



April 3, 2023

Submitted via FEHCouncil@dfeh.ca.gov

Civil Rights Council
c/o Mariel Block, Senior Fair Employment and Housing Counsel
Civil Rights Department
555 12th Street – Suite 2050
Oakland, CA 94607

Re: Proposed Modifications to Fair Housing Regulations

Dear Civil Rights Councilmembers:

Thank you for the opportunity to comment on the latest proposed fair housing regulations. The following comments regarding the Civil Rights Council's proposed fair housing regulations are respectfully submitted on behalf of the undersigned organizations, all of which represent the interests of low-income tenants throughout the state.

We commend the Council's thoughtful approach toward these regulations, and look forward to continuing our work 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. Our comments below show support for many of the proposed revisions and also identify areas where the proposed regulations would benefit from additional clarification or changes.

On April 7, 2021, many of the undersigned organizations submitted a comment letter on proposed regulatory actions on housing. In that letter, we outlined suggestions to improve the Source of Income regulations, among other recommendations. We urge the council to reconsider those suggestions given how rampant source of income discrimination is across the state.¹

Article 3: Intentional Discrimination

§ 12040 Definitions

To eliminate ambiguity, the Council proposes to change the word "takes" to "requires" in the definition of "facially discriminatory policy." We are concerned that the proposed change narrows the definition and fails to fully capture the instances in which a facially discriminatory policy is covered by this regulation. We suggest amending the definition by changing the word

¹ [California Civil Rights Department Finds Widespread Housing Discrimination Against Federal Housing Choice Vouchers](#). Press Release (Oct. 2022)

“takes” to “requires or allows” to ensure it articulates the scope of the definition by including written policies that not only require adverse action based on a protected class, but those that *allow* for it as well. For example, a housing provider having a listing that says “voucher tenants will be considered on a case by case basis.” We therefore suggest the following revision (note that throughout these comments, we have directly copied language from the Council’s proposed changes including strike throughs and underlined words; bolded strike throughs represent suggested deletions; bolded underlined words represent suggested additions):

(c) “Facially discriminatory policy” (sometimes referred to as “express classification”) means a written policy that explicitly conditions a housing opportunity on a protected basis, ~~takes~~ requires or allows adverse action based on a protected basis, or directs adverse action to be taken based on a protected basis.

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

The Council is proposing changing language in section 12042(c)(1) from the word “takes” to “requires.” Here again, we are concerned that the proposed change narrows the definition and fails to fully capture the instances in which a facially discriminatory policy is covered by this regulation. We suggest amending the definition by changing the word “takes” to “requires or allows” to ensure it articulates the scope of the definition.

(c) Direct evidence means evidence that, if believed, proves that discriminatory intent was a factor motivating the respondent’s challenged practice without inference or presumption.

(1) Direct evidence includes an express condition stated orally or in writing that either conditions a housing opportunity on a protected basis, ~~takes~~ requires or allows an adverse action based on a protected basis, and/or directs an adverse action to be taken based on a protected basis.

The Council’s proposed changes to section 12042(f) regarding the respondent’s burden of proof to avoid liability for a facially discriminatory policy articulates the standard the respondent must meet to ensure proper application of the regulations.

Article 13: Consideration of Income:

§ 12140. Definitions

We support the proposed changes to section 12140(b) with additional examples of “lawful, verifiable income.” Explicitly protecting tenants that utilize federal, state and local rental assistance programs created in response to the COVID-19 pandemic helps vulnerable tenants who suffered financial impacts due to the pandemic and is consistent with Health and Safety Code §50897.1(i). This addition is a necessary update to the regulations because the federal Emergency Rental Assistance Program did not exist when these regulations were initially drafted. Protecting tenants that receive all types of rental assistance is also consistent with Government Code §12927(i), which refers broadly to federal, state, and local assistance.

§ 12140.1 Source of Income Discrimination in Housing Other Than Rental Housing Covered by Section §12141

Newly added section 12140.1 articulates that source of income protections are not limited to rental housing. Below we suggest several changes to further delineate the scope of these protections.

We recommend including additional language to section 12140.1(b) to clarify the regulation and align it with Government Code section 12955(c).

(b) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale of a housing accommodation that indicates any preference, limitation, or discrimination **or an intention to make that preference, limitation or discrimination** because of source of income;

We also recommend adding language to section 12410.1(h) and (j) that would require insurance companies to comply with fair housing laws. Courts have recognized that insurance companies that refuse to provide insurance, or provide such insurance on less favorable terms, to landlords who rent units to Section 8 Housing Choice Voucher holders are discriminating based on characteristics protected by the federal Fair Housing Act.² Section 12410(h) is equivalent to Section 3605 of the FHA and courts have held that Section 3605 covers insurance.³

(h) For any person or other organization or entity whose business involves real estate-related transactions, **which includes providing rental property and other insurance to housing providers**, to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of source of income **or the source of income of any household members, or persons to whom they provide services**;

(j) For any person to deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service, because of their source of income **or the source of income of any household members, or persons to whom they provide services**;

§ 12141. Source of Income Discrimination in Rental Housing.

The Council's proposed additions to section 12141(a) will clarify that housing applicants are protected (not just tenants) and that it is an adverse action for a landlord or a landlord's agent to

² 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"); *Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 29 (D.D.C. 2017); see also *Jones v. Travelers Cas. Ins. Co. of Am.*, 2015 WL5091908, 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 claims).

³ See *Nat'l Fair Hous. Alliance v. Prudential Ins. Co.*, 208 F. Supp. 46, 58 (D.D.C. 2002).

seek to discriminate on the basis of source of income by “Terminating or threatening to terminate participation in a rental assistance program.” The additional example helps protect tenants who rely on rental assistance programs from discriminatory actions or threats of their landlord which can result in the loss of their assistance. We suggest amending the example to clarify that the adverse action would occur when due, in whole or in part, because of source of income.

(a) It is unlawful for a landlord or a landlord’s agent to discriminate on the basis of the source of income by which a tenant or applicant for tenancy pays part or all of their rent by taking an “adverse action” as defined in section 12005(b). For purposes of this section, additional examples of “adverse action” include:

(7) Terminating or threatening to terminate participation in a rental assistance program due, in whole or in part, because of source of income;

Article 18. Disability:

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

The proposed changes to section 12181(n)(3) provide helpful clarity to the examples of reasonable modifications. We suggest the Council include an additional sentence to highlight the homeowners’ association’s responsibility to maintain the modification to the common area which will benefit all the tenants. This change would align with the requirements of section 12181(i).

(n) Examples of Reasonable Modification:

(3) Example of factors to be considered in responding to a request for a reasonable modification in a common interest development: Aki is a member of a homeowners’ association because she owns a an interest in a condominium unit. Aki is deaf and would like to install a blinking doorbell to their apartment. This requires modifications to the front doorbell to the condominium complex and to the doorbell in Aki’s unit. Aki has arranged for a community organization to pay for the modifications. Aki asks the homeowners’ association permission to make the modifications. ~~The home owners’~~ homeowners’ association must consider the request under these regulations, including sections 12176 through 12181. It is unlawful for the owners’ association to refuse to permit Aki to make the modifications, regardless of any provisions in the common interest development’s governing documents. The source of the funding for the modifications is irrelevant. Further, the homeowner’s association may not condition the approval of the modifications by requiring restoration of the former doorbells when Aki sells the condominium unit, because restorations can only be required for interior rental unit modifications, **and even then, only when reasonable to do so.** The owners’ association can require that Aki provide reasonable assurances that the work will be done in a competent manner and that any required building permits will be obtained. **Finally, the owner’s association will be responsible for maintenance of the modified front doorbell because it will be used by other tenants and the public as well as the tenant with the disability.**

We look forward to working with the Civil Rights Department to ensure that no Californian is denied access to housing due to discriminatory housing practices. Should you have any questions about these comments, please contact Lila Gitesatani (lgitesatani@nhlp.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Lila Gitesatani".

Lila Gitesatani
National Housing Law Project

Madeline Howard,
Western Center on Law and Poverty

Patti Prunhuber,
Justice in Aging

Michelle Uzeta,
Disability Rights Education & Defense Fund

Ugochi Anaebere-Nicholson,
The Public Interest Law Project

Navneet Grewal,
Disability Rights California

Consuelo I. Amezcua
Bay Area Legal Aid