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Submitted via FEHCouncil@dfeh.ca.gov
Fair Employment and Housing Council
c/o Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment and Housing
320 West 4th Street, 10th Floor
Los Angeles, CA 90013

Re: Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information

Dear Fair Employment and Housing Councilmembers:

The following comments regarding the Fair Employment and Housing Council's (the Council's) proposed fair housing regulations are respectfully submitted on behalf of the undersigned attorneys and organizations. We commend the Council's thoughtful approach toward these regulations, and look forward to working with the Council to ensure the adoption of meaningful fair housing regulations that provide clear guidance to tenants, homeowners, advocates, housing providers, lending institutions, communities, and others about existing protections from housing discrimination. To that end, we offer the following recommendations concerning the proposed regulations regarding discriminatory effect, discriminatory land use practices, and the use of criminal history information.

I. Article 4. Discriminatory Effect

The Council takes the appropriate step in issuing draft regulations formalizing discriminatory effects theory under FEHA. The discriminatory effects method of proof has been an integral part of fair housing enforcement for decades, most recently affirmed by the U.S. Supreme Court in the *Inclusive Communities Project* decision. We offer the following suggestions and recommendations regarding Article 4 of the proposed FEHA regulations.

A. Practices with a Discriminatory Effect (Proposed § 11098.04.1)

Proposed § 11098.04.1 largely tracks the HUD Discriminatory Effects Rule,[1] 24 C.F.R. § 100.500. Proposed § 11098.04.1(b) however should use the term "person" or "persons" instead of "individual" or "group of individuals," as "individual" or "individuals" are not defined in FEHA. We also recommend adding language stating that a single action, failure to

[1] Implementation of the Fair Housing Act's Discriminatory Effects Standard, Final Rule, 78 Fed. Reg. 11,460 (Feb. 15, 2013) [hereinafter *HUD Discriminatory Effects Rule*].

act, rule, law decision, standard, or policy or procedure, whether written or unwritten, can have a discriminatory effect.[2] Thus, § 11098.04.1(b) should reflect the following changes (throughout these comments, strike throughs represent deletions; underlined words represent additions):

> (b) A Practice has a discriminatory effect where it actually or predictably results in a disparate impact on ~~an individual~~ a Person or group of ~~individuals~~ Persons or creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a Protected Class. A single action, failure to act, rule, law decision, standard, or policy or procedure, whether written or unwritten, can have a discriminatory effect.

Additionally, we recommend removing proposed § 11098.04.1(d), and incorporating its text into proposed § 11098.04.1(a). As currently proposed, the word "Practice" in subsection (d) is not describing anything. Instead, by adding this language into subsection (a), it would be clear that the type of "Practice" being described is one with a discriminatory effect. The HUD Discriminatory Effects Rule has a similar construction.[3] A suggested edit could read as follows:

> (a) Liability may be established under the Act based on a Practice's discriminatory effect, as defined in paragraph (b) of this section, even if the Practice was not motivated by a discriminatory intent. The Practice may still be lawful if supported by a legally sufficient justification, as defined in section 11098.04.3.

B. Burdens of Proof in Discriminatory Effect Cases (Proposed § 11098.04.2)

For the purposes of clarity, the text in subsections (a) and (b) should not just refer to a "plaintiff" or "defendant" as the burden shifting framework also presumably applies to administrative complaints filed at the Department—in addition to lawsuits filed in court. Thus, references to the "plaintiff" and the "defendant" should be supplemented with terms that encompass the DFEH administrative process.[4] For example, FEHA uses the terms "complainant" and "respondent" at Cal. Gov. Code § 12980.

We also support the draft regulation's burden-shifting framework which assigns the burden of proving that "[t]he substantial, legitimate, nondiscriminatory business interest [or purpose] could

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[2] *See* proposed § 11098.3(f) (definition of Practice "includes an action or actions, failure to act, rules, laws, decisions, standards, policies and procedures, whether written or unwritten, and "practices" as used in 24 C.F.R. Part 100").

[3] 24 C.F.R. § 100.500.

[4] For example, the HUD Discriminatory Effects Rule, in addition to using the terms "plaintiff" and "defendant" also uses the terms "charging party" and "respondent." *See generally*, 24 C.F.R. § 100.500.

not be served by another Practice that has a less discriminatory effect"[5] to the business establishment, Person, or Owner (i.e.., the defendant or respondent) whose Practice is being challenged.

C. Evidence of Discriminatory Effect

The HUD Office of General Counsel issued guidance on the use of criminal history in housing decisions,[6] limited English proficiency,[7] and crime-free and nuisance ordinances,[8] that are helpful in exploring the types of evidence that can be used to demonstrate a disparate impact under FEHA. HUD's guidance provides examples of the types of evidence that can be used to establish a disparate impact, the first step in the discriminatory effects analysis. For example, HUD's memo regarding criminal history in housing decisions contemplates the use of national statistics or local statistics, depending on the circumstances of the case and the nature of the claims at issue.[9] HUD's memo regarding criminal history continues, "While state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case, national statistics on racial and ethnic disparities in the criminal justice system may be used where, for example, state or local statistics are not readily available and there is no reason to believe they would differ markedly from the national statistics."[10] The HUD memo adds that "[a]dditional evidence, such as applicant data, tenant files, census demographic data and localized criminal justice data, may be relevant in determining whether local statistics are consistent with national statistics and whether there is reasonable cause to believe that the challenged policy or practice causes a disparate impact." [11]

Case law supports this approach; in *Sisemore v. Master Financial*, a FEHA housing discrimination case, the appellate court explained that plaintiffs had successfully pled a disparate impact claim by comparing the percentages of women and families with children among licensed

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[5] *See* proposed § 11098.04.2(b) and proposed § 11098.04.3.
[6] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016) [hereinafter *HUD Criminal Records Guidance*], available at: https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf.
[7] Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency (Sept. 15, 2016), available at: https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf.
[8] 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: https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf.
[9] *HUD Criminal Records Guidance* at 3 ("Whether national or local statistical evidence should be used to evaluate a discriminatory effects claim at the first step of the analysis depends on the nature of the claim alleged and the facts of that case.").
[10] *Id*. at 3 (also noting that "[n]ational statistics provide grounds for HUD to investigate complaints challenging criminal history policies").
[11] *HUD Criminal Records Guidance* at 4.

daycare home providers within Santa Clara County with the incidence of these protected characteristics within the general population.[12]

The analysis of disparities bearing more heavily on one group of people than another includes, for example, numerical disparities based on statistical studies or anecdotal evidence.[13] We therefore recommend the following new subsection, § 11098.04.2(a)(1):

> (a)(1) Evidence that a challenged Practice caused or predictably will cause a discriminatory effect includes, but is not limited to:
>
> > (i) Statistics, including local, state, and national statistics. National statistics may be used where appropriate, such as where state or local statistics are not readily available.
> >
> > (ii) Applicant data.
> >
> > (iii) Tenant/resident files or data.
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> > (iv) Demographic data from the Decennial Census of Population (Census), the annual American Community Survey (ACS), and other reliable data sources, such as studies and reports.
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> > (v) Local agency data and records.
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> > (vi) Police records and court records, including eviction data.
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> > (vii) Data from expert-designed surveys.

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[12] 151 Cal. App. 4th 1386, 1421 (Cal. Ct. App. 2007) ("Plaintiffs have alleged further that this facially neutral policy had a disproportionately negative impact on members of two protected classes—women and families with children, because licensed day care home providers in Santa Clara County are made up of higher percentages of women and families with children than the percentages of those groups as reflected in the County's general population. Therefore, since plaintiffs have alleged facts in the Complaint 'of a violation causing a discriminatory effect' by alleging practices 'that [have] the effect regardless of intent, of unlawfully discriminating on the basis of ... sex [or] ... familial status'…they have properly pleaded a disparate impact housing discrimination claim under FEHA.").

[13] *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Griggs v. Duke Power Co*., 401 U.S. 424 (1971); U.S. Department of Justice, Civil Rights Division, *Title VI Legal Manual* at pages 42-58 and cases cited (2001), available at: https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf (accessed March 27, 2017).

Note that addition of this subsection is not stating that demonstrating statistical disparity alone is sufficient to establish a discriminatory effect.[14] Instead, we recognize that the plaintiff or complainant still must demonstrate that a "challenged Practice caused or predictably will cause a discriminatory effect," as currently outlined in proposed § 11098.04.2(a).

D. Legally Sufficient Justification (Proposed § 11098.04.3)

The Council should include language in proposed § 11098.04.3 stating that maximizing profits does not, de facto, constitute a substantial, legitimate, nondiscriminatory business interest in the context of business establishments. Doing so would prevent a defendant or respondent, in response to a charge of a discriminatory housing practice, to defeat such a claim by simply stating that engaging in the practice at issue would maximize profits whereas an alternative practice with a less discriminatory effect would not allow for profits to be maximized (even if profits, albeit fewer profits, could still be realized).

In the preamble to HUD's final rule[15] regarding discriminatory effects, HUD declined to insert language suggested by a commenter that the "final rule expressly state that increasing profits, minimizing costs, and increasing market share qualify as legitimate, nondiscriminatory interests."[16] In response, HUD stated that the "Fair Housing Act covers many different types of entities and practices, and a determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity is fact-specific and must be determined on a case-by-case basis. Accordingly, the final rule does not provide examples of interests that would always qualify as substantial, legitimate, nondiscriminatory interests for every respondent or defendant in any context."[17] Including language that says maximizing profits is not a de facto substantial, legitimate, nondiscriminatory business interest is consistent with the focus on a case-by-case analysis, and would provide clarity on this point.

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[14] *See Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507, 2523 (2015)

[15] *HUD Discriminatory Effects Rule*, 78 Fed. Reg. 11,460.

[16] *HUD Discriminatory Effects Rule*, 78 Fed. Reg. at 11,471 (also responding to a commenter who "asked that the final rule codify examples of tenant screening criteria such as rental history, credit checks, income verification, and court records that would be presumed to qualify as legally sufficient justifications"). Additionally, in an older joint policy statement regarding lending by HUD, the U.S. Department of Justice, the U.S. Department of Treasury, and other federal entities stated, "Identifying the existence of a disparate impact is only the first step in proving lending discrimination under this method of proof. When an Agency finds that a lender's policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by 'business necessity.' The justification must be manifest and may not be hypothetical or speculative. Factors that *may b*e relevant to the justification *could include cost and profitability*." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994) (emphasis added).

[17] *HUD Discriminatory Effects Rule*, 78 Fed. Reg. at 11,471.

E. Relationship of Legally Sufficient Justification to Intentional Violations (Proposed § 11098.04.4)

We recommend replacing the phrase "intentional violations" with "intentional discrimination." The phrase "intentional discrimination" is used in the federal discriminatory effects regulation at 24 C.F.R. § 100.500(d). Though used in provisions such as Cal. Gov. Code § 12955.8, the term "violation" is not defined within FEHA, while "discrimination" is defined.[18] The phrase "intentional violations" does not describe any particular law or regulation.

We recommend that the Council clarify proposed § 11098.04.4 as follows:

> § 11098.04.4 Relationship of Legally Sufficient Justification to Intentional ~~Violations~~ Discrimination Claims
>
> A demonstration that a Practice is supported by a legally sufficient justification, as defined in section 11098.04.3, may not be used as a defense against a claim of intentional ~~violations~~ discrimination.

Alternatively, the Council could also amend this provision to state "…may not be used as a defense against a claim of intentional violations of the Act."

F. Financial Assistance Practices with Discriminatory Effect (Proposed § 11098.04.5)

We welcome the inclusion of illustrations of discriminatory conduct, derived in part from HUD's regulations at 24 C.F.R. § 100.130. However, it unclear why these select sections regarding loans and financial assistance were separated from the rest of the provisions included in 24 C.F.R. § 100.130, to the extent the Council seeks to incorporate these illustrations by reference to HUD regulations, and why this proposed section chooses to only focus on Practices that result in a discriminatory effect.

In lieu of describing this section simply in terms of discriminatory effects, we recommend removing the phrases "that result in a discriminatory effect" (subsection (a)) and "that results in a discriminatory effect" (subsection (b)), because, depending on the circumstances of a particular case, the prohibited practices described in this proposed section could also arise where there is discriminatory intent. Inclusion of language that limits these Practices to a discriminatory effects theory is confusing. Removing references to "discriminatory effect" in this provision is also consistent with the approach taken in the HUD Discriminatory Effects Rule. The HUD Rule preamble notes that the HUD Rule "also adds and revises illustrations of practices that violate the Act through *intentional discrimination or through a discriminatory effect* under the standards

[18] Cal. Gov. Code § 12927 (defining "discrimination").

outlined in § 100.500."[19] Given this, the Council should consider whether this section should be included in Article 4, or elsewhere in the regulations.

The title of this section should be changed to "Discrimination in the terms and conditions for making available loans or other financial assistance," consistent with the title for 24 C.F.R. § 100.300.

This provision also should include references to loan modifications, foreclosure, and the foreclosure process—all of which are related to the lending process.

G. Residential Real Estate-Related Practices with Discriminatory Effect (Proposed § 11098.04.6)

For proposed § 11098.04.6, we have similar comments as outlined above for proposed § 11098.04.5. This provision appears intended to incorporate select language from 24 C.F.R. § 100.120. It is unclear why these select sections regarding loans and financial assistance were separated from the rest of the provisions included in 24 C.F.R. § 100.120, to the extent the Council seeks to incorporate these illustrations by utilizing language from HUD regulations. Again, to limit the scope of this proposed section to Practices that result in a discriminatory effect is confusing.

Specifically, at minimum, we recommend removing the phrase "that result in a discriminatory effect" in this section (specifically from subsections (a) and (b)), for the same reason as stated previously – namely, that the prohibited practices described in this proposed section could also arise where there is discriminatory intent. As noted in the prior section, the illustrations HUD included in the Discriminatory Effects Rule were intended to illustrate practices that could manifest through either intentional discrimination, or through a practice with a discriminatory effect. Given this, the Council should also consider whether this section should be included in Article 4, or elsewhere in the regulations.

Furthermore, if this section purports to cover residential real-estate practices, the focus of the provisions is too narrow, as the section only focuses on loans or other financial assistance. It does not, for example, cover the sale, brokering, or appraisal of a residential property – which are all included in the federal definition of "residential real-estate transactions."[20] Accordingly, the title of this section should share the title with 24 C.F.R. § 100.120, "Discrimination in the making of loans and in the provision of other financial assistance" unless it intends to expand its scope. As written, it is unclear why certain practices were chosen and others omitted.

[19] *HUD Discriminatory Effects Rule*, 78 Fed. Reg. at 11,460 (emphasis added).
[20] *See* 42 U.S.C. § 3605; *see also* 24 C.F.R. § 100.115.

Regardless of whether this section seeks to cover residential-real estate practices, this provision should include references to loan modifications, foreclosure, and the foreclosure process—all of which are related to the lending process.

H. Insurance Coverage in Proposed §§ 11098.04.5, 11098.04.6

The Council should also include language in proposed §§ 11098.04.5, 11098.04.6 such that "financial assistance" is defined to include insurance (including property insurance, liability insurance, homeowners' insurance, and renters' insurance) that provides coverage to a dwelling. Lawsuits have been brought against insurance companies for refusing to provide insurance, or providing such insurance on less favorable terms, to landlords who rent units to Section 8 Housing Choice Voucher holders.[21] These lawsuits alleged that such practices by insurance providers discriminated based on characteristics protected by the federal Fair Housing Act.

I. Exploitation Theory under FEHA

We recommend that the Council add a subsection—similar to those illustrative examples found in proposed §§ 11098.04.5, 11098.04.6—prohibiting practices that subject members of a protected class to inferior terms and conditions because of their membership in that protected class.[22] "Exploitation theory" has been used to show discrimination in cases where a protected group is given an inferior product, including in predatory lending cases where members of a protected class were offered unfavorable loan terms as compared to white counterparts.[23] Although case law applying exploitation theory has involved residential real estate transactions, the theory could apply equally to situations where a housing provider is targeting and exploiting a specific group of people for inferior treatment and services, including habitability cases where a landlord fails to make repairs or rents substandard housing largely to members of a particular group. Similar to our suggestions for proposed §§ 11098.04.5, 11098.04.6, we recommend applying such a provision to intentional discrimination (disparate treatment) and discriminatory effects.[24]

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[21] *See e.g., Viens v. America Empire Surplus Lines Ins. Co.*, 113 F.Supp.3d 555 (D. Conn. 2015) (denying insurance company's motion to dismiss disparate impact claim under the Fair Housing Act challenging "insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance"); *see also Jones v. Travelers Cas. Ins. Co. of Am.*, 2015 WL 5091908, C-13-02390 HK (N.D. Cal. May 7, 2015) (court transcript of judge denying insurer's motion for summary judgment where plaintiffs alleged both disparate treatment and disparate impact; suit also included FEHA clams).

[22] *Clark v. Universal Builders, Inc*., 501 F. 2d 324 (7th Cir. 1974).

[23] *See, e.g., Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d. 7, 11, (D.C. 2000) (holding that that where plaintiffs sufficiently alleged that the terms of defendants loans are unfair and predatory, it was not necessary that the defendants make loans on more favorable terms to anyone other than the targeted class).

[24] As noted above for the other two illustrative provisions, the Council should consider whether this section should be included in Article 4, or elsewhere in the regulations.

II. Article 14 Discrimination in Land Use Practices

The term "Land Use Practices" might cause confusion because the term "Practices" is also separately defined in a prior part of the rule, at section 11098.3(f)[25]. It is unclear whether "Land Use Practices" as used in this part is intended to incorporate the previously defined term. The Council should clarify this and cross-reference the section 11098.3(f) definition in this subsection. One way to clarify this issue would be to add a new subsection, 11098.14.1(c), stating:

> The terms "Public Land Use Practices" and "Private Land Use Practices" both incorporate the definition of the term "Practices" as specified at §11098.3(f) and include a single action, multiple actions, and failure to act.

A. Definitions (Proposed §11098.14.1)

1. Public Land Use Practices (Proposed 11098.14.1(a))

Subsection 11098.14.1 proposes definitions for the terms "Public Land Use Practices" and "Private Land Use Practices." The Council is correct to define this term broadly, and we believe that using additional terms under subsection (a)(1), including "omissions" and "failure to act" is important to convey that a land use practice also includes the lack of action. This issue could also be addressed with the clarification discussed above, so that it is clear that "Land Use Practices" incorporates the term "Practices" defined in section 11098.3(f).

The definition should explicitly state that fair housing law encompasses regulation of land use affecting the use and enjoyment of residential housing (as opposed to simply obtaining any housing) including decisions regarding municipal services, which is embodied in governing law. To this end, the language of subsection 11098.14.1(a) should be changed from "all government regulation of land use in connection with existing or proposed housing" to "all government regulation in connection with existing or proposed housing, including regulation that could affect the feasibility, affordability, or the condition of such housing." Adding the terms "allocations," "provision or denial of facilities or services," and "permitting" under (a)(1) also would address this by conveying that covered land use practices include activities such as allocation and provision of water and sewer services, provision of emergency services, other municipal services, and permitting for toxic waste and other facilities that affect the dwellings and the quality of life for community residents. Including this language is consistent with the federal Fair Housing Act, which encompasses activities that involve land use, such development of highways that cause air and noise pollution,[26] provision of sewer services[27], infrastructure development, and other development that affects the people living nearby.

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[25] That definition provides that "Practice" includes an action or actions, failure to act, rules, laws, decisions, standards, policies and procedures, whether written or unwritten, and "practices" as used in 24 C.F.R. Part 100.

[26] *See Keith v. Volpe* (C.D. Cal. 1985) 643 F.Supp. 37, 39, *aff'd* (9th Cir. 1987) 833 F.2d 850 (Discussing the consent decree in a Fair Housing Act case securing benefits for protected classes including minimizing noise and air pollution)

[27] *The Committee Concerning Community Improvement v. City of Modesto* (9th Cir. 2009) 583 F.3d 690 (discussing discrimination claims based on municipal failure to provide sewer services and infrastructure development to adjoining unincorporated areas).

Specifying that "a decision or decisions" and "an action or actions" constitutes a land use practice is essential to make it clear that a single action may still be discriminatory.[28]

A more comprehensive list of statutory references would clarify the scope of land use discrimination described in subsection (a)(1). The proposed language includes Planning and Zoning Law and Community Redevelopment Law.[29] We recommend including other appropriate laws such as the "Dissolution Law" (Division 24, Parts 1.8, 1.85 and 1.87), the Ellis Act (Gov't Code §7060), the Mobilehome Residency Law (Civ. Code §798 *et seq.*),the Mobilehome Parks Act (Health and Safety Code §18200 *et seq.*) the California Relocation Assistance Act (Gov't Code §7260 *et seq.*), the Surplus Lands Act (Gov't Code §54220 *et seq.*) and State Housing Law (Health and Safety Code §17910 *et seq.;* Gov't Code §65580, *et seq.*) to effectively convey the broad coverage of these land use provisions.

We also believe that it is appropriate to include a catchall provision in subsection (a)(1) referencing other federal and state laws related to property. However, the term "development and transfer" is too narrow. It is essential to capture the full range of potentially discriminatory land use practices, by referring to "disposition and demolition," "provision of public facilities and services," and "regulation" of property, each of which relate to land use. A decision to demolish subsidized housing occupied primarily by African American tenants,[30] or an ordinance that had the effect of forcing housing for people with disabilities to close would be actionable under the federal Fair Housing Act and should be covered by these regulations.[31] A decision to provide or not to provide water and sewer service to a community also constitutes a land use practice. [32] Adding more specific language to Subsection (a)(2), such as "Other practices related to regulation of land use, including Practices that affect infrastructure, municipal services and community amenities," would help clarify the broad scope of land use activities covered by the regulation.

Modifying subsection (a)(3) to refer to "Adoption or implementation of housing-related programs" would clarify that this subsection is meant to refer to ancillary programs related to the Practices described above. With the above proposed rewording, 11098.14.1 would read as follows:

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[28] *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 504, *cert. denied* (2016) 137 S.Ct. 295 (Single decision denying rezoning application constitutes discrimination under Fair Housing Act); *Salisbury v. Hickman* (E.D. Cal. 2013) 974 F.Supp.2d 1282, 1290 (finding that two isolated incidents of sexual harassment could create a hostile environment under the Fair Housing Act).

[29] § 11098.14.1(a) currently mistitles the Community Redevelopment Law as the "California Redevelopment Law."

[30] *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005)(Demolition of subsidized housing units violated Fair Housing Act)

[31] *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1147 (9th Cir. 2013)(City ordinance which had the effect of prohibiting or eliminating group homes in residential areas may violate FHA by making housing unavailable).

[3232] *See The Committee Concerning Community Improvement v. City of Modesto*, *supra*, 583 F.3d 690.

(a) "Public Land Use Practices" include all government regulation in connection with existing or proposed housing, including regulation that could affect the feasibility, affordability or condition of such housing, including:

(1) Ordinances, resolutions, actions, policies, decisions, authorizations, denials, approvals, zoning, use permits, allocations, provision or denial of facilities or services, permitting, variances, and other actions authorized under the California Planning and Zoning Law (Title 7 (commencing with Section 65000)), ~~the California~~ Community Redevelopment Law (Health and Safety Code sec 33320 et seq.), Dissolution Law" (Division 24, Parts 1.8, 1.85 and 1.87), the Ellis Act (Gov't Code §7060), the Mobilehome Residency Law (Civ. Code §798 *et seq.*),the Mobilehome Parks Act (Health and Safety Code §18200 *et seq.*) the California Relocation Assistance Act (Gov't Code §7260 *et seq.*), the Surplus Lands Act (Gov't Code §54220 *et seq.*) and State Housing Law (Health and Safety Code §17910 *et seq.;* Gov't Code §65580, *et seq.*) and other federal and state laws regulating disposition and demolition of property, provision of public facilities and services, and development and transfer of property;
(2) Other practices related to regulation of land use including Practices that affect infrastructure, municipal services and community amenities; and
(3) Adoption or implantation of housing-related programs.

2. Private Land Use Practices (Proposed §11098.14.1(b))

In addition to clarifying that the term "Private Land Use Practices" incorporates the previously defined term "Practices", the Council should clarify this term. The definition of Private Land Use Practices is unclear as it refers only to contractual regulation. Since much of private land use activity is not contractual, and involves other types of actions and decisions related to development such as disposition, rehabilitation, and regulation of property, this section should be revised.

Defining Private Land Use Practices to include only activities that constitute "constraints on transfer or use" is too limiting as it does not capture the range of private land use activities that *facilitate* transfer. A property owner's practice of evicting tenants who are members of protected classes and marketing newly vacated units to white, non-disabled tenants is a "land use practice" that may be undertaken for discriminatory purposes or have a discriminatory effect.[33]

This definition should state:

> "Private Land Use Practices" includes all ~~private contractual regulation of property~~ private Practices that affect development and land use including

[33] *Martinez v. Optinnis Properties,* S.D. Cal., Mar. 14, 2017, No. 2:16-cv-08598-SVW-MRW, 2017 WL 1040743 (Tenants stated FHA and FEHA claims by alleging landlord engaged in campaign of evicting tenants in protected classes and marketing newly renovated units to childless, white, non-disabled people.)

> rehabilitation, transfer, conversion, demolition and development of property, regulations and rules governing use of property and its occupants, covenants and deed restrictions, ~~and other constraints on transfer of property, whether or not recovered with a county~~ provision or denial of services or facilities, and land use that affects the use and enjoyment of property.

B. Discrimination in Land Use Practices and Housing Programs Prohibited (Proposed § 11098.14.2)

The Council's decision to incorporate a broad range of actions in this subsection is appropriate, but it would be beneficial to clarify that this is not an exhaustive list of discriminatory actions. The initial clause of 11098.14.2, "Except as specifically provided…" also appears unnecessary. It is well established that state law preempts agency regulation, and federal fair housing law preempts state laws that are less protective of housing rights, so this introductory paragraph would be clearer if it simply stated that:

> ~~Except as specifically provided in other statutes regulating land use practices, housing, and housing programs, and where those statutes are not in violation of federal fair housing laws,~~ It is ~~shall be~~ unlawful for the State, a city, county, city and county, any other local or state government agency, or any other Person or Owner, to engage in any Public or Private Land Use Practice that discriminates against members of a protected class, including any of the following:"

Use of the introductory terms "enact or implement" in subsections (a), (d) and (g) may unintentionally limit the scope of these provisions, and we suggest omitting the terms and beginning each subsection with "Public or Private Land Use Practices that…."
In subsection (b), we recommend replacing the phrase "render infeasible" with "adversely impact" to account for discriminatory land use practices that impair use and enjoyment of property, such as, for example, the location of food processing facilities in communities of color that produce noxious odors and require residents to keep their windows shut and stay indoors.
In subsection (d), we recommend adding the word "infrastructure" so that the subsection reads as follows:

> "~~Enact or implement~~ Public or Private Land Use Practices that provide different, limited, or no governmental infrastructure, facilities or services such as water, sewer, garbage collection, code enforcement, or other municipal infrastructure, facilities or services in connection with the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use or in connection with a Dwelling, or otherwise make unavailable such infrastructure, facilities or services, because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;"

The term housing programs is undefined in subsection (g) (as it is in 11098.14.1(a)(3)). It would be clearer to state "Engage in Public or Private Land Use Practices that restrict or deny…"

The regulations should also expressly prohibit discriminatory application of neutral laws or policies. This applies in a broad range of contexts, including citing individuals who are members of protected classes for violations of code or other public safety requirements while others are not cited,[34] and enforcing noise and other nuisance rules only in buildings or neighborhoods occupied by members of protected classes. We suggest adding a subsection (j) under 11098.14.2 stating:

> Public or Private Land Use Practices which are facially neutral but are applied or implemented in a discriminatory manner or with a discriminatory intent are also prohibited.

The regulations should directly address discriminatory land use practices relating to the location of toxic, polluting, and hazardous land uses in and a manner that results in disproportionate environmental and public health impacts on a protected class. We recommend the addition of a subsection (k) to Section 11098.14.2 with the following language:

> Public or Private Practices that result in the location of toxic, polluting, and/or hazardous land uses in a manner that adversely impacts environmental quality, public health, and/or enjoyment of residence because of membership in a Protected Class.

The regulations should also reflect the fact that discrimination against persons with limited English proficiency constitutes national origin discrimination, consistent with guidance issued by HUD's office of General Counsel,[35] and add a subsection (l) stating:

> Public or Private Land Use Practices that deny, restrict, or condition services related to housing on the basis of a Person's or Persons' ability to speak, read or understand the English language.

C. Public land use actions that reflect prejudice of the public

The Department of Justice and HUD's joint guidance[36] explains that government land use actions that reflect acquiescence to bias or stereotypes of the public are intentionally discriminatory, even where the public officials themselves are not personally biased. This principle is also reflected in federal court decisions interpreting the Fair Housing Act, where local decisions to block housing development reflected racially-motivated public hostility to intended residents of the new housing.[37]

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[34] Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* ("Joint statement") (Nov. 10, 2016). Available at: https://www.justice.gov/opa/pr/departments-justice-and-housing-and-urban-development-release-updated-fair-housing-actJoint Statement at 3. (Accessed Mar. 28, 2017)

[35] *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency* (Sept. 15, 2016) Available at: https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf (Accessed Mar. 28, 2017)

[3636] Joint Statement at 3.

[3737] *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 504, *cert. denied* (2016) 137 S.Ct. 295. (City discriminated against developer with reputation for building housing for Latino families by denying zoning application in order to appease race-based opposition from community); *Mhany Management, Inc. v. County*

The regulations should therefore include a subsection "Public land use –intentional discrimination" which states:

> Where a Public Land Use Practice reflects acquiescence to the bias, prejudices or stereotypes of the public or members of the public, intentional discrimination may be shown even if public officials themselves do not hold such bias, prejudice or stereotype.

This language parallels the language found in HUD guidance and case law.[38]

D. Land Use Practices with Discriminatory Effect (Proposed §11098.14.3)

Each of the subsections under section 14.2 incorporates language stating that practices engaged in have an effect on individuals *because of* membership in a protected class. For the sake of clarity, we suggest adding an introductory clause to subsection 14.3 stating that

> Even if no discriminatory intent is shown, Practices prohibited under section 11098.14.2 shall be unlawful if they have a discriminatory effect on the basis of membership in a protected class unless a legally sufficient justification applies, pursuant to Article 4.

E. Specific Practices Related to Land Use Practices (Proposed §11098.14.4)

We suggest moving section 11098.14.4 up to be a subsection of 14.2, since the conduct prohibited parallels the other subsections in 11098.14.2. This section includes local "nuisance" ordinances that impose fines on property owners for tenant conduct, but fails to cover private housing policies that operate similarly. A property management company that has a policy of evicting residents who call 911 multiple times would have a disparate impact based on sex (gender), because it would adversely impact victims of domestic violence.[39]

These types of policies and practices, whether public or private, have a particularly harmful effect on immigrant families, victims of domestic violence, elderly people and people with disabilities, who might have greater need for emergency services. The references for this subsection should therefore include Gov't Code §53165, Code of Civ. Proc. §1161.3, and Civil Code §1940.3.

In its guidance on local nuisance ordinances, HUD also recognizes that these "nuisance" or "crime-free" policies might penalize vaguely defined categories of conduct such as "excessive noise" and "disturbing the peace," and might be enacted for a discriminatory purpose,

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of Nassau (2nd Cir. 2016) 819 F.3d 581, 609 (City decision to block development of affordable housing based on racial animus of public constitutes discrimination under Fair Housing Act).

[38] *Id.*

[39] *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: https://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-134

implemented in a discriminatory manner or have a discriminatory effect.[40] We therefore suggest that in addition to moving this section to be a subsection of 14.2, it be reworded to prohibit several categories of Practices as follows:

~~It shall be an unlawful public land practice to:~~

Public or Private Land Use Practices which impose penalties or fines or require eviction based on calls to emergency services, or to visits to the property by emergency services, and are enacted, implemented or operated to impose fines or penalties or require eviction of tenants or occupants who are members of Protected Classes or associated with members of Protected Classes.

Public or Private Land Use Practices which impose fines or penalties or require eviction of tenants based on nuisance activities such as disturbing the peace, disorderly conduct, excessive noise, and are enacted, implemented or operated to impose fines or penalties or require eviction of tenants or occupants who are members of Protected Classes or associated with members of Protected Classes.

Public or Private Land Use Practices which require investigating or reporting information related to immigration status or legal residency of housing occupants or people associated with occupants or otherwise relate to enforcement of laws related to immigration, except where required by federal law or court order.

III. Article 18 Consideration of Criminal History Information in Housing

A. General Comments

We appreciate the Council for including draft regulations to guide housing providers and others who are subject to federal and state fair housing laws and who currently have policies or practices that use criminal history information to make housing decisions. As noted by the Council in its "Initial Statement of Reasons," these regulations are especially important because research shows that access to housing is critical to the successful reentry of former prisoners.[41] These regulations are also important because formerly incarcerated individuals face systemic barriers to housing, such as public housing restrictions and landlord discrimination, placing them at high risk of residential instability. This has the effect of not only leading some to experience homelessness upon release, but increasing the propensity of people who have been incarcerated to reoffend. [42]

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[40] *Id.*

[41] *See* Fair Employment & Housing Council, Proposed Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information, Initial Statement of Reasons, p. 19.

[42] *See Examining Housing as a Pathway to Successful Reentry: A Demonstration Design Process*, Jocelyn Fontaine, PhD, November, 2013, pp. 1-6; *see also The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, Jocelyn Fontaine, Cityscape: A Journal of Policy Development and Research, Vol. 15, No.3 (2013), U.S. Department of Housing & Urban Devel., Office of Policy Development and Research, pp. 55-57.

To advance the fair housing goals of protecting individuals from discrimination who pose no risk to their neighbors, the regulations must be precise and avoid stereotypes of formerly incarcerated people. The draft language can be revised in this regard. For example, the use of "arrests" should be explicitly excluded from the definition of criminal history given that it has little bearing on an individual's future behavior. In addition, the term "conviction" can be replaced with "criminal history" in several places. It is also helpful to define these terms, as suggested in the comments below.

Last, the Initial Statement of Reasons relies heavily on the HUD guidance. On one hand, the HUD guidance provides important support for the FEHA regulations, which mirror the FHA. On the other, case law provides strong authority that the use of criminal history in housing decisions may have a discriminatory effect under both state and federal fair housing law. Given the alternative legal authority, the Council need not rely as heavily on the federal guidance.

B. Discriminatory Effect of Criminal History Information (Proposed § 11098.18.1)

Proposed §11098.18.1 defines a discriminatory effect of the use of criminal history information as:

> *Any practice of a Person or Owner that includes use of, inquiries about, or solicitation of information about criminal history is unlawful if it has a discriminatory effect, unless a legally sufficient justification applies under Article 4 and Government Code section 12955.8.*

First, the Council should revise the proposed regulation to include a definition of "criminal history." The Council can include this definition either in Article 18 or in an earlier part of the regulations. The failure to define "criminal history" allows housing providers to erroneously use arrests as a basis to deny housing to this very vulnerable population.[43] Although having a criminal record is not a protected characteristic under the Fair Housing and Employment Act, it is well established under the law that 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[44] or (2) they constitute intentional discrimination on members of protected classes.

Additionally, the terms "inquires about" and "solicitation of information" are too broad. The final regulations should narrow the definitions of these terms to the context of housing in order to prevent any constitutional challenges under the First Amendment. The Council should also narrow these terms to prevent a housing provider from engaging in a fishing expedition to obtain information from a potential tenant that is irrelevant.

C. Discriminatory Statements Regarding Criminal History (Proposed §11098.18.2)

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[43] See U.S. Dept. of Housing & Urban Devel., *FAQs: Excluding the Use of Arrest Records in Housing Decisions*, PIH Notice 2015-19/2015-10, available at https://portal.hud.gov/hudportal/documents/huddoc?id=FAQ_Exclude_Arrest_Records.pdf (clarifying that the fact that someone has been arrested does not itself prove that the person has engaged in criminal activity, poses a threat, or has otherwise violated admission standards or lease terms relating to criminal activity.)

[44] 24 C.F.R. § 100.500; *accord Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* 135 S. Ct. 2507 (2015).

Proposed Regulation §11098.18.2 provides that:

> *A notice, advertisement, application, or other written or oral statement regarding criminal history or criminal records that conflicts with the provisions in this Article and Article 4 shall be a violation of the Act.*

The Council should revise this Regulation to specifically state to whom this language applies, because it is unclear regarding whether it applies to tenants or borrowers, or both. The Council should be more specific because statements coming from a neighbor, absent other behavior, e.g., harassment or intimidation, are not protected by FEHA. Moreover, if this proposed Regulation is intended to apply to a private citizen, First Amendment issues may arise. Finally, the language in the proposed Regulation should specifically refer to housing.

> A Person's or Owner's housing-related notice, advertisement, application, or other written or oral statement regarding criminal history or criminal records that conflicts with the provisions in this Article and Article 4 shall be a violation of the Act.

D. Plaintiff's Burden of Proof in Discriminatory Effects Cases Related to Criminal History Information (Proposed §11098.18.3)

We reiterate our comment in (I)(B) above that "plaintiff" and "defendant" language in the proposed regulations should be revised to include the "complainant" and "respondent" in an administrative complaint.

The plaintiff generally has the same burden of proof in all discriminatory effects cases brought under FEHA. The plaintiff has the initial burden to show that a challenged practice caused or predictably will cause a discriminatory effect.[45] "Discriminatory effect" is defined in Article 4 § 11098.04.1(b):

> *A practice has a discriminatory effect where it actually or predictably results in a disparate impact on an individual or group of individuals or creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a protected class.*

The definition of "discriminatory effect" in Article 18 should be consistent with the definition in Article 4 and certainly should not heighten the plaintiff's burden in a discriminatory effects case based on the use of criminal history. The council should therefore revise section (a) to be consistent with Article 4 as follows:

> (a) A practice regarding the use of criminal history in housing decisions has a discriminatory effect where it actually or predictably results in a disparate impact on a Person or group of Persons or creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a protected class.

[45] *See* proposed § 11098.04.2(a); *see also* 24 C.F.R. § 100.500(c)(1).

As the Initial Statement of Reasons notes, the regulations aim to provide greater clarity to assist the public in interpreting FEHA. Because statistics are a critical way for plaintiffs to meet their burden of proof in criminal history cases,[46] it is important for the regulations to clarify that local, state, or national statistics related to criminal records (not only limited to conviction statistics) may be used to establish a discriminatory effect. The notion that statistics are presumptively sufficient to establish a discriminatory effect is in line with HUD guidance[47] and case law interpreting FEHA.[48] Please note that we have also provided proposed language for Section 11098.04.2 on the use of statistics and other data as evidence in discriminatory effects cases (pages 2-5 of this letter). Our suggested changes to both sections will create consistency and clarity on the plaintiff's burden of proof. It is also important to specify that the determination of whether a Practice results in a discriminatory effect is ultimately a fact-specific and case-specific inquiry.

However, as drafted, section (b) limits the use of statistics to meet the plaintiff's burden. The proposed language allows a housing provider to easily refute the existence of a discriminatory effect, even where local, state, or national statistics provide evidence of a disproportionate impact on a protected class. It leaves significant room for a housing provider or other entity to argue that local circumstances warrant a unique analysis.

For example, to meet her initial burden, a plaintiff may present evidence that a housing provider's policy that excludes everyone with a conviction on their record has a discriminatory effect because the national and statewide rates of conviction are significantly higher for African American and Latino males. Under the proposed regulations, a housing provider could argue that the housing subject to the claim is located in a predominantly African American neighborhood and that due to this particularized circumstance, a vast majority of the applicants are African American. As a result, the policy in question does not have a discriminatory effect, despite the statistics. The Court rejected a similar argument in a recent case, *Alexander v. Edgewood Management Corporation*.[49] There, the defendant housing provider argued that the building in question had mostly African American residents; therefore there could be no evidence of a discriminatory effect. The District Court denied the landlord's motion to dismiss finding that even if the other tenants were all African American, a tenant screening policy can still have a disparate impact on individual African Americans applying for housing.

Last, § 11098.18.3(b) reverses the presumption that statistics are sufficient to establish a discriminatory effect if there is reason to expect a different result based on a particular type of housing or housing related service. This language should be deleted from the draft because it (1) creates a loophole that allows the landlord to argue that the type of housing involved warrants a unique analysis and (2) will cause people living in certain types of housing to be more susceptible to discrimination. For example, should a landlord for a building that houses chronically homeless adults be held to a different standard than private housing?

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[46] HUD, Office of General Counsel, *Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 2016).
[47] *Id.*
[48] *Sisemore v. Master Financial,* 151 Cal. App. 4th 1386 (Cal. Ct. App. 2007)
[49] *Alexander v. Edgewood Management Corp.*, No. CV 15-01140 (RCL), 2016 WL 5957673 (D.D.C., Jul. 25, 2016)

Given the above, we suggest the following re-write for section (b):

> A discriminatory effect may be established through the use of criminal record statistics or other statistics related to criminal activity. Local, state or national level statistics showing substantial disparities in the ~~conviction~~ criminal records of individuals based on membership in a Protected Class are presumptively sufficient to establish a discriminatory effect of a Practice under Article 4, ~~unless there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the relevant geographic areas for the applicant pool, the type of convictions being considered, or the particular type of housing or housing related service.~~ Regardless of the data used, determining whether a practice results in a discriminatory effect is ultimately a fact-specific and case-specific inquiry.

E. Establishing a Legally Sufficient Justification relating to Criminal History Information (Proposed §§ 11098.18.4)

Similar to the plaintiff's burden of proof in criminal history cases, the defendant's burden to establish a legally sufficient justification should mirror the burden laid out in section 4 of the regulations. § 11098.18.4(a) seems to indicate that in a case related to criminal history, there is a heightened burden on the defendant to prove there is a legally sufficient justification under Article 4 *and* Article 18. Rather, section (b) is simply interpreting the prongs in Article 4 related to a case based on the use of criminal information.

For consistency and clarity, consider revising § 11098.18.4(a) as follows:

(a) Persons or Owners ~~with a~~ whose Practice of ~~soliciting, inquiring about, or~~ using criminal history information ~~that~~ has a discriminatory effect on individuals in Protected Classes ~~must be able to prove that the practice meets all of the prongs of a legally sufficient justification under Article 4 and in this section~~ shall not be considered to have committed an unlawful housing Practice in violation of this Act if the Person or Owner can establish that:

The subsections can then go on to list the elements that must be met to establish a legally sufficient justification. The proposed language includes several key elements, although this entire section should be clarified to encourage compliance with fair housing laws. It is imperative the housing providers and other entities understand the requirements of FEHA in order to craft nondiscriminatory tenant screening policies.

§ 11098.18.4(b)(1) is the first prong, for example, and sets a clear and consistent standard with Article 4.

§ 11098.18.4(b)(2), the second prong (to take into account the nature and severity of an individual's conviction), is inaccurate for several reasons. Some housing providers may adopt a policy that only considers criminal history after a determination of eligibility. Therefore, the

nature and severity of an individual's conviction history will never be under consideration. Also, defining the "nature" and "severity" of an individual's criminal conduct is arbitrary. Finally, subsection (b)(2) is redundant because subsection (b)(3) accomplishes the same purpose with more specificity. We suggest deleting this element.

§ 11098.18.4(b)(3), the third prong, limits consideration of convictions that are directly-related to an individual's capacity to be a good tenant. The Council should define the term "directly related" in order to provide clear guidance to housing providers engaging in a fair housing analysis (see below for a suggested definition).

§ 11098.18.4(b)(4), the fourth prong, is an important one, although the language as written is circular. It also explicitly omits the requirement in proposed § 11098.04.3 that the defendant or respondent (business establishment), in order to establish a legally sufficient justification, must demonstrate that the "substantial, legitimate, nondiscriminatory business interest could not be served by another Practice that has a less discriminatory effect."[50]

We therefore suggest revising section (b) as follows:

(b) In order to meet their burden of establishing a legally sufficient justification under Article 4 and this section, Persons or Owners must:

1. Identify a specific substantial, legitimate, nondiscriminatory interest supporting the practice such as the risk to the safety of its residents, employees, or property.

2. ~~Take into account the nature and severity of an individual's conviction and the amount of time that has passed since the criminal conduct occurred.~~

3. Limit consideration to criminal convictions that are directly related to an individual's capacity and likelihood of fulfilling the obligations related to the housing or services. ~~(For example, a recent conviction for arson or possession of illegal weapons could be directly related to tenancy obligations, while a conviction of illegal gambling or a non-alcohol related traffic offense would not likely be directly related to tenancy or a real estate loan transaction) and;~~

    i. <u>"Directly-related conviction" means that the conduct for which the person was convicted has a direct and specific negative bearing on the safety of persons or property.</u>

4. ~~Prove~~ <u>Provide evidence</u> that the Practice actually achieves the identified interest, <u>that the identified interest could not be served by another Practice that has a less discriminatory effect (i.e., a "less discriminatory alternative"),</u> ~~which include proving that its practice accurately distinguishes between criminal conduct that~~

[50] Furthermore, this section forgoes the distinction between business establishments and non-business establishments as it relates to showing a legally sufficient justification as set out in proposed § 11098.04.3; *see also* Cal. Gov. Code. § 12955.8.

~~poses a demonstrable risk to the proffered interest and criminal conduct that does not~~ and that the justification provided is not hypothetical or speculative.

§ 11098.18.4(c) provides guidance to housing providers and other entities on what constitutes a less discriminatory alternative tenant screening policy. The section promotes best practices in the field and lists examples of policies that do not violate the Fair Housing Act because they require an individualized determination of an individual's risk to the health and safety of residents, employees, or property. The language is confusing, however, because it indicates that when a housing provider presents a legally sufficient justification for a policy that has a discriminatory effect, the defendant must show one of the factors listed as sufficient evidence that a less discriminatory alternative exists. The regulation could be improved by simply providing considerations as to what factors may be considered as part of a less discriminatory alternative analysis. This can be accomplished by reorganizing the remainder of Section (c) to provide guidelines for housing providers and other entities that implement screening policies.

We suggest the following language:

(c) Whether a less discriminatory alternative is sufficient to defeat an allegation of a discriminatory effect will depend on the particular Practice under challenge, provided that the implementation of the Practice does not violate section 11098.18.5.

(d) The following factors must be taken into consideration when determining whether a less discriminatory alternative exists to the Practice:

1. *If a Person or Owner provided an opportunity for the applicant to explain or provide evidence of mitigating circumstances. Mitigating circumstances include but are not limited to:*
    - *i. The facts or circumstances surrounding the criminal activity.*
    - *ii. The amount of time that has passed since the criminal activity.*
    - *iii. If the individual was a juvenile or young adult at the time of the criminal activity.*
    - *iv. Whether the criminal activity was engaged in by an individual or household member with a disability who is entitled to a reasonable accommodation under this Act.*
    - *v. Whether the individual has presented evidence of rehabilitation. Evidence of rehabilitation includes, but is not limited to, a person's satisfactory compliance with all terms and conditions of parole and/or probation; successful completion of parole, probation, mandatory supervision, or Post Release Community Supervision.*
    - *vi. Evidence that the individual has maintained a good tenant history within the past two years.*

2. *If the Person or Owner delayed obtaining or considering a third party report on criminal history until after an individual's financial and other qualifications were verified.*

3. *If a Person or Owner has a policy on the use of criminal history in housing decisions and has provided a copy or description of the policy to an individual upon request.*

F. Changes Regarding Specific Practices Related to Criminal History Information (Proposed § 11098.18.6)

1. §11098.18.6(a)(1)

In § 11098.18.6(a)(1), (2), and (3), we urge the Council to replace "Use, inquire, or solicit information about" with this language: "Inquire about or take an adverse action based on." The phrase "use, inquire, or solicit information about" does not provide sufficient clarity to notify housing providers or prospective or current tenants of the prohibited action.

To provide further clarity to this section, we also propose adding a definition of "adverse action." Note that the definition includes the failure to refuse to add a household member to an existing lease or to reduce any tenant subsidy. This is critical to protect the rights of people with criminal records and promote family stability.

> "Adverse Action" in the context of housing shall include but is not limited to evict, fail or refuse to rent or lease real property to an individual, or fail or refuse to continue to rent or lease real property to an individual, or fail or refuse to add a household member to an existing lease, or to reduce any tenant subsidy.

We also urge the council to simplify the language in § 11098.18.6(a)(1), by replacing "any charge, arrest, indictment, or detention by any law enforcement or military authority that did not result in, or has not yet resulted in, a conviction" with the following language: "an arrest that has not resulted in a conviction."

Once streamlined, this provision will be easier to enforce. For further clarity, we propose adding the following definition of "arrest":

> "Arrest" shall mean a record from any jurisdiction that does not result in a conviction and includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried and acquitted for any felony, misdemeanor or other criminal offense.

We also propose adding the following definition of "conviction":

> "Conviction" shall mean a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor, provided that the

conviction is one for which the person has been placed on probation, fined, imprisoned or paroled.

Last, we suggest that the Council add a subsection that prohibits housing providers from making inquiries or taking adverse actions based on a person's juvenile record. In general, California does not permit the general public to access juvenile case files.[51] Given the confidentiality of juvenile records, it is inappropriate for housing providers to consider such records in their decisions. For this reason, we propose adding a prohibition against the use of juvenile records in housing decisions.

We propose the following language for § 11098.18.6(a)(1):

(a) It is unlawful for a Person or Owner to:

(1) Use, inquire about , or solicit information about or take an adverse action based on an arrest that has not any charge, arrest, indictment, or detention by any law enforcement or military authority that did not result in, or has not yet resulted in, a conviction.

(2) Inquire about or take an adverse action based on any adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system.

2. § 11098.18.6(a)(2)

In § 11098.18.6(a)(2), we urge the Council to add participation in a deferred entry of judgment program as a prohibited basis for housing inquiries and adverse actions since California law refers to both diversion and deferred entry of judgment.[52] We propose the following language:

(3) Use, inquire about, or solicit information about or take an adverse action based on any referral to or participation in or completion of a pre-trial or post-trial diversion program or a deferred entry of judgment program; provided that this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

3. § 11098.18.6(a)(3)

In § 11098.18.6(a)(3), we urge the Council to replace "criminal records" with "convictions" to be more precise; it is typically convictions that are subject to judicial relief such as expungement. Non-convictions, such as dismissed charges, will be covered by Section 18.6(a)(1); therefore, further protection under this sub-section will be redundant.

[51] Cal. Rules of Court, Rule 5.552; *see also* Riya Saya Shah & Lauren Fine, Juvenile Records: A National Review of State Laws on Confidentiality, Sealing, and Expungement 13 (2014), http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf.
[52] Penal Code §1000.

(4) Use, inquire about , or solicit information about or take an adverse action based on any criminal records convictions that are dismissed, vacated, expunged, sealed, or closed by judicial action or by statute have been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative, by way of example but not limitation, under California Penal Code §§ 1203.4 or 1203.4a, or 1203.1; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

4. § 11098.18.6(a)(4)

In § 11098.18.6(a)(4), we are concerned that the Council's language is vague, especially with the use of the undefined term "blanket prohibition," and therefore difficult to implement and enforce. For this reason, we propose language clarifying that the prohibited policies are overly broad categorical exclusions of people with criminal records that fail to account for actual risk. To provide further clarification, we added explicit examples of the types of bans often used by housing providers in the state of California and across the country. These examples build upon the Council's initial draft, which was unnecessarily narrow in its focus on persons with conviction records.

(5) ~~Use a "blanket prohibition" that covers all individuals with any conviction record whatsoever, without distinguishing between~~ Implement an overly broad categorical exclusion that takes adverse action against all individuals with a criminal record regardless of whether the underlying criminal conduct that indicates a demonstrable risk to the proffered Person's or Owner's substantial, legitimate, nondiscriminatory interest and criminal conduct that does not indicate such a demonstrable risk.; examples of such overly broad categorical exclusions include but are not limited to bans against individuals with a criminal records, bans against individuals with prior conviction, bans against individuals with prior misdemeanors, and bans against individuals with prior felonies.

If the Council adopts the changes and additions suggested above, § 11098.18.6(a) will read as follows (plus the definitions above which can be added here or in the definitions section of the FEHA regulations):

(a) *It is unlawful for a Person or Owner to:*

(1) Inquire about or take an adverse action based on an arrest that has not resulted in a conviction.

(2) Inquire about or take an adverse action based on a conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system.

(3) Inquire about or take an adverse action based on participation in or completion of a pre-trial or post-trial diversion program or a deferred entry of judgment program; provided that this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

(4) Inquire about or take an adverse action based on any convictions that have been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative, by way of example but not limitation, under California Penal Code §§ 1203.4 or 1203.4a, or 1203.1; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

(5) Implement an overly broad categorical exclusion that takes adverse action against all individuals with a criminal record regardless of whether the underlying criminal conduct indicates a demonstrable risk to the Person's or Owner's substantial, legitimate, nondiscriminatory interest; examples of such overly broad categorical exclusions include but are not limited to bans against individuals with a criminal records, bans against individuals with prior conviction, bans against individuals with prior misdemeanors, and bans against individuals with prior felonies.

4. § 11098.18.6(b)

For subsection (b) of § 11098.18.6, we urge the Council to reduce the number of years from seven to three. We are concerned that by setting a longer time period for a rebuttable presumption, seven years will become the norm for criminal background check policies in California, and this is simply too long for people coming home from the criminal justice system to wait for a fair chance at housing. Although Civil Code sections 1785.13 and 1786.18 limit the ability of credit reporting agencies to report convictions that are older than seven years, the question of what a housing provider may see on a background check is separate from the question of what a housing provider should consider in assessing prospective or current tenants.

The Council should consider the time periods that the federal government has adopted or encouraged in the area of public housing. For serious crimes, HUD has suggested that five years is a reasonable lookback period.[53] More recently, HUD highlighted as a best practice a public housing authority's policy of looking back twelve months for drug-related criminal activity and twenty-four months for violent and other criminal activity.[54] Even for individuals who had previously been evicted from federally subsidized housing for drug-related criminal activity, Congress considered three years to be an adequate period of time for them to wait before

[53] Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,779 (May 24, 2001).
[54] HUD, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, PIH Notice 2015-19, at 6 (Nov. 2, 2015).

applying again to federally subsidized housing.[55] Finally, a study of over three hundred public housing authorities showed that most used lookback periods in the three to five year range.[56] Compared to the time periods offered by the federal government and adopted by many federal housing providers across the country, the seven years put forth in § 11098.18.6(b) is unnecessarily and arbitrarily long. We strongly urge the Council to consider adopting a three year time period instead.

We understand that some may favor a seven year lookback period in light of HUD's reference to a recidivism study in its April 2016 guidance on the fair housing rights of people with criminal records.[57] However, as representatives of HUD's Office of General Counsel have noted, inclusion of this study was not meant to be an endorsement of a seven-year exclusionary period.[58] To avoid burdening families with an unnecessary seven-year wait, therefore, the Council should include a shorter time period.

Finally, consistent with its desire to curb the use of "blanket prohibitions," we urge the Council to clarify the time period is not a bar, but rather the relevant period of inquiry. Housing providers are inconsistent with how they currently make use of lookback periods, and many use them as a way to categorically exclude people with criminal records during that time period. This goes against the spirit of these regulations, which is to give people a fair opportunity to present the individual circumstances of their case.

With the above change, § 11098.18.6(b) will read as follows:

(a) There is a rebuttable presumption that a conviction ~~seven~~ three or more years old does not indicate a demonstrable risk to the safety of residents, employees or property.

G. Local Laws or Ordinances (Proposed §§ 11098.18.8)

Just as the statement of reasons notes that the purpose of Section 18.8 is to alert defendants that municipalities may impose stronger protections against discrimination on the basis of criminal history than FEHA, we urge the Council to also put municipalities on notice that they cannot chip away at FEHA's floor of criminal history protections through local nuisance and/or crime free rental ordinances.

As discussed above, crime-free rental housing and nuisance property ordinances generally punish tenants and landlords for police activity associated with rental properties. Although the details may differ depending on the jurisdiction, these ordinances commonly: (i) require landlords to conduct criminal records screening for all prospective tenants; (ii) mandate the use of a "crime-free lease" that makes criminal activity by any person connected to a tenant household as a basis

[55] 42 U.S.C. § 13661(a).
[56] Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* app. 1 (Feb. 2015).
[57] HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions fn. 34 (Apr. 4, 2016).
[58] Sargent Shriver National Center on Poverty Law, Ensuring Fair Housing For People with Criminal Records: A Conversation with HUD, https://www.youtube.com/watch?v=y4tTiGgOky8 (Oct. 26, 2016).

for eviction (even if the tenant themselves were not involved in the crime or were victims of it); and (iii) force landlords to evict households that make calls for police service.[59]

Last fall, HUD issued guidance explaining that when these ordinances mandate or strongly encourage landlords to implement lease provisions that require eviction based upon an arrest alone, they run afoul of civil rights laws, namely the federal Fair Housing Act.[60] These concerns arise from the fact that people of color, particularly African-Americans and Latinos, are arrested at disproportionately higher rates than the general population and that arrests by themselves do not prove that a person engaged in criminal activity. Like HUD, the Council should make clear that similar ordinances may infringe upon the FEHA rights of prospective and current tenants who are members of protected classes and that municipalities should exercise caution when enacting and implementing crime-free and/or nuisance ordinances.

IV. Conclusion

In closing, we continue to appreciate the thoughtful consideration the Council has already afforded the proposed regulations, as well as the opportunity for public input and engagement during this process. Should you have any questions about these comments, please contact Deborah Thrope (dthrope@nhlp.org), Renee Williams (rwilliams@nhlp.org), or Madeline Howard (mhoward@wclp.org).

We look forward to working with the Department of Fair Employment and Housing to ensure that no Californian is denied access to housing due to discriminatory housing practices.

Sincerely,

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Western Center on Law & Poverty

Deborah Thrope & Renee Williams
National Housing Law Project

Michael Rawson
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Public Law Center

Ilene Jacobs
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(*Additional signatories on following page*)

[59] For an example of objections to such a proposed ordinance, see Letter from Law Foundation of Silicon Valley to the City of San Jose, Rules and Open Government Committee, September 30, 2015, Crime Free Multi-Housing Program, Agenda Item G.2 (Sept. 30, 2015), http://ebclc.org/wp-content/uploads/2016/10/Letter-Opposing-San-Jose-Crime-Free-Ordinance-2015.pdf.

[60] HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, 6-7 (Sept. 13, 2016).

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