

**FAIR EMPLOYMENT & HOUSING COUNCIL**  
**Proposed Housing Regulations Regarding Discriminatory**  
**Effect, Discriminatory Land Use Practices, and Use of**  
**Criminal History Information**

**INITIAL STATEMENT OF REASONS**

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 3. Discrimination in Housing

As it relates to housing, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits conduct that has a discriminatory effect based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information, unless there is a legally sufficient justification. This includes inquiries regarding or use of criminal history if such inquiry or use has a discriminatory effect, unless there is a legally sufficient justification. FEHA also prohibits discrimination in public and private land use.

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

These proposed regulations add sections 11098.04.1-11098.04.6, 11098.14.1-11098.14.4, and 11098.18.1-11098.18.8, to Title 2 of the California Code of Regulations. These are the first implementing regulations promulgated for the related portions of FEHA. The proposed regulations most notably clarify and/or articulate the following: (1) the doctrine of discriminatory effect (also known as “disparate impact”); (2) burdens of proof and defenses to allegations of discriminatory effect; (3) practices that may have a discriminatory effect; (4) the prohibition of discriminatory land use practices; (5) what may constitute a discriminatory land use practice; (6) how the use of criminal history information may violate the FEHA if it has a discriminatory effect, constitutes an intentional violation, or constitutes a discriminatory statement; and (7) the relationship

between the FEHA and other laws as it relates to the use of criminal history information.

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

### **Subchapter 3. Discrimination in Housing**

#### **Article 4. Discriminatory Effect**

##### **§ 11098.04.1. Practices with a Discriminatory Effect**

The purpose of this section is to provide greater clarity to the public as to when practices are unlawful based on their discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). This section also provides an overall framework for the more detailed subsequent sections in Article 4. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

This section is necessary to provide clarity to the public about the scope and basis of discriminatory effect under Government Code section 12955.8(b), particularly in light of some differences between FEHA, the federal Fair Housing Act, and recent federal case law.

Additional referenced sections provide background for the proposed regulation. Government Code sections 12920 and 12921 set out the overall public policies and purposes of FEHA in regard to housing as a civil right, providing context for the definitions. Government Code sections 12926 and 12927 provide additional context for the meaning of a variety of terms, including “discrimination,” and “person” as they are used in this section. Government Code section 12955 identifies specific unlawful practices that might have a discriminatory effect.

This section is drafted to be consistent with the comparable federal regulations, except where FEHA provides greater rights and remedies to an aggrieved person than those afforded by federal law, as required by Government Code section 12955.6 or where FEHA’s statutory language otherwise specifically differs from the federal fair housing law. See HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory

Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart G; 42 U.S.C. 3615; DFEH v. Merribrook Apts. (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm); Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al, 135 S.Ct. 2507 (2015); *Id at*, 2550 (Dissent) (Confirming that states can enact their own fair housing laws, including laws creating disparate impact liability.)

**§ 11098.04.1, subd. (a)**

The purpose of this subdivision is to set out and clarify the general rule that liability may be established based on discriminatory effect, pursuant to Government Code section 12955.8(b), and to direct the public to other portions of the section and Article for more detail. Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

This subdivision is necessary to provide clarity to the public about the scope and basis of discriminatory effect under Government Code section 12955.8(b), particularly in light of some differences between FEHA and the federal Fair Housing Act and recent federal case law.

**§ 11098.04.1, subd. (b)**

The purpose of this subdivision is to set out and clarify the legal standard for establishing discriminatory effect, pursuant to Government Code section 12955.8(b). Further clarity will benefit the public by assisting them in compliance with the law and will prevent misconstruction of the statute.

This subdivision is necessary to provide clarity to the public about the scope and basis of discriminatory effect under Government Code section 12955.8(b). It is also necessary to make explicit that discriminatory effect can be based on a Practice that “creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a Protected Class.” This subdivision is derived from Government Code 12955.8(b), case law, and federal regulations, and is drafted to be consistent with the comparable federal law, as required by Government Code section 12955.6. See HUD Final Rule on Implementation of the Fair

Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart G; 42 U.S.C. 3615; Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al., 135 S.Ct. 2507 (2015).

**§ 11098.04.1, subd. (c)**

The purpose of this subdivision is to direct the public to the more specific section of the proposed regulations, Section 11098.04.2, where the burdens of proof are detailed. This subdivision is necessary to provide clarity as to the general rule.

**§ 11098.04.1, subd. (d)**

The purpose of this subdivision is to direct the public to the more specific section of the proposed regulations, Section 11098.04.3, where the components of a legally sufficient justification defense are detailed. This subdivision is necessary to provide clarity as to the general rule.

**§ 11098.04.2. Burdens of Proof in Discriminatory Effect Cases**

The purpose of this section is to provide greater clarity as to the burdens of proof that apply in determining whether housing practices are determined to be unlawful based on their discriminatory effect in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the federal Fair Housing Act. The section sets out both the plaintiff's burden (subdivision (a)) and the defendant's burden (subdivision (b)).

**§ 11098.04.2, subd. (a)**

The purpose of this section is to provide greater clarity as to the burdens of proof that apply in determining whether housing practices are determined to be unlawful based on their discriminatory effect in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the federal Fair Housing Act.

In particular, subdivision (a) of this section establishes that the Plaintiff has the initial burden of proving that a challenged Practice caused or predictably will cause a discriminatory effect. This is consistent with Government Code section 12955.8(b) but states the rule with additional clarity. Such clarity is necessary to assist the public and also to maintain consistency between the federal FHA and the FEHA, which both provide that Plaintiff shall bear the initial burden of proof in a case involving discriminatory effect. Government Code section 12955.6 reads in parts “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the proposed subdivision maintains consistency. See HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart G; 42 U.S.C. 3615, DFEH v. Merribrook Apts. (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm); Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al, 135 S.Ct. 2507 (2015); Id. at 2550 (Dissent) (Confirming that states can enact their own fair housing laws, including laws creating disparate impact liability.)

### **§ 11098.04.2, subd. (b)**

The purpose of this subdivision is to provide clarity about the framework and general scope for the defendant’s burden of proof in rebutting a claim of disparate effect, referred to as a legally sufficient justification, then to refer the parties to Government Code section 11098.04.3 for more detail on the components of that defense. This subdivision is necessary to provide clarity as to the general rule.

### **§ 11098.04.3. Legally Sufficient Justification**

The purpose of this section is to provide greater clarity as to the components of the defense of legally sufficient justification that must be proved by different types of defendants in order to defeat a claim of discriminatory effect, in order to assist the public in the interpretation and

implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where FEHA differs from the federal Fair Housing Act.

This section is drafted to be consistent with the comparable federal case law and regulations, except where FEHA provides greater rights and remedies to an aggrieved person than those afforded by federal law, as set out in Government Code section 12955.6. Government Code section 12955.6 reads in parts “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the proposed subdivision maintains consistency with the FHA except in those instances where FEHA provides greater protection to protected classes or where FEHA provides distinctions among different types of defendants for purposes of establishing a legally sufficient justification.

In particular, Government Code Section 12955.8(b) provides more detailed direction as to the burden of proof in discriminatory effects cases than the federal law. It establishes comparable, but different, standards for the burden of showing a legally sufficient justification for business entities compared to other entities.

Section 12955.8(b)(1) also sets out a different burden of proof on less restrictive alternatives than federal law. The proposed regulatory section interprets 12955.8(b)(1) by making it explicit that the burden of showing there are less restrictive alternatives falls on defendant, which is consistent with *DFEH v. Merribrook Apts.*, a FEHC Precedential Decision, and the legislative history of 12955.8, cited with approval in *Merribrook*. *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm). There is also a 9th Circuit Case in accord. *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988). Because FEHA language is different on this point than FHA, the requirements of this prong regarding burden of proof of less discriminatory alternatives are different than the burden on this issue set out in HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects

Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart G. See Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al, 135 S.Ct. 2507 (2015); Id.at 2550 (Dissent) (Confirming that states can enact their own fair housing laws, including laws creating disparate impact liability).

The public will benefit from further clarification of these similarities and differences between FEHA and FHA, as described more specifically below in reference to each subdivision.

### **§ 11098.04.3, subd. (a)**

The purpose of this proposed subdivision is to provide greater clarity and specify the specific prongs necessary for a business establishment to establish that its actions had a legally sufficient justification and therefore did not create liability for a discriminatory effect. Government Code section 12955.8(b) sets out specific standards for business establishments, which are articulated in subdivisions (a)(1)-(2), and are consistent with state and federal law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100. Subdivision (a)(3) articulates the additional prong, as set forth in Government Code section 12955.8(b)(1) which applies both to business entities and other persons. The proposed subdivision is necessary to provide guidance to the public because section 12955.8(b) sets out different criteria for businesses that are not explicitly addressed under federal law, and because those criteria and 12955.8(b)(1) provide greater protection for members of Protected Classes than under parallel FHA provisions.

### **§ 11098.04.3, subd. (b)**

The purpose of this proposed subdivision is to provide greater clarity and specify the specific prongs necessary for a Person other than a business establishment to establish that its actions had a legally sufficient justification and therefore did not create liability for a discriminatory effect. Government Code section 12955.8(b) sets out parallel but specifically framed standards for Persons other than a business establishment, which are articulated in subdivision (b)(1)-(3), and are consistent with state and federal law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100. Subdivision (b)(4) articulates the additional prong, as set forth in Government Code section 12955.8(b)(1) which applies both to business entities and other persons. The proposed subdivision is

necessary to provide guidance to the public because section 12955.8(b) sets out different criteria for nonbusiness establishments that are not explicitly addressed under federal law, and because those criteria and 12955.8(b)(1) provide greater protection for members of Protected Classes than under parallel FHA provisions.

#### **§ 11098.04.3, subd. (c)**

This proposed subdivision makes explicit in this context the general rule of law that the defense of a legally sufficient justification must have an evidentiary support, and is consistent with the comparable FHA provisions. This proposed subdivision is necessary to prevent any misunderstanding about the necessary evidentiary basis for this defense.

#### **§ 11098.04.3, subd. (d)**

This proposed subdivision adds a reference to the statutory definition of “business establishment,” pursuant to Government Code section 12955.8(b)(2) and Civil Code section 51. This addition is necessary to elaborate upon a term that is used throughout this Article and the proposed regulations and enables the Council to succinctly state rules rather than provide definitions mid-sentence. In this instance, Government Code section 12955.8(b)(2) establishes the correct reference, but it is provided here for the sake of clarity and thoroughness, and using this term provides a body of existing case law to aid in implementation.

#### **§ 11098.04.4. Relationship of Legally Sufficient Justification to Intentional Violations**

The purpose of this section is to provide greater clarity as to the relationship between the defense of legally sufficient justification and a claim of intentional violations, in order to assist the public in the interpretation and implementation of Government Code section 12955.8. Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

This section is drafted to be consistent with the comparable federal case law and regulations, pursuant to Government Code section 12955.6. Government Code section 12955.6 reads in part “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, this section is drafted to be consistent with the comparable federal regulations and case law as well as state law provisions. See HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart G; 42 U.S.C. 3615, DFEH v. Merribrook Apts. (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99; Bill Analysis, Senate Committee on Judiciary, 1993-94 Regular Session, AB 2244 (Polanco), as amended August 23 for hearing date of August 24, 1993, pages 10 - 11; available at: [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab\\_2201-2250/ab\\_2244\\_cfa\\_930505\\_134939\\_sen\\_comm](http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930505_134939_sen_comm); Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al, 135 S.Ct. 2507 (2015); Johnson v. Macy, 145 F.Supp.3d 907, 917 (2015) (When a plaintiff provides direct evidence, the burden-shifting analysis is unnecessary); Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 250 (9th Cir.1997), abrogated on other grounds, as recognized by Borja–Valdes v. City and Cnty. of San Francisco, 2015 WL 5522287, \*8 n. 5 (N.D.Cal.2015) (“Where direct evidence is used to show that a housing decision was made in violation of the statute, the burden shifting analysis is inapposite.”); Lowe v. City of Monrovia, 775 F.2d 998, 1006 (9th Cir.1985) (“a plaintiff can establish a prima facie case of disparate treatment without satisfying the McDonnell Douglas test.”)

#### **§ 11098.04.5. Financial Practices with Discriminatory Effect**

The purpose of this section is to provide greater clarity as to specified financial practices that may give rise to a claim of discriminatory effect in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

This section is drafted to be consistent with the comparable federal case law and regulations, pursuant to Government Code section 12955.6. Government Code section 12955.6 reads in parts “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the proposed section is consistent with Government Code sections 12955.8(b) and 12955.7, as well as with the comparable

federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subparts C and G.

**§ 11098.04.5, subd. (a)**

The purpose of this proposed subdivision is to provide greater clarity as to specified housing related loan and financial assistance practices that may give rise to a claim of discriminatory effect in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(e), as well as with the comparable federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subparts C and G.

**§ 11098.04.5, subd. (b)**

The purpose of this proposed subdivision is to provide greater clarity as to specified housing related financial assistance practices relating to servicing or provision of loans and financial assistance that may give rise to a claim of discriminatory effect in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(e) and (i), as well as with the comparable federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subparts C and G.

**§ 11098.04.6. Residential Real Estate-Related Practices with Discriminatory Effect**

The purpose of this section is to provide greater clarity as to specified residential real estate practices that may give rise to a claim of discriminatory effect, in order to assist the public in the interpretation and

implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

This section is drafted to be consistent with the comparable federal case law and regulations, pursuant to Government Code section 12955.6. Government Code section 12955.6 reads in parts “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the proposed section is consistent with Government Code sections 12955.8(b) and 12955.7(i) and (j), as well as with the comparable federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart C, Sec. 100.120, and Subpart G.

**§ 11098.04.6, subd. (a)**

The purpose of this proposed subdivision is to provide greater clarity as to specified residential real estate related practices, particularly those involving withholding information or providing inaccurate information about the availability of loans and financial assistance, that may give rise to a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(e), (i) and (j), as well as with the comparable federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart C, Sec. 100.120, and Subpart G.

**§ 11098.04.6, subd. (b)**

The purpose of this proposed subdivision is to provide greater clarity as to specified residential real estate related practices, particularly those involving the provision or denial of loans and financial assistance, or that

involves provision of different terms related to such assistance, that may give rise to a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.8(b). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(e), (i), and (j), as well as with the comparable federal regulations and case law. See HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460 (2/15/13); 24 C.F.R. Part 100, Subpart C, Sec. 100.120, and Subpart G.

## **Article 14. Discrimination in Land Use Practices**

### **§ 11098.14.1. Definitions.**

The purpose of this section is to define terms relating to land use which are used throughout this Article.

#### **§ 11098.14.1, subd. (a)**

The Council proposes to add the definition of "Public Land Use Practices." This addition is necessary to elaborate upon and clarify a term that is used extensively in Article 14 and which is common in case law. It enables the Council to state rules succinctly rather than provide a definition mid-stream. It also is necessary to clarify the distinction drawn in the statute between public and private land use practices. Specific practices are identified as examples for clarification. The proposed definition is consistent with Government Code section 12955.7(l) and with the Fair Housing Act.

#### **§ 11098.14.1, subd. (b)**

The Council proposes to add the definition of "Private Land Use Practices." This addition is necessary to elaborate upon and clarify a term that is used extensively in Article 14 and which is common in case law. It enables the Council to state rules succinctly rather than provide a definition mid-stream. It also is necessary to clarify the distinction drawn in the statute between public and private land use practices. Specific practices are identified as examples for clarification. The proposed definition is consistent with Government Code section 12955.7(l) and with the Fair Housing Act.

## **§ 11098.14.2. Discrimination in Land Use Practices and Housing Programs Prohibited**

The purpose of this section is to identify specific actions that have been identified in FEHA, including in section 12955.7(l), or case law as discriminatory practices, in order to provide more guidance to the public. In addition, providing detailed examples is necessary to ensure consistency with a variety of state statutory and common law provisions and with federal law where that law accurately reflects parallel California law. Government Code section 12955.6 reads in part: “[n]othing 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. section 100.1 et seq.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters.

This section is drafted to be consistent with the comparable federal regulations and guidance, but provides greater specificity in some areas due to the more detailed language in Government Code Section 12955(l) and related California statutes. See, for example, Civil Code sections 53 and 782 et seq., and Government Code sections 12956.1 and 12956.2 (regarding restrictive covenants), Government Code 65008 (regarding other discriminatory land use practices), and California Attorney General Guidance on reasonable accommodations in land use practices. Letter to All California Mayors from the Office of the Attorney General, Bill Lockyer, A.G., re: “Adoption of a Reasonable Accommodation Procedure,” May 15, 2001, [ag.ca.gov/civilrights/pdf/reasonab\\_1.pdf](http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf). This section is also drafted to be consistent with Federal guidance on discriminatory land use practices, and relevant case law. Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, “Group Homes, Local Land Use, and the Fair Housing Act, August 18, 1999, and Related Questions and Answers, Updated August 6, 2015, <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>; Joint Statement, Chapter 1277, Statutes of 1993, Sec. 18 (Legislative Intent Language on 12955); H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24, reprinted in 1988 U.S. Code Cong. \* Admin news at 2173, 2185 (Legislative Intent language on FHA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

**§ 11098.14.2, subd. (a)**

The purpose of this proposed subdivision is to provide greater clarity as to specified practices relating to regulation of land use ownership and land use benefits that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (b)**

The purpose of this proposed subdivision is to provide greater clarity as to specified practices relating to regulation of residential uses, landownership, tenancies and other land use benefits that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. In addition, providing detailed examples is necessary to ensure consistency with a variety of state statutory and common law provisions and with federal law where that law accurately reflects parallel California law.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (c)**

The purpose of this proposed subdivision is to provide greater clarity as to specified practices relating to land use decisions and authorizations that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (d)**

The purpose of this proposed subdivision is to provide greater clarity as to specified practices relating to provision of governmental services in connection with residential uses that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations. In addition, providing detailed examples is necessary to ensure consistency with a variety of state statutory and common law provisions and with federal law where that law accurately reflects parallel California law.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (e)**

The purpose of this proposed subdivision is to provide greater clarity as to specified practices that may limit privileges, services or facilities relating to residential uses that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (f)**

The purpose of this proposed subdivision is to provide greater clarity as to the use of, approval of, or implementation of restrictive covenants that may give rise to a claim of discriminatory intent or a claim of discriminatory

effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with California Civil Code sections 53 and 782 et seq., and Government Code sections 12956.1 and 12956.2, regarding restrictive covenants, as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (g)**

The purpose of this proposed subdivision is to provide greater clarity as to the enactment, implementation, or operation of housing programs that may give rise to a claim of discriminatory intent or a claim of discriminatory effect, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), as well as with the comparable federal regulations and case law.

**§ 11098.14.2, subd. (h)**

The purpose of this proposed subdivision is to provide greater clarity that the failure of a governmental body to make reasonable accommodations to ordinances, rules, policies, Practices or services, when required by law, may give rise to a discriminatory land use practice, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), and the California Attorney General's Guidance on reasonable accommodations in land use practices. Letter to All California Mayors from the Office of the Attorney General, Bill Lockyer, A.G., re: "Adoption of a Reasonable Accommodation Procedure," May 15, 2001, [ag.ca.gov/civilrights/pdf/reasonab\\_1.pdf](http://ag.ca.gov/civilrights/pdf/reasonab_1.pdf). It also clarifies that other

existing statutory and regulatory provisions, both federal and state, regarding provisions of reasonable accommodations to people with disabilities, apply to Public Land Use Practices. See also Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, "Group Homes, Local Land Use, and the Fair Housing Act, August 18, 1999, and Related Questions and Answers, Updated August 6, 2015, <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>; Joint Statement, Chapter 1277, Statutes of 1993, Sec. 18 (Legislative Intent Language on 12955); H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24, reprinted in 1988 U.S. Code Cong. \* Admin news at 2173, 2185 (Legislative Intent language on FHA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

### **§ 11098.14.2, subd. (i)**

The purpose of this proposed subdivision is to provide greater clarity that the failure of a governmental body to provide reasonable modifications to housing programs or dwellings, when required by law, may give rise to a discriminatory land use practice, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

The proposed subdivision is consistent with Government Code sections 12955.8(b) and 12955.7(l), and other existing statutory and regulatory provisions, both federal and state, regarding provisions of reasonable modifications to people with disabilities.

### **§ 11098.14.3. Land Use Practices with Discriminatory Effect**

The purpose of this section is to clarify the circumstances under which the Public and Private Land Use practices delineated in Section 11098.14.2 may give rise to a discriminatory effect claim, in order to assist the public in the interpretation and implementation of Government Code sections 12955.7(l) and 12955.8(b). Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public.

This section is also drafted to be consistent with Federal guidance on

discriminatory land use practices, and relevant case law. Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, “Group Homes, Local Land Use, and the Fair Housing Act, August 18, 1999, and Related Questions and Answers, Updated August 6, 2015, <https://www.justice.gov/crt/joint-statement-department-justice-and-department-housing-and-urban-development-1>; Joint Statement, Chapter 1277, Statutes of 1993, Sec. 18 (Legislative Intent Language on 12955); H.R. Rep. No. 100-711, 100th Congress, 2d Sess. 24, reprinted in 1988 U.S. Code Cong. \* Admin news at 2173, 2185 (Legislative Intent language on FHA); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

#### **§ 11098.14.4. Specific Practices Related to Land Use Practices**

The purpose of this section is to delineate with more specificity certain Land Use Practices that are unlawful, where the nature of those practices and evolving case law might create confusion in the absence of such specificity. Further clarity is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public.

#### **§ 11098.14.4, subd. (a)**

The purpose of this proposed subdivision is to provide greater clarity about when a governmental body’s adoption of certain ordinances or practices related to nuisances may constitute a discriminatory Public Land Use practice, in order to assist the public in the interpretation and implementation of Government Code section 12955.7(l). Further clarity is necessary to ensure compliance with the law and to prevent misconstruction of provisions in the statute and proposed regulations.

This section is drafted to be consistent with the comparable federal law, pursuant to Government Code section 12955.6. Government Code section 12955.6 reads in parts “[n]othing 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.)...” and California courts look to cases interpreting the FHA to rule on FEHA matters. Accordingly, the proposed section is consistent with Government Code sections 12955.8 and 12955.7(l), as well as with comparable federal law. See Office of General Counsel Guidance on Application of Fair Housing Act Standards to

the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>.

### **Article 18. Consideration of Criminal History Information in Housing**

FEHA prohibits discrimination in the sale, rental and financing of housing accommodations and in other housing-related activities on the basis of numerous protected classes, including race, color, and national origin. These regulations address how three types of liability (discriminatory effects, intentional discrimination and discriminatory statements) apply in fair housing cases under FEHA in which a housing provider or other covered person or entity justifies an adverse housing action based upon an individual's criminal history.

As background, it is important to note that significant public policies support the facilitation of re-entry of former prisoners, and the importance of housing in that regard. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016); *The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al.*, Civil Action No. CV-14-6410 (VMS), U.S. District Court, Eastern District of New York (Filed 10/18/2016). According to the California Department of Corrections and Rehabilitation's Spring 2016 Population Projections, California had 129,182 prisoners on June 30, 2015. Due to the impact of prisoners completing their sentences, court-ordered population reduction measures, and Proposition 47, many of these prisoners will be re-entering society. The vast majority of current prisoners will be released at some point. Over 4,500 inmates were resentenced and released from prison as a result of Proposition 47 alone. A great deal of empirical research demonstrates that access to housing is critical to successful reentry of former prisoners. However, many housing providers and others subject to FEHA currently have policies or practices that use criminal history information in order to make housing decisions. (David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 *Law & Soc. Inquiry* 5, 14 -15 (2008).) While providers and others have legitimate interests in screening potential tenants or borrowers to determine if they can fulfill a tenant's or borrower's obligations, individuals who have been arrested or who have criminal records often face difficult barriers in obtaining housing because of their

criminal records, even if their criminal history bears no relationship to their ability to be a responsible tenant, housing consumer or borrower. Consequently, they have a high risk of becoming homeless, which is in turn linked to a greater propensity to reoffend.

Furthermore, nationally and in California, arrest, conviction and incarceration rates of African Americans and Hispanics (or Latinos), and possibly other protected classes, are disproportionate to their numbers in the general population. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). Hence, the use of criminal history information in housing decisions is likely to disproportionately negatively affect African Americans and Latino populations. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). While having a criminal record is not a protected characteristic under FEHA, restrictions on housing opportunities based upon policies or practices that use criminal history violate the Act if, without sufficient legal justification: (1) they have a discriminatory effect on members of Protected Classes; (2) they constitute intentional discrimination on members of protected classes; or, (3) statements about the use of criminal history information that are discriminatory.

The primary benefits of these regulations will be to prevent such discrimination, to reduce instances of discrimination, and to provide a clear basis for DFEH and courts to apply FEHA to cases where such discrimination is alleged. A secondary benefit will be to assist in enabling formerly incarcerated persons to successfully reenter society and to reduce recidivism.

### **§ 11098.18.1. Discriminatory Effect of Criminal History Information.**

The purpose of this section is to set out the general rule that defendants can be liable for discrimination based upon a claim of discriminatory effect if their use of criminal history information has a discriminatory effect on members of a Protected Class that is not supported by a legally sufficient justification. The section clarifies that Article 4 is the legal standard for such liability. This section is necessary to make explicit that discriminatory effect based upon the use of criminal history information is a valid (though pre-existing) cause of action. Proposed section 11098.18.3 provides more

specificity and clarity as to the application of discriminatory effect in criminal history information cases.

The following are persuasive authority for this section: U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016) and United States of America's Statement of Interest, Doc. No. 102, *The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al.*, Civil Action No. CV-14-6410 (VMS), U.S. District Court, Eastern District of New York (Filed 10/18/2016).

### **§ 11098.18.2. Discriminatory Statements Regarding Criminal History**

The purpose of this section is to set out the general rule that defendants can be liable for discrimination based upon a claim of discriminatory effect if their use of criminal history information violates the applicable standard. The section clarifies that liability could be based either on the legal standard for discriminatory statement liability or on Article 4 (if the discriminatory statement has a discriminatory effect that is not supported by a legally sufficient justification). This section is necessary because it makes explicit the rule that a discriminatory statement based upon the use of criminal history information may give rise to a valid (though pre-existing) cause of action. The problem it addresses is that if a housing provider makes certain statements about the use of criminal information in its screening policy (e.g. "We don't allow criminals here."), members of protected classes may be illegally dissuaded from applying for housing, or such statements may have a disparate impact on members of protected classes. The benefit of this section will be to prevent or reduce such instances of discrimination.

### **§ 11098.18.3. Plaintiff's Burden of Proof in Discriminatory Effects Cases Related to Criminal History Information.**

This section provides more specificity and clarity to the application of the discriminatory effect standard in criminal history information cases by setting out the plaintiff's burden of proof in criminal history information cases. This section along with those that follow are necessary to clarify this rapidly evolving area of law.

### **§ 11098.18.3, subd. (a)**

The purpose of the first sentence of this subdivision is to contextualize the rest of this section. It is necessary to clarify that not all inquiries or use of criminal history information in housing are prohibited, but only those that are discriminatory. The purpose of the second sentence of this subdivision is to clarify that the types of evidence that a plaintiff can use to establish a discriminatory effect include statistics, but are not limited to statistics. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. Of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011) (“No single test controls in measuring disparate impact, but the [plaintiff] must offer proof of disproportionate impact, measured in a plausible way.”), *cert dismissed*, 134 S.Ct. 636 (2013). This sentence is necessary to provide guidance to parties, factfinders and the public regarding what kinds of evidence are relevant.

#### **§ 11098.18.3, subd. (b)**

Similar to the previous subdivision, the purpose of this subdivision is to further clarify the types of statistical evidence that a plaintiff can use to establish a discriminatory effect. In addition, this subdivision specifies that certain evidentiary showings are presumptively sufficient. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016); *The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al.*, Civil Action No. CV-14-6410 (VMS), U.S. District Court, Eastern District of New York (Filed 10/18/2016); *EI v. SEPTA*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005, *aff'd* on other grounds, 479 F.2d 232 (3d Cir. 2007); and *Brown v. Omaha Housing Auth.*, No. 8:05-cv-423, 2007 WL 2123750, at \*2 (D. Neb., July 20, 2007) support the use of national statistics. If national statistics are sufficient, it would appear *a fortiori* that state level statistics would be sufficient. However, consistent with case law, the regulation confirms that whether a plaintiff’s burden has been met is a fact-specific and case-specific inquiry. This subdivision is necessary to provide guidance to parties, factfinders and the public.

#### **§ 11098.18.4. Establishing a Legally Sufficient Justification Relating to Criminal History Information**

The purpose of this section is to provide more specificity and clarity to the application of the discriminatory effect standard in criminal history

information cases by setting out what constitutes a legally sufficient justification when a discriminatory effect has been shown in criminal history information cases. This section along with those that follow are necessary to clarify potential defendants' burden of proof in these cases.

**§ 11098.18.4, subd. (a)**

The purpose of this subdivision is to introduce the requirement that a defendant must meet all of the elements specified in the following subdivision in order to establish a defense under the applicable law. It is necessary to provide clarity to parties, factfinders and the public as to the various factors necessary to a defense.

**§ 11098.18.4, subd. (b)**

The purpose of this subdivision is to specify each of the elements a defendant must meet in order to establish a defense, and to explain how to determine when such a defense is properly asserted. The interests named in in paragraph (b)(1) of the subdivision are generally recognized as the types of interests upon which landlords might offer to support their policy or practice of using criminal background information to screen prospective tenants. Other Owners or Providers may proffer other or additional interests.

The requirement that Owners or Providers who use criminal history in housing decisions limit consideration to convictions directly-related to an individual's capacity and likelihood of fulfilling obligations related to the housing or services is supported by *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8<sup>th</sup> Cir. 1975) from the Title VII context. The California Apartment Association's Criminal Background Checks White Paper (2011) also supports this requirement ("Any screening standards should be narrowly tailored to help an owner select individuals who are able to fulfill their tenancy obligations without excluding others arbitrarily.") *Id.* at 2.

The factors identified in paragraph (b)(2) of the subdivision are drawn from a number of sources, including *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8<sup>th</sup> Cir. 1975), citing *Butts v. Nichols*, 381 F.Supp. 573, 580-81 (S.D.la.1974) (from the Title VII context), the U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). In addition, the California Apartment Association's Criminal Background Checks White Paper (2011) agrees that consideration of the time since a conviction occurred as well as the type and severity of the crime underlying the

conviction are relevant.

Paragraph (b)(3) of the subdivision also intends to offer some useful examples that might or might not, under some circumstances, constitute a basis for a particular practice. The examples are consistent with those offered in the California Apartment Association's Criminal Background Checks White Paper (2011).

The requirement stated in paragraph (b)(4) is supported by *EI v. SEPTA*, 479 F.2d 232, 245-46 (3d Cir. 2007) (stating that "Title VII...require[s] that the [criminal conviction] policy under review accurately distinguish[es] between applicants that pose an unacceptable level of risk and those that do not"). This subdivision is necessary because it clarifies potential defendants' rights and obligations by clarifying that an Owner or Provider of housing may employ a policy or practice of using criminal history information in housing decisions only when certain criteria are met.

#### **§ 11098.18.4, subd. (c)**

This subdivision is intended to make explicit that, pursuant to proposed sections 11098.04.3(a)(3) and (b)(4), a defendant's failure to use a less discriminatory policy or practice to achieve its legitimate interest is a valid (though pre-existing) basis for liability. Proposed section 11098.18.4(c) provides more specificity and clarity as to the application of this doctrine in criminal history information cases.

This subdivision clarifies that an Owner or Provider may choose to conduct individualized assessments in its use of criminal history information in housing decisions as a possibly less discriminatory alternative to the type of policy or practice considered in the prior subdivision. It may do so either as its primary policy or practice or in addition to the type of policy or practice considered in the prior subdivision. This subdivision also provides some practices that a court could consider in determining whether a challenged individualized assessment policy or practice would result in either a discriminatory intent or a discriminatory effect or does in fact constitute a less discriminatory alternative. This subdivision is supported by *EI v. SEPTA*, 479 F.2d 232, 245 (3d Cir. 2007) and *Waldon v. Cincinnati Pub. Sch.*, 941 F.Supp. 2d 884 (S.D. Ohio 2013).

The purpose of this subdivision is to clarify these options for Owners or Providers and to facilitate their compliance with the Act. It is necessary to clarify that even if a policy or practice considered in the prior subdivision meets the requirements of that section, it can still violate the Act if it is overly broad and more discriminatory than is necessary to accomplish its specific, substantial, legitimate, nondiscriminatory interest. This subdivision is also necessary to alert potential defendants that if they employ an

individualized assessment policy, there is a risk that implementation of such a policy could violate FEHA as an intentional violation under Section 11098.18.5. or have a discriminatory effect under Section 11098.18.1. Individualized assessments may allow prospective tenants or borrowers to provide information to correct errors in criminal records and so prevent a negative housing decision from being made based on inaccurate information, and, if so, they may assist in reducing discrimination. According to the Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005), criminal records obtained by housing providers and others subject to FEHA may include errors. Similarly, the U.S. Dept. of Justice, The Attorney General's Report on Criminal History Background Checks (June 2006) revealed errors in the FBI's Interstate Index system. And because housing providers and others subject to FEHA may be inclined to make a favorable housing decision if they receive mitigation information, individualized assessments are more likely to prevent unintentional discrimination. The subdivision also intends to offer some useful examples of potentially relevant mitigating information and possible best practices. These examples are taken from U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). The practice of delaying consideration of criminal history until after review of other eligibility information comes from U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). California Apartment Association's Criminal Background Checks White Paper (2011) also proposes such a practice. The practices of providing a copy of a policy and providing space on an application form for individuals to provide additional information about rehabilitation or other mitigating circumstances also may be a means for reducing the potentially discriminatory effect of inquiring about criminal history. This subdivision is necessary to provide additional guidance as to how to evaluate the "less discriminatory alternative" component of the discriminatory effect doctrine in proposed sections § 11098.04.3(a)(3) and (b)(4) as applied to consideration of criminal history.

### **§ 11098.18.5. Intentional Violations Liability and the Use of Criminal History**

The purpose of this section is to set out the general rule that defendants can be liable under an intentional violations theory if their use of criminal history information meets the criteria for such a claim, is not supported by a

legally sufficient justification or is shown to be pretextual. The section clarifies FEHA's legal standard for such liability. This section is also intended to provide examples of potential violations. These examples are taken from the U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). This section is necessary because it clarifies that an intentional violation based upon the use of criminal history information may give rise to a valid (though pre-existing) cause of action. In addition to the authority cited in the text, the U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016) is persuasive authority for this section.

#### **§ 11098.18.6. Specific Practices Related to Criminal History Information**

The purpose of this section is to set out some specific practices related to criminal history information that are unlawful, to clarify a "seven year" evidentiary presumption, and to enumerate related provisions in federal and state law. This section is necessary to fully clarify potential plaintiffs' and defendants' rights and obligations in this context.

#### **§ 11098.18.6, subd. (a)**

The purpose of this subdivision is to enumerate further limitations on certain uses of particular kinds of criminal history information in housing decision policies and practices and to clarify when such information or policy is permissible. This subdivision is necessary to provide guidance to potential plaintiffs and defendants. The prohibition on use of criminal history information other than convictions is supported by U.S. Supreme Court opinions (e.g. *Schwabe v. Bd. of Bar Examiners*, 353 U.S. 2323, 241 (1957); *U.S. v. Berry*, 553 F.3d 272, 282 (3d Cir. 2009); and *U.S. v. Zapete-Barcia*, 447 F.3d 57, 60 (1<sup>st</sup> Cir. 2006)) and certain California statutes (e.g. Labor Code section 432.7). In addition, the California Apartment Association's Criminal Background Checks White Paper (2011) encourages screening criteria that are consistent with California consumer law's prohibitions of consumer reports including arrests, indictments, or misdemeanor complaints that did not result in a conviction. Support for a prohibition of "blanket prohibitions" includes *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8<sup>th</sup> Cir. 1975); *Field v. Orkin Extermination Co.*, No.

00-5913, 2002 WL 32345739, at \*1 (E.D. Pa. Feb 21, 2002) and *The Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp., et al.*, Civil Action No. CV-14-6410 (VMS), U.S. District Court, Eastern District of New York (Filed 10/18/2016). In addition, the California Apartment Association’s Criminal Background Checks White Paper (2011) discourages blanket bans.

**§ 11098.18.6, subd. (b)**

The purpose of this subdivision is to further specify how defendants must meet their burden of proof in establishing a defense under § 11098.18.4. subd. (b). Sections 1785.13 and 1786.18 of the California Civil Code informs the “seven year” rebuttable presumption contained within the subdivision. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016). In addition, the California Apartment Association’s Criminal Background Checks White Paper (2011) encourages screening policies that are consistent with the seven year limit. Because the test requires a fact-specific and case-specific inquiry, the presumption is rebuttable and not conclusive. This subsection is necessary to prevent housing decisions from harming the rights of persons protected under FEHA based upon the use of irrelevant information.

**§ 11098.18.6, subd. (c)**

The purpose of this subdivision is to provide a reference to related federal and state laws. This subdivision is necessary to provide a clear reference to related laws to facilitate compliance with them.

**§ 11098.18.7. Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.**

The purpose of this subdivision is to alert potential defendants of their legal duties and rights under other federal or state laws that may permit or require consideration of criminal history in housing decisions. This subdivision is necessary to clarify the relationships between FEHA’s requirements and those of other federal or state laws, to maintain consistency between the laws, and to clarify that this section does not change potential defendants’ legal duties and rights under other federal or state laws. While the issue of whether criminal background checks

constitute “investigative consumer reports” subject to the federal and state laws is currently being litigated, e.g. in *Moran v. Screening Pros* (9<sup>th</sup> Cir, Case No. 12-57246), the regulation is drafted to reflect current law.

**§ 11098.18.7, subd. (a)**

The purpose of this subdivision is to clarify the effect that compliance with other federal or state laws that obligate consideration of specific criminal history information has on a potential defendant’s liability under Article 4. Some federal or state provisions are less protective of persons with criminal history in that they may require consideration of criminal information that FEHA would not otherwise allow. Some of these federal and state laws only apply to certain types of public or subsidized housing, such as the example provided. This subdivision is necessary to clarify that compliance with those other federal or state laws that also apply to particular situations may in some instances be a defense to conduct that might otherwise be prohibited under FEHA. U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016); HUD Memorandum re: Use of Arrest Records in Screening Program Applicants or Evicting or Terminating Assistance of Tenants of Public and Other HUD-Assisted Housing, April 8, 2015; HUD Notice PIH, November 2, 2015, re: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.

**§ 11098.18.7, subd. (b)**

The purpose of this subdivision is clarify that if specific federal or state laws prohibit consideration of specific criminal history information that the FEHA would otherwise allow, a Person or Owner who fails to comply with these federal or state laws that are more protective of persons with criminal histories will also violate the FEHA. Some of these federal and state laws only apply to certain types of public or subsidized housing This subdivision is necessary to clarify that Owners and Providers subject to those federal and state laws are obligated to comply with those prohibitions in addition to the FEHA’s requirements. For example, federal law *requires* that Public Housing Authorities provide public housing, project-based Section 8, and Section 8 HCV applicants with notification and the opportunity to dispute the accuracy and relevance of a criminal record *before* admission or assistance is denied on the basis of such record. HUD Notice PIH 2015-

19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, and citations therein, available at [portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf); See also HUD Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016) (*add link*); HUD Memorandum re: Use of Arrest Records in Screening Program Applicants or Evicting or Terminating Assistance of Tenants of Public and Other HUD-Assisted Housing, April 8, 2015, and citations therein.

### **§ 11098.18.8. Local Laws or Ordinances**

The purpose of this subdivision is to alert potential defendants of their legal duties and rights under local laws or ordinances that may be more protective of members of Protected Classes and further limit consideration of criminal history in housing decisions and to clarify that this section does not change potential defendants' legal duties and rights under those local laws or ordinances. This subdivision is necessary to clarify that municipalities can legislate beyond FEHA because FEHA is a floor, not a ceiling, on an individual's right to be free from discrimination. One example is Article 49, San Francisco Police Code.

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

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

### **REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

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

### **REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY**

## **ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

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

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

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

## **ECONOMIC IMPACT ANALYSIS/ASSESSMENT**

Because the proposed regulations provide detail about compliance with existing obligations but do not create any new liabilities or obligations, the Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs or housing within the state; the creation of new businesses or housing or the elimination of existing businesses or housing within the state; the expansion of businesses or housing currently doing business within the state; or worker safety and the environment. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for housing providers, owners, and tenants to understand their rights and obligations, and reducing litigation costs.