

**State of California
Office of Administrative Law**

In re:
Fair Employment and Housing Council

Regulatory Action:

Title 02, California Code of Regulations

Adopt sections: 12005, 12010, 12060,
12061, 12062, 12063,
12100, 12120, 12130,
12155, 12161, 12162,
12176, 12177, 12178,
12179, 12180, 12185,
12264, 12265, 12266,
12267, 12268, 12269,
12270, 12271

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2019-0214-01

**OAL Matter Type: Regular Resubmittal
(SR)**

SUMMARY OF REGULATORY ACTION

On February 14, 2019, the Fair Employment and Housing Council (Council) submitted to the Office of Administrative Law (OAL) this proposed regulatory action to adopt in Title 2 of the California Code of Regulations (CCR) regulations that relate to the protection against discrimination in the context of fair housing. The proposed regulations provide definitions. They also deal with liability for discriminatory housing practices, discriminatory effects and the burden of proof in establishing discriminatory effects, legally sufficient justifications for practices that have discriminatory effects, harassment, retaliation, real estate transactions practices, discrimination in land use practices, reasonable accommodations, assistance animals, and consideration of criminal history information in housing.

DECISION

On March 29, 2019, OAL notified the Council that OAL disapproved the proposed regulations because the regulations failed to comply with the necessity and clarity standards of Government Code section 11349.1 and the Council failed to follow procedural requirements of the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

The adoption, amendment, or repeal of regulations by the Council must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. NECESSITY STANDARD

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines “necessity” to mean:

(a) ...the record of the rulemaking proceeding demonstrates *by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law* that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. [Emphasis added.]

To further explain the meaning of substantial evidence in the context of the necessity standard, Title 1 of the CCR, section 10, subsection (b) provides:

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of *each* adoption, amendment, or repeal; and

(2) information explaining why *each provision* of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert”

within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. [Emphasis added.]

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). (Gov. Code, sec. 11346.2, subd. (b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, sec. 11346.2, subd. (b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b) and sec. 11346.5, subs. (a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The ISOR in this rulemaking action lacks necessity for a number of the proposed regulations.

1.1.Common Law as the Basis for Necessity

Proposed section 12005

In some proposed sections, the ISOR states that "the proposed section is based on California statutes and common law" but it does not cite any specific case law. For example, during the 45-day notice period, proposed section 12005, subsection (j), defined the term "criminal history information." The ISOR explained that the definition "is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and is common in case law...." However, the ISOR does not support the assertion with the specific case law that defines the term.

Proposed section 12265

In the ISOR's explanation for proposed section 12265, which prohibits use of criminal history information, the Council states that "having a criminal record is not a protected characteristic under FEHA" and that "restrictions on housing opportunities based upon policies or practices that use criminal history violate the Act if they do not have sufficient legal justification." The ISOR goes on to say that "the proposed section is based on California statutes and common law." However, it does not cite to the specific case law that supports the assertion that "restrictions on housing opportunities based upon policies or practices that use criminal history violate the Act if they do not have sufficient legal justification."

The rulemaking record does not demonstrate by substantial evidence the need for the regulations. Thus, the Council must articulate in a Supplement to its ISOR the common law or case law that provides that necessity.

1.2. Informational Language in the Regulation

Proposed section 12176, subsection (a)(1) through (6), enumerates other regulatory sections and provides a brief description of their content. It states:

12176.(a) It is a discriminatory housing practice for any person to refuse to make reasonable accommodations....

(1) Subsection (b) of this section describes confidentiality requirements regarding reasonable accommodations;

(2) Subsection (c) of this section defines requirements relating to requests for reasonable accommodations;

(3) Section 12177 of this article describes the interactive process that is required when the duty to consider a reasonable accommodations request has been triggered;

(4) Section 12178 of this article defines requirements relating to the determination of whether a requested accommodation is necessary;

(5) Section 12179 of this article defines the bases upon which a requested accommodation can be lawfully denied;

(6) Section 12180 of this article states other requirements or limitations in the provision of reasonable accommodations and provides examples of reasonable accommodations.

The ISOR provides the following information to explain the necessity for these provisions:

Because the interaction of the various reasonable accommodation requirements is often misunderstood, subdivisions (a)(1) – (a)(6) are also necessary to provide a “road map” to the public as to the application of the various provisions in this section and in sections 12170-12180, all of which implement different components of the reasonable accommodation requirement set out generally in section 12176.

Subsection (a)(1) through (6) merely appears informational by providing a brief summary of each subsequent subsection or section. There is no “road map” regarding the application of the subsections or sections. In the ISOR, the Council does not demonstrate the need for subsection (a)(1) through (6) to effectuate the purpose of the statute, court decision, or other provision of law. Thus, for subsection (a)(1) through (6), the necessity standard of the APA has not been met.

The Council must review its proposed text for other language that appears informational only, keeping mind that *each provision* of the proposed regulations is required to carry out the purpose of the provision described in the ISOR and the rationale for each proposed provision must be provided.

1.3. Necessity for the Modifications Made Subsequent to the 45-Day Notice

Substantive modifications to the initially proposed text must also meet the necessity standard. As discussed above, Title 1, CCR, section 10, requires a statement of the specific purpose of *each*

adoption, amendment or repeal, and information explaining why *each* provision of the adopted regulation is required to carry out the described purpose of the provision. Further, Government Code section 11346.9, subdivision (a)(1), requires an update of the information contained in the ISOR. If the regulation text is modified and made available to the public for comment, the state agency must comply with both Title 1, CCR, section 10, and Government Code section 11346.9, subdivision (a)(1) by addressing each modification in the Final Statement of Reasons (FSR).

The Council modified the regulation text in several places. For example, in proposed section 12005, the Council removed the definition of “arrest” from the regulation. Also, the definition of “criminal history information” was revised and moved to another section number. However, the Council did not provide the purpose and explanation or rationale for these modifications in the FSR. Therefore, the Council did not comply with Government Code section 11346.9, subdivision (a)(1), and Title 1, CCR, section 10, as well as the necessity standard of Government Code section 11349.1

To ensure compliance with the APA, the Council must include in the FSR information explaining why *each* modified provision is needed to carry out the described purpose of the provision.

Any addition to the ISOR that provides the missing necessity must be made available to the public for comment for at least 15 days pursuant to Government Code section 11347.1. The document which supplements the ISOR must be included in the rulemaking record before resubmitting these regulations to OAL for review.

2. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16, Title 1, of the CCR, OAL's regulation on “clarity,” which provides:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or...

(3) the regulation uses terms which do not have meaning generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute;...

(b) Persons shall be presumed to be “directly affected” if they:

- (1) are legally required to comply with the regulations; or
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the Council failed to comply with the clarity standard of the APA.

2.1. Definition of "Owner"

Proposed section 12005, subsection (t), states:

12005(t) "Owner" means any person having any legal or equitable right of ownership, *governance*, possession or the right to rent or lease housing accommodations, including the following if they hold such rights:

- (1) A lessee, sublessee, assignee, managing agent, real estate broker or salesperson;
 - (2) A trustee, trustee in bankruptcy proceedings, receiver, or fiduciary;
 - (3) Any person that is defined as a "housing provider" in a statute, regulation or government program or that is commonly referred to as a "housing provider" in the housing industry;
 - (4) The state and any of its political subdivisions and any agency thereof;
 - (5) Agencies, districts and entities organized under state or federal law, and cities, counties, and cities and counties (whether charter or not), and all political subdivisions and agencies thereof having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations; and
 - (6) Governing bodies of common interest developments.
- [Emphasis added.]

The ISOR explains that this definition elaborates on Government Code section 12927, subdivision (e). During the 45-day comment period, a commenter pointed out that the "responsibility of government entities under FEHA can be clearly expressed without conceptually or linguistically conflating 'governance' with 'ownership'."

In the FSR, the Council summarized and responded to the comment by stating:

The Council disagrees with the comment. The Act's definition of "owner" in Government Code section 12927(e) states: "'Owner' includes... the state and any of its political subdivisions or an agency thereof." "Governance" in this context refers to the right to rent or lease housing accommodations or any of a bundle of legal or equitable rights related to ownership. It is commonly used to refer to the obligations of common interest development in relationship to the housing units over which they exercise authority. It also could include, for example, a government agency

that controls specified operations of a housing accommodation through a regulatory agreement. In this context, it is not intended to refer to the general legislative functions of a governmental entity within its territorial jurisdiction.

This explanation in the FSR defines the term “governance,” which further interprets, implements, and makes specific the meaning of the word “owner.” The explanation also demonstrates that the term “governance” can be interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subsec. (a)(1).) The meaning of “governance” described in the FSR is also not one that is generally familiar to those directly affected and is neither defined in regulation nor in statute. (Cal. Code Regs., tit. 1, sec. 16, subsec. (a)(3).) Thus, the regulation is unclear. The term “governance” must be clearly defined as to how it applies to the term “owner.”

Furthermore, a regulation must not impair or enlarge the scope of a statute. (Gov. Code, sec. 11342.1) If the definition of “governance” extends liability beyond those the Legislature intended as “owners,” then this would not be permissible without demonstration of legal authority.

3. FAILURE TO FOLLOW REQUIRED APA PROCEDURES

The APA requires agencies to follow specific procedures. In this rulemaking action, the Council did not follow the required procedures by: (1) failing to identify documents relied upon in the 15-day modification notice, (2) failing to include the documents relied upon in the rulemaking file, (3) failing to transmit to OAL copies of each regulation adopted or amended, and (4) using incorrect reference citation.

3.1. Requirement to Identify of Documents Relied Upon

Government Code section 11346.2, subdivision (b)(3), requires that the ISOR include “[a]n identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.”

In discussing the necessity for the various proposed regulatory adoptions, the ISOR refers to over thirty documents, such as the “HUD’s Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” “FEHC Precedential Decision,” “Joint Policy Statement on Discrimination in Lending,” and “California Attorney General Guidance.” Because the ISOR mentions these documents in the context of supporting the necessity for the regulations, the Council has indicated that it relied on them in proposing the action. Thus, the Council was required to identify these documents as documents relied upon in the ISOR but failed to do so. In fact, under a heading entitled “Technical, Theoretical, or Empirical Studies, Reports, or Documents,” the Council specifically stated that “[o]ther than 24 CFR 100 et seq., [the] Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.” (Underlining omitted.)

Government Code section 11347.1, subdivision (a) states that when an “agency adds any... document to the rulemaking file after the publication of the notice of proposed action and relies on the documents in proposing the action shall make the documents available [to the public for a 15-

day comment period].” Government Code section 11347.1, subdivision (b) further requires that the agency mail a notice of modification to persons listed in Government Code section 11347.1, subdivision (b). This notice must identify the added document and state the place and business hours that the document is available for public inspection.

To add these documents relied upon in the rulemaking file and comply with the APA, a new notice identifying the added documents will have to be mailed out to persons required pursuant to section 11347.1, subdivision (b) of the Government Code.

3.2. Requirement to Include Documents Relied Upon in the Rulemaking File

Government Code section 11347.3, subdivision (b)(7), requires that the rulemaking file include:

- (7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

As discussed above, a number of documents were relied upon by the Council in proposing the action. However, the documents relied upon are not included in the rulemaking file. The Council is required to add the documents mentioned above to the rulemaking file upon resubmitting the regulatory action to OAL.

3.3. Requirement to Transmit to OAL Copies of Each Regulation Adopted or Amended

Government Code section 11343, subdivision (a), states that every state agency must “[t]ransmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it....” Further, the completed Form 400 attached to the regulations submitted to OAL must include “the title(s) of the California Code of Regulations affected and a list of all regulation sections being adopted, amended or repealed.” (Cal. Code Regs., tit. 1, sec. 6, subsec. (b)(2).)

The text attached to the Form 400 includes articles and section numbers marked as “[Reserved]”. For example, the text states “§§ 12006-12009. [Reserved],” “Articles 2-6. [Reserved],” and “§§ 12011-12059. [Reserved].” These “reserved” articles and sections are not adopted, amended, or repealed in this regulatory action and they were not listed as sections affected on the Form 400. Thus, they must be removed from the text attached to the Form 400.

3.4. Use of Incorrect Reference Citation

A “reference” is defined as “the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” (Gov. Code, sec. 11349, subd. (e).)

Title 1, section 14, of the CCR states in relevant parts:

- 14. In reviewing a regulation for compliance with the “authority” and “reference” requirements of the Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a)...
- (b) Sources of "Reference." "Reference" shall be presumed to exist if an agency is empowered to implement, interpret or make specific a:
 - (1) California constitutional provision; or
 - (2) California statute; or
 - (3) federal statute or regulation; or
 - (4) court decision or order, cited in its "reference" note proposed for printing in the California Code of Regulations.
- (c)...
- (d) Citations. Citations of "authority" and "reference" for each regulatory section which has been adopted or amended and submitted to OAL for filing with the Secretary of State shall appear at the end of each section. Court decisions relied upon by the agency as support for the citations may also be cited at the end of each relevant section.

At the end of proposed section 12062, the Council cited "*DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99" as a reference citation. A precedential decision is not a proper reference citation and must be removed.

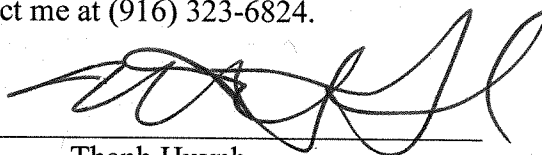
CONCLUSION

For these reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Council may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this Disapproval Decision will be emailed to the Council on the date indicated below.

Any changes made to the regulation text to address the issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption. Additionally, any document relied upon and any supplement to the ISR or other document the Council may create or otherwise propose to add to the record in order to address the necessity issue discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1 prior to adoption. The Council must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval, before resubmitting to OAL.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: April 5, 2019



Thanh Huynh
Senior Attorney

Original: Kevin Kish, Director
Copy: Jacob Barak