September 25, 2020

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
Via E-Mail to FEHCouncil@dfeh.ca.gov

Re: Proposed Fair Housing Regulations

Dear Councilmembers:

The California Apartment Association (CAA) and the California Association of REALTORS® (C.A.R.) offer the following comments on the proposed fair housing regulations regarding definitions; intentional discrimination; discriminatory notices, statements, and advertisements; consideration of income; residential real estate-related practices; and disability.

CAA is the largest statewide rental housing trade association in the country, representing more than 50,000 single family and multi-family rental owners and operators who are responsible for nearly two million affordable and market rate rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial and other state and local forums.

This letter focuses on CAA and C.A.R.'s concerns related to the modifications noticed for the 45-day comment period. This should not be interpreted as a waiver or indication of satisfaction with concerns raised in previous rulemaking actions.

Section 12005 – Definitions

Subdivision (t) includes a definition of "military or veteran status." CAA and C.A.R. have several minor concerns with the definition provided.

First, the definition lists the Army, Marine Corps, Navy, Air Force, Coast Guard, United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines as being part of the armed forces. This definition is both over and under inclusive.

The definition provided in section 12005(t) is under inclusive because it fails to include the Space Force, the newest branch of the armed forces. 10 U.S.C. § 101(a)(4) defines the "armed forces" as "the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard."

The definition is over inclusive because it includes the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines as being part of the armed forces. The definition of "armed forces," cited above, does not list these groups as part of the armed forces. 10 U.S.C. § 101(a)(5) does list the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps. as members of the "uniformed services" – an umbrella term that also includes the armed forces. Similarly, 38 U.S.C. § 106(a)(1) recognized the service of members of the Women's Army Auxiliary Corps, who served for at least ninety days or more before October 1, 1943 and who were honorably discharged for disability incurred or aggravated in the line of duty which rendered them physically unfit to perform further service, as having "active duty" status, but does not specify that such service members are members of the "armed forces." CAA and C.A.R. are also aware that in 1987 the U.S. District Court for the District of Columbia, in *Schumacher v. Aldridge* (D.D.C. 1987) 665 F.Supp. 41, found that the Secretary of the Air Force had abused its discretion under 38 U.S.C. § 106 in denying active military service recognition to American merchant seamen who participated in World War II; however, CAA and C.A.R. are not aware of such service members being deemed to be members of the "armed forces." To be clear, CAA and C.A.R. do not object to inclusion of the United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., Women Airforce Service Pilots, and designated members of the Merchant Marines in the definition of "military or veteran status." Rather, it's simply inaccurate to characterize such groups as being members of the armed forces.

Second, the reference to "designated members of the Merchant Marines" is confusing as it does not make clear which members of the Merchant Marines are considered to have military or veteran status. Information about which members of the Merchant Marines are considered to have military or veteran status is not clarified in the initial statement of reasons. Assuming the Council intended to refer to those American merchant seamen who participated in World War II who were the subject of *Schumacher v. Aldridge*, the proposed amendment provided below would clarify the ambiguity. If the Council intended to refer to different members of the Merchant Marines, CAA and C.A.R. request that the Council provide clarification as to which members of the Merchant Marines the Council intended to include in the definition.

CAA and C.A.R. request the following amendment:

"'Military or veteran status' includes a member or former member of the United States Armed Forces (including the Army, Marine Corps, Navy, Air Force, Space Force, and Coast Guard), United States Public Health Service Commissioned Corps., National Oceanic and Atmospheric Administration Commissioned Officer Corps., ~~Women Airforce Service Pilots, and designated members of the Merchant Marines)~~, the United States Armed Forces Reserve, the United States National Guard (including the Army National Guard and the Air National Guard), and the California National Guard (including the California Air National Guard, California Army National Guard, and

California State Guard), regardless of duty status or discharge status, and any person determined to have active duty status pursuant to 38 U.S.C. § 106, including but not limited to the Women's Army Auxiliary Corps."

Section 12041 – Intentional Discrimination Practices

CAA and C.A.R. do not object to the draft language of this section, but are concerned with the portion of the initial statement of reasons related to subdivision (b), which states:

> "In the absence of regulations interpreting and implementing section 12955.8(a) of the Act, some case law, e.g. *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), cert. denied 535 U.S. 1017 (2002), interpreted FEHA's prohibition of intentional discrimination as being the same as the federal Fair Housing Act. However, the explicit language of section 12955.8(a) differs from the liability rules that some courts have developed to apply the federal Fair Housing Act. In particular, some courts have interpreted the federal Fair Housing Act's prohibition against disparate treatment to allow a 'mixed motive defense,' first articulated in the federal employment context in *Price Waterhouse v. Hopkins* (490 U.S. 228 (1989)). FEHA is more protective of members of protected classes and does not allow a 'mixed motive defense' because it explicitly only requires a complainant to prove that any protected status 'is a motivating factor in committing a discriminatory housing *practice even though other factors may have also motivated the practice*.' (Emphasis added.) Accordingly, this section is necessary to clarify what constitutes unlawful conduct under FEHA."

The Council's assertion that the FHA is less protective than FEHA in this context notwithstanding – the difference in statutory text between the FHA and FEHA – is incorrect. The statutory differences do not support a finding that a "mixed motive" defense is inapplicable under FEHA, as explained in more detail below.

As noted in the initial statement of reasons, FEHA makes express the prohibition on intentional discrimination and provides that "[a] person intends to discriminate if [a protected basis] is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice." By contrast, the FHA provides that it is illegal to discriminate "because of" a protected basis. This difference between the text of the two statutes on this point, though, is a distinction without a difference, as the courts have applied the same "motivating factor" standard stated in FEHA to FHA disparate treatment claims. Specifically, in *Avenue 6E Investments, LLC v. City of Yuma, Ariz*. (9th Cir. 2016) 818 F.3d 493, 504, the 9th Circuit found:

> "*Arlington Heights* governs our inquiry whether it is plausible that, in violation of the FHA and the Equal Protection Clause, an 'invidious discriminatory purpose was a motivating factor' behind the City's decision to deny the zoning application. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. Under *Arlington Heights*, a plaintiff must 'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely that not motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way.' *Pac. Shores Props*., 730 F.3d at 1158

> (*quoting McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir.2004)). 'A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'' *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir.2015) (quoting *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555)."

This conclusion is consistent with 9th Circuit's finding in *McDonald v. Coldwell Banker* (9th Cir. 2008) 543 F.3d 498 – a case relied upon by the Council in its initial statement of reasons – that "[w]ith respect to the FHA claim, the standard of proof and analysis applied in a disparate treatment case are the same as those applied in a FEHA case."

Further supporting the conclusion that this provision of FEHA is consistent with the FHA is the California Supreme Court's filing *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 that "the Legislature added the 'motivating factor' language to the FEHA's housing provisions as part of a 1993 amendment *whose sole purpose was to bring California housing law into conformity with federal law*." [emphasis added].

In light of the above, the Council's outright rejection of the so-called "mixed motive" defense is contradicted by the case law. Because of this, the Council's adoption of such reasoning would run afoul of the Administrative Procedures Act's consistency requirements. *See* Gov. Code § 11349(d) ("'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, *court decisions*, or other provisions of law." [emphasis added].) CAA and C.A.R. request that the Council clarify this issue in the final statement of reasons.

Section 12042 – Burdens of Proof and Types of Evidence in Intentional Discrimination Cases

As a preliminary matter, all references to the "burden of proof" in the title and body of this section should refer instead to either the burden of producing evidence or burden of production. The burden of proof, synonymous with the burden of persuasion, refers to the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. The burden of proof does not shift, it remains with the party who originally bears it. The burden discussed in this section, by contrast, is the burden of producing evidence or burden of production. *See Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658 for a general discussion of the distinction between burdens of proof and burdens of producing evidence.

CAA and C.A.R.'s only substantive concern with this section is subdivision (d)(2)'s requirement that the defendant "produce evidence that the challenged practice was *solely* motivated by a legitimate, non-discriminatory reason" [emphasis added]. The initial statement of reasons explains this requirement as the "logical corollary" of Gov. Code § 12955.8, which only requires a complainant to prove that any protected status "is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice." However, as discussed above with respect to section 12041, this provision of FEHA has been interpreted to be coextensive with the FHA.

The caselaw under both the FHA and FEHA have applied the *McDonnell Douglas* burden shifting analysis to intentional discrimination claims based on indirect evidence. CAA and C.A.R. are aware of no cases in which the *McDonnell Douglas* burden shifting analysis has been articulated to require the defendant to show that the challenged action was *solely* motivated by a legitimate, non-discriminatory reason.

Rather, cases routinely articulate the *McDonnell-Douglas* burden shifting analysis as requiring the defendant to "articulate *a* legitimate nondiscriminatory reason for its decision" [emphasis added]. *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1128. If the evidence shows that the case is one of mixed motives, then a limitation of remedies may be appropriate, as articulated by the California Supreme Court in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Section 12051 – Exceptions

Subdivision (a) of this section provides that it is not discriminatory "for a person to make a written or oral inquiry concerning the level or source of income *in order to verify the amount and source of income stated in an application for a housing opportunity*" [emphasis added]. While the sentiment of this subdivision is correct, the exception is unnecessarily narrow. Gov. Code § 12955(p)(2) states "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." By adding a qualifier to the exception regarding the purpose for which the housing provider is using the information, the Council is limiting the statutory exception impermissibly.

This is not merely a matter of form. There are legitimate reasons for housing provider to inquire about a person's level or source of income outside of the application process. The eviction protections enacted by the Legislature and local governments in response to the COVID-19 pandemic provide an excellent example. Many of these eviction protections require the tenant to provide proof that they have lost income as a result of the pandemic to qualify for protection. If the exception regarding inquiries into a person's level or source of income was limited to those inquiries made during the application process, landlords could not ask tenants for the very thing that might prevent them from being evicted.

CAA and C.A.R. request the following amendment:

"For a person to make a written or oral inquiry concerning the level or source of income ~~in order to verify the amount and source of income stated in an application for a housing opportunity~~."

Section 12140 – Definitions

This section defines "source of income" and "lawful, verifiable income."

Subdivision (a) defines "lawful, verifiable income" to include a long list of various forms of payments, including payments from employers and payments from parents, guardians, or other third parties. While many of the items listed *may* be lawful, verifiable income, the list implies that such payments are always lawful, verifiable income, which is not the case. The term "lawful, verifiable income" refers to the specific circumstances related to the income in question, which will nearly always require a case-by-case analysis. For example, "payments from employers" may be or may not be lawful and verifiable. In the case of a person earning wages who can produce documentation such as a W-2 or pay stubs, such income is clearly lawful and verifiable. On the other hand, if a person who is working "off the books" and cannot produce documentation of their income, such income is likely not lawful and verifiable.

Subdivision (a) also uses vague terms including "General Assistance," "General Relief," and "veteran benefits." It's unclear what these terms mean. Without a definition, CAA and C.A.R. cannot discern whether such payments are, in fact, forms of "lawful, verifiable income." To the extent these items refer to cash assistance or rental assistance paid by a governmental entity, they would clearly be a "lawful, verifiable income." However, these terms could also be interpreted more broadly. For example, "veteran benefits" might include health care benefits or tuition assistance – these amounts would not be considered "lawful, verifiable income" as they are not "paid directly to a tenant, or to a representative of a tenant, or paid to a housing owner or landlord on behalf of a tenant" as required by Gov. Code § 12955(p)(1).

Subdivision (b) defines "source of income" in three sub-parts. Paragraphs (1) and (2) of subdivision (b) essentially follow the statutory definition found in Gov. Code § 12955(p)(1).

However, paragraph (3) of subdivision (b) breaks from the statutory definition found in Gov. Code § 12955(p)(1) by stating that "payments by a parent or guardian on behalf of a child, and payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement" and "third-party payments made in any form consistent with section 1947.3 of the Civil Code" are sources of income. There are several problems with this language.

First, with respect to the references to payments from third parties, parents, and guardians, the language is repetitive of the definition of "lawful, verifiable income" found in subdivision (a) and suffers from the same defects identified above.

Second, the inclusion of "payments by a rent guarantor or co-signer based upon a rental guarantor or co-signer agreement" as one of type of payment made "on behalf of" a tenant payment is an incorrect characterization of the role of a guarantor/co-signor and impermissible expansion of statute.

A guarantor/co-signor is not making payments on behalf of a tenant, rather, they make payments pursuant to an agreement they have with the landlord to pay in the event of a tenant's default. In other words, the guarantor/co-signor essentially acts as an insurer, which has no obligation to pay except in case of default. California law makes the nature of this relationship clear in Civ. Code § 2787, which states in relevant part: "A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Case law has found that a guarantor is tantamount to a creditor of the principal (in this case, the tenant):

> "In suretyship, the risk of loss remains with the principal, while the surety merely lends its credit so as to guarantee payment or performance in the event that the principal defaults. (*Schmitt v. Insurance Co. of North America* (1991) 230 Cal.App.3d 245, 257, 281 Cal.Rptr. 261.) In the absence of default, the surety has no obligation." *American Contractors Indemnity Co. v. Saladino* (2004) 115 Cal.App.4th 1262.

To find that payments by a guarantor/co-signor are a source of income – which a landlord would then be required to accept in determining whether a tenant meets the landlord's screening criteria – would turn the nature of guarantor/co-signor relationship on its head, essentially allowing a prospective tenant to turn a creditor or surety into a source of income. It would also create a dangerous precedent that lines

of credit are sources of income. This would severely undermine the housing providers' ability to use minimum income policies as part of their screening criteria to protect their business interest in ensuring full and timely payment of rent, which the California Supreme Court has recognized as a legitimate, non-discriminatory practice. *See Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162-63 ("The minimum income policy is no different in its purpose or effect from stated price or payment terms. Like those terms, it seeks to obtain for a business establishment the benefit of its bargain with the consumer: full payment of the price. In pursuit of the objective of securing payment, a landlord has a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their sex, race, religion, or other personal beliefs or characteristics.")

In addition, the Legislature in enacting SB 329 and SB 222 did not intend to expand "source of income" to allow prospective tenants to qualify for tenancy by having a guarantor/co-signor. Review of the legislative history for these bills shows the intent of the Legislature in enacting these bills was only to expand the definition of source of income to allow tenants to use Section 8, VASH, and similar government rental housing vouchers. There is no evidence to support the conclusion that a guarantor/co-signor was intended to be a "source of income." To the contrary, the issue was debated among stakeholders and ultimately rejected because, among other reasons, guarantors may be out of state or out of the country (such as in the case of a parent of a visiting student) and a property owner would find it difficult, if not impossible, to collect from those guarantors.

These issues, together with the fact that statute already defines "source of income," make section 12140 unnecessary, lacking in clarity, and inconsistent with statute. As such, it fails to meet the criteria required by the Administrative Procedure Act. CAA and C.A.R. request that section 12140 be deleted in its entirety. To the extent the Council believes it is important to include a definition of "source of income," it should simply cross-refer to the existing statutory definition found in Gov. Code § 12955(p)(1).

Section 12141 – Source of Income in Rental Housing and Examples

Subdivision (b) of this section has the same defect as section 12051(a). Namely, the exception is unnecessarily narrow. Gov. Code § 12955(p)(2) states "[f]or the purposes of this section, it shall not constitute discrimination based on source of income to make a written or oral inquiry concerning the level or source of income." By adding a qualifier to the exception regarding the purpose for which the housing provider is using the information, the Council is limiting the statutory exception impermissibly.

Section 12142 – Aggregate Income

This section states that a landlord must consider aggregate income of persons seeking to reside together, whether or not they are married. This section impermissibly expands Gov. Code § 12955(n)'s prohibition on using a "financial or income standard in the rental of housing that fails to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together."

Gov. Code § 12955(n) merely requires that landlords apply the same standards regarding aggregate income to married and unmarried persons. Section 12141 goes further by requiring that landlords consider aggregate income *in all circumstances*. There is no basis for this expansion in statute.

CAA and C.A.R. request that this section either be deleted in its entirety or made consistent with Gov. Code § 12955(n).

Section 12143 – Financial and Income Standards Where There is a Government Rent Subsidy

This section seeks to implement Gov. Code 12955(o)'s requirement that "[i]n instances where there is a government rent subsidy, [it is prohibited for a landlord] to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant." This section largely tracks Gov. Code 12955(o)'s but adds a requirement that the landlord's financial or income standard be "solely based on the portion of the rent to be paid by the tenant."

This addition could be interpreted to expand the effect of Gov. Code § 12955(o) beyond what was intended by the Council or the Legislature. Specifically, this language could be interpreted to prohibit landlords from considering financial criteria that are not based on the amount of rent and which are applied equally to all applicants, regardless of source of income. For example, it is typical for landlords to require applicants to have both a minimum income (typically a multiplier applied to the monthly rent) and a track record of timely payments. CAA and C.A.R. agree that the minimum income policy must be based on the rent to be paid by the tenant – so in the case of a tenant using a housing voucher, the minimum income would be a multiple of the tenant portion of rent, not the portion paid by the government. However, Gov. Code § 12955(o) would not prohibit the landlord from also examining the applicant's payment history, as the landlord would for any other applicant – but the second sentence of section 12143 suggests that doing so is prohibited since the payment history inquiry is not "solely based on the portion of the rent to be paid by the tenant."

CAA and C.A.R. request that the second sentence of section 12143 be deleted.

Sec. 12155 – Residential Real Estate-Related Practices with Discriminatory Effect

Subdivision (a)(8) of this section includes a technical error. It refers to a "discriminatory impact," while the rest of the section, and the regulations on the whole, refer to "discriminatory effect." CAA and C.A.R. request that the word "impact" be replaced with "effect."

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

This section identifies requirements related to the consideration of a request for reasonable modification. Subdivision (c) deals specifically with a landlord's ability to require assurances that the work will be done in a competent manner. Among the requirements of subdivision (c) is a prohibition on owners insisting that modifications be "accomplished by a particular contractor or builder" and a statement that "modifications may be accomplished by any party reasonably able to complete the

work in a competent manner." While these statements are generally correct, an owner is permitted to insist that the contractor or builder be licensed where required by California law. *See* Bus. & Prof. Code § 7027.2 and 7028. Being licensed where required by law is one factor in determining whether a party is "competent," but the use of unlicensed contractors is one of the most common issues CAA and C.A.R. members face when dealing with reasonable modification requests. CAA and C.A.R. believe it would be very helpful for all parties if the regulations clarified that a landlord may require the work to be performed by a licensed contractor where required by law.

CAA and C.A.R. request the following amendment:

"Owners shall not insist that modifications be accomplished by a particular contractor or builder but may require that the modifications be made by a licensed contractor where required by law."

Thank you for your consideration of our comments and suggestions. Please do not hesitate to contact Whitney Prout at wprout@caanet.org if you have any questions or need additional information.

Sincerely,

California Apartment Association

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