

Fair Employment & Housing Council
Proposed Text of Housing Regulations
Regarding Discriminatory Effect and
Use of Criminal History

Draft from Housing Subcommittee 2
August 31, 2016

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

[The following text is a working draft for the purpose of enabling discussion between all Councilmembers and receiving public feedback. The Council will vote on a revised draft at a future meeting to initiate a formal rulemaking action.]

TEXT

Article 1. General Matters §§ 11098.XX - §§ 11098.XXX

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Authority: Gov't Code §§ 12955 et seq.; 42 U.S.C. §§ 3535(d), 3600–3620.

§ 11098.XXX Statement of Policy and Purpose

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§ 11098.XXX Authority and Scope

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(xx) The illustrations of unlawful housing discrimination in this subchapter may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in §§ 11098.XXX.

§ 11098.XXX Exemptions

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§ 11098.XXX Definitions

As used in this subchapter, the following definitions shall apply unless the context otherwise requires:

(xx) "Dwelling" - "Housing Accommodation" or "Dwelling" includes:

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

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

(3) Dwelling includes but is not limited to all dwellings covered by the Fair Housing Act, 42 U.S.C. § 3601 et seq.; single family homes; apartments; condominiums; rooms; transitional housing; supported housing, residential motels or hotels, including single room occupancy hotels and motels; boardinghouses; shelters; cabins and other structures housing migrant farmworkers; hospices; manufactured homes; mobile homes and mobile home spaces; floating homes and floating home spaces, communities and live-aboard marinas; bunkhouses; recreational vehicles used as a home or residence; *and group and congregate living arrangements,*

whether licensed or unlicensed, such as dormitories, group homes, supported housing, drug and alcohol treatment homes, and long term care nursing homes and facilities.

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

(xx) "Housing Provider" means a Person (as defined in Section § 11098.XXX of this subchapter), an organization or corporation, a governmental agency, or any entity involved in:

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

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

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

Authority: Gov't Code 12927(e)

(xx) "Person" includes:

- (1) all individuals and entities that are described in 42 U.S.C. § 3602(d) (*FHA definition of "person"*)
- (2) all individuals and entities that are described in § 11098.XXX of this subchapter (*the definition of "owner"*);
- (3) all individuals and entities that are described in § 11098.XXX of this subchapter (*the definition of "housing provider"*); and

(4) all institutional third parties, including the Federal Home Loan Mortgage Corporation.

Authority: Gov't Code 12927(d), (e), (f); 42 U.S.C. § 3602(d).

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

(xx) "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.

Authority: Cal. Gov't Code 12955.8; HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Register 11460, 11468 (2/15/13); 24 C.F.R Part 100.

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Article 2—Discriminatory Housing Practices

§ 11098.XXX [Specify General Discriminatory Housing Practices]

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§ 11098.XXX Harassment

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§ 11098.X XX Retaliation

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§ 11098.XXX Other prohibited conduct.

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Article 3-- Discrimination in the terms and conditions for making available loans or other financial assistance.

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(xx) Practices prohibited under this section in connection with loans and financial assistance include, but are not limited to:

(xx) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, cost, duration or other terms or conditions for a loan or other financial assistance for a dwelling or which is secured by residential real estate, because of membership in a protected class.

(xx) Servicing of loans or other financial assistance with respect to dwellings in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates, or providing such loans or financial assistance with other terms or conditions that discriminate, because of membership in a protected class.

Article 4 - Discrimination in Residential Real Estate-Related Transactions

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(xx) Practices prohibited under this section in connection with a residential real estate-related transaction include, but are not limited to:

(xx) Failing or refusing to provide to any person information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of membership in a protected class.

(xx) Providing, failing to provide, or discouraging the receipt of loans or other financial assistance in a manner that discriminates in the cost, rate of denial, or terms and conditions of such loans or other financial assistance; or otherwise discriminates in the availability of such loans or other financial assistance because of membership in a protected class.

Article 5 - Discrimination in Land Use Practices

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(xx) Practices prohibited under this section in connection with land use practices include, but are not limited to:

(xx) Enacting or implementing land-use rules, ordinances, policies, or procedures, including actions authorized under the Planning and Zoning Law (Gov't Code Title 7, commencing with Section 65000), that restrict or deny housing opportunities or otherwise make housing opportunities unavailable or deny dwellings to persons because of membership in a protected class,

xx) Denying or authorizing permits or making public or private land use decisions or authorizations that restrict or deny housing opportunities, or that otherwise make housing opportunities unavailable or deny dwellings to persons because of membership in a protected class;

xx) Enacting or implementing practices that provide different, limited or no governmental services such as water, sewer, garbage collection or other municipal services in connection with dwellings, or otherwise make unavailable such services because of membership in a protected class; and

xx) Limiting the use of privileges, services or facilities associated with a dwelling, or otherwise making unavailable such privileges, services or facilities because of membership in a protected class.

Article 6—Discriminatory Effect

§ 11098.XXX Discriminatory effect prohibited.

(a) Liability may be established under the Fair Employment and Housing Act and this Subchapter 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.

(b) A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of membership in a protected class.

(c) The burdens of proof for establishing a violation under this subpart are set forth in Section § 11098.XXX of this Article (*below*).

(d) The practice may still be lawful if supported by a legally sufficient justification, as defined in Section § 11098.XXX of this Article (*below*).

Authority: Gov't Code 12955.8; 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; *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al*, 135 S.Ct. 2507 (2015)

§ 11098.XXX Burdens of proof in discriminatory effects cases.

(a) The plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(b) Once the plaintiff satisfies the burden of proof set forth in paragraph (a) of this section, the defendant has the burden of proving that the challenged practice meets all of the prongs of a legally sufficient justification.

Authority: Gov't Code 12955.8; 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; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al*, 135 S.Ct. 2507, 2550 (2015) (Dissent) (Confirming that states can enact their own fair housing laws, including laws creating disparate impact liability.)

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§ 11098.XXX Legally sufficient justification.

(a) A business establishment whose practice has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of FEHA and this subchapter if the business establishment can establish that:

- (1) The practice is necessary to the operation of the business;
- (2) The practice is needed to effectively carry out the substantial, legitimate, nondiscriminatory business interest that it is alleged to serve; and
- (3) The interest could not be served by another practice that has a less discriminatory effect.

(b) In cases that do not involve a business establishment, the entity or person whose practice has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of FEHA and this subchapter if the entity or person can establish that:

- (1) The challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose;
- (2) The purpose is sufficiently compelling to override the discriminatory effect;
- (3) The challenged practice is needed to effectively carry out the purpose that it is alleged to serve; and
- (4) The purpose could not be served by another practice that has a less discriminatory effect.

(3) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

(4) For purposes of this Article, the term “business establishment” shall have the same meaning as in Section 51 of the Civil Code.

§ 11098.XXX Relationship of legally sufficient justification to discriminatory intent.

A demonstration that a practice is supported by a legally sufficient justification, as defined in § 11098.XXX of this Article, may not be used as a defense against a claim of intentional discrimination.

Authority: Cal. Gov't Code 12955.8; 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; *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."); *i*, 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.")