a protected basis~~related to membership in a protected class; or
- (7) Revealing private information about an individual to a third party.

~~(e)(b) Harassment may be established by showing that the conduct was sufficiently severe or pervasive to alter the aggrieved person’s conditions of residency or to create an environment which a reasonable person in the aggrieved person’s position would find intimidating, hostile, offensive, or otherwise significantly less desirable in the provision of housing accommodations or benefits. The severity of the harassment is judged from the perspective of a reasonable person in the aggrieved person’s position, considering all the circumstances. One act or omission may be sufficient to establish conduct that is sufficiently severe under this section.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

Article 6 Retaliation.

§ 11098.7. Retaliation.

- (a) It shall be unlawful for any housing provider take adverse action against any person for engaging in a protected activity when the dominant purpose for the adverse action is retaliation.
- (b) “Adverse action” includes, but is not limited to, harassment, eviction, a change in the terms and conditions, or any other discrimination made unlawful by the FEHA.
- (c) “Protected activity” includes, but is not limited to, opposition of practices made unlawful under the FEHA, informing law enforcement agencies of practices believed unlawful under the FEHA, testifying or assisting in a proceeding regarding unlawful activity, assertion of rights protected by the FEHA, aiding or encouraging a person to exercise their rights under the FEHA, or making a request for a reasonable accommodation.
- (d) “Dominant purpose” means a purpose that is a substantial motivating factor in the harassment, eviction, or other adverse actions challenged as retaliatory. A substantial factor motivating the adverse action is a factor that a reasonable person would consider to have contributed to the action. It must be more than a remote or trivial factor. It does not have to be the only cause of the adverse action.

Commented [DS98]: I think this is a useful addition, but the term “private information” would need to be defined and more explanation is needed as to what third parties are permissible and which aren’t, depending on the nature of the private information. Certainly medical information and information about disability should be shared among housing management staff only on a “need to know” basis and should not otherwise be shared. However, the language is broad and requires clarification.

Commented [DS99]: This is the 1st subcommittee’s language, I believe the concepts are covered above.

Commented [DS100]: This is the 1st subcommittee’s language, I recommend the HUD language above.

Commented [DS101]: Moved to Article 1

Commented [DS102]: I have concerns about this section, but did not have time to prepare written alternatives. I have noted my concerns;

Commented [DS103]: I believe we have to find a way to reconcile the phrase “dominant purpose” language with the possible broader protections of the FHA

Commented [DS104]: This subparagraph conflates adverse action, with discrimination, they are different. I believe the intent to have adverse action broadly defined is a good one, but do not think the language works well.

Commented [DS105]: I believe there are other actions that would be protected, including actions to enforce ones rights under other civil rights laws or other laws generally, exercising first amendment rights, and other things.

Commented [DS106]: See note above.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

Commented [DS107]: Moved to the definitions section in Article I.

Page 2: [1] Formatted **Dara Schur** **6/24/2016 12:01:00 PM**

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Page 2: [2] Formatted **Dara Schur** **6/24/2016 12:01:00 PM**

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Page 2: [3] Commented [DS11] **Dara Schur** **6/26/2016 6:20:00 PM**

FEHA uses the term "Housing Accommodation" and FHA uses the term "Dwelling. We should decide which term we want to use. I have some concern that "Housing Accommodation" will get confused with the term "Reasonable Accommodation." I've tried to provide some thoughts for reaching a clear definition, but I believe it needs some work.

Page 4: [4] Commented [DS26] **Dara Schur** **6/23/2016 4:43:00 PM**

While it is difficult to draft one definition that will apply to all regs without including the related definitions, I propose an alternative definition aimed at accomplishing a similar purpose – ensuring that the regulation applies to all individuals providing housing or housing related services. "Housing Provider" is somewhat misleading in lending, real estate, and land use contexts, hence the alternative.

Page 4: [5] Commented [DS27] **Dara Schur** **6/24/2016 10:04:00 AM**

As did HUD, I have suggested that we make this provision applicable to all discriminatory conduct. I have broadened the language so it is not limited to harassment, as did HUD,, and have moved the Liability section from the Discriminatory Housing Practices Article to the General Matters Article, which is comparable to its proposed placement in the HUD regulations.

Page 4: [6] Formatted **Dara Schur** **6/24/2016 11:55:00 AM**

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Page 4: [8] Commented [DS28] **Dara Schur** **6/24/2016 10:10:00 AM**

Because this section applies to all individuals covered by the Regulation, I have used the broadest term, "Person". See note above in definition.

Page 4: [9] Commented [DS29] **Dara Schur** **6/24/2016 10:17:00 AM**

Generally, I suggest we closely track the proposed federal regulatory language except where California law is more protective of the protected classes, pursuant to 12955.6. I propose to amend this section accordingly. This is both in accord with the FEHA statute, and also provides for a broader range of case law to draw upon. Although my draft language (based on HUD's) is different than the 1st housing subcommittee, I believe the intent of my changes is in accord with that proposed by the 1st housing subcommittee, except where I have specifically noted otherwise.

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Page 4: [11] Commented [DS30] **Dara Schur** **6/25/2016 9:20:00 AM**

