

**FAIR EMPLOYMENT AND HOUSING COUNCIL
CONSIDERATION OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS REGULATIONS**

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 2. Particular Employment Practices

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person. Accordingly, FEHA prohibits employers from utilizing criminal records and information in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the Act that the employer cannot prove is job-related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in Oakland on April 7, 2016. The Council further solicited public comment on four modified texts at four subsequent meetings: June 27, 2016, in Los Angeles; August 31, 2016, in San Francisco; November 15, 2016, in San Francisco; and January 10, 2017, in Los Angeles.

The following list summarizes the Council's notable amendments to the originally proposed text:

- clarification that the only time when a policy or practice that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is permissible is when it is job-related and consistent with business necessity;
- addition of examples of convictions that can be judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law;

- addition of “arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law,” which comes from AB 1843 (2016), to the list of items that employers are already prohibited from considering in employment decisions per Labor Code section 432.7;
- clarification that employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.);
- removal of “[a]s used in this section, ‘adverse impact’ has the same meaning as ‘disparate impact’ as used and defined in the Equal Employment Opportunity Commission’s Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 2012)” because the cross-reference was not necessary to effectuate the purpose of the regulation;
- clarification of the standard for proving and rebutting adverse impact;
- addition that conviction related-information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense;
- clarification of what an individualized assessment of the circumstances and qualifications of the applicants or employees excluded by the conviction screen entails;
- clarification that the disparate treatment analytical framework is still applicable in addition to adverse impact; and
- dozens of non-substantive grammatical and technical revisions (e.g. renumbering subdivisions and using uniform spacing and citation conventions).

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council’s response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State. To the contrary,

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adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations duplicate or overlap a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11017 – Employee Selection

Comment: There appears to be a drafting error in regard to the term “job-related.” Section 11017(a) formerly cross-referenced Section 11017(e) which used the following language to define job related: “sufficiently related to an essential function of the job in question.” The proposed revision seeks to strike this cross-reference, replacing it with a reference to Section 11010(b). Section 11010, entitled “Affirmative Defenses to Employment Discrimination,” sets forth affirmative defenses generally available in employment cases brought under FEHA. Subsection (b) defines “business necessity” but does not address “job-related.” Subsection (c) is where the definition of “job-related” is referenced. However, instead of defining “Job-Relatedness,” subsection (c) refers to and incorporates Section 11017(e). Previously, Section 11017(e) contained above quoted language defining “job-relatedness.” However, the Council has proposed to strike that language, leaving a circular cross-reference and no actual definition. Because the present Notice of Rulemaking does not include Section 11010, we believe the appropriate way to deal with this issue is within Section 11017. We believe the language in proposed Section 11017.1 (e) sufficiently sets forth the various factors to be considered to establish “job relatedness,” and for sake of clarity and consistency would recommend a cross-referencing with Section 11017.1(e).

Council Response: The Council agrees with this comment and ultimately amended all relevant subdivisions of section 11017 to be internally consistent and clearly state that the only time when a policy or practice that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is permissible is when it is job-related and consistent with business necessity.

Section 11017.1(a) – Introduction

Comment: “Lay-off” should be added to the list of employment decisions for which employers may not use certain enumerated criminal records and information.

Council Response: The Council agrees and added “lay-off.”

Comment: “The Council should add language requiring employers provide notice to applicants and employees their right to withhold certain criminal history. This provision would ensure applicants and employees are apprised on their right of non-disclosure of the types of criminal history listed in this subdivision. This provision also should be added to the posting requirements under the FEHA.

Council Response: The Council believes that the proposal would be unduly burdensome and is already addressed by the limitations placed on employers regarding the types of criminal history information employers can seek on applications or through interviews with applicants or employees.

Section 11017.1(b) – Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact

Comment: In proposed Section 11017.1(b)(1), an employer is prohibited from considering or seeking information from an employee or applicant regarding an arrest or detention that did not result in a conviction, except if otherwise provided by law. The proposed regulation cites Labor Code section 432.7 as authority for this language. Labor Code section 432.7 actually does not impose a blanket prohibition on all employers with regards to all arrests that do not result in a conviction, as suggested. There actually are several exceptions to when arrests that do not result in a conviction may be inquired into by an employer. To the extent the FEHC is relying upon Labor Code section 432.7 to recite existing law regarding the consideration of criminal history employment decisions, we request the FEHC to include all provisions in Labor Code section 432.7 to avoid any unnecessary confusion.

Council Response: The exceptions provided for in Labor Code section 432.7 apply in a narrow set of employment contexts and their existence is acknowledged both by the phrase “except if otherwise specifically permitted by law” and by the cross reference citation to the Labor Code section itself that is provided in Section 11017.1(b)(1).

Comment: We suggest the Council clarify and strengthen this provision. The first full sentence of subsection (b) creates a carve-out that reads, “except if otherwise provided by law.” We propose replacing this carve-out language with the phrase, “except if expressly permitted by law.” This minor wording change would more accurately mirror the structure of Labor Code section 432.7, which establishes that employers are prohibited from asking about or considering specified categories of criminal history records, unless specific exceptions – spelled out in various subsections of Labor Code 432.7 – apply. The carve-out language as currently phrased creates ambiguity in cases where other laws permit employers to receive conviction information, but do not comprehensively track which of those employers are specifically exempted from the prohibitions in Labor Code section 432.7(a). Our proposed wording change would make clearer that the prohibitions enumerated in section 11017.1(b) of the Council’s Proposal apply in all cases except where the Labor Code expressly permits employers to inquire about and/or consider the otherwise prohibited categories of criminal history records.

Council Response: The Council agrees with this comment and modified the phrase accordingly.

Comment: Additional criminal history limitations, irrespective of adverse impact. Section 11017.1(c)(1) of the proposed regulation provides that *state or local agency* employers are prohibited from asking about criminal history including through an application, until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for the position. First, we note that this section specifically applies only to *state or local agency employers*. The rest of the proposed regulation does not appear to be limited to only state or local agency employers. This provision is consistent with §V(B)(3) of the EEOC Guidance, which states that "[a]s a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications." However, we note that as written, this provision does not address the EEOC Guidance's further recommendation "that, if and when [employers] make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." *Id.* FEHC may consider adding this best practice to the proposed regulation.

Council Response: The provision contained in Section 11017.1(c)(1) pertains to a specific California Labor Code provision that is only applicable to state and local agency employers, not private employers. While the Council appreciates the recommendations of "best practices" provided for in the EEOC Guidance, it does not believe that converting the "best practices" in to mandatory requirements in the regulations was warranted. However, the issues being flagged by this comment are addressed by the Council more generally in Section 11017.1(d) – (e).

Section 11017.1(c) – Additional Criminal History Limitations, Irrespective of Adverse Impact

Comment: The proposed regulations reference other relevant laws that employers should be aware of, including the statewide "Ban-the-box" law and San Francisco's Fair Chance Ordinance. Another important set of laws not mentioned are the consumer protections found in the federal Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA).

Council Response: The Council agrees and added the language to subdivision (c)(3).

Section 11017.1(d) – Consideration of Other Criminal Convictions and the Potential Adverse Impact

Comment: We recommend this subdivision read as follows:

Consideration of Other Criminal Convictions and the Potential Adverse Impact. The department will accept national and state criminal justice statistics as prima facie evidence of adverse impact, while allowing the employer the opportunity to show, with relevant evidence, that its employment policy or practice does not cause an adverse impact on the protected group(s). For purposes of such a determination, adverse impact is defined at Section 11017 and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). As used in this section, "adverse impact" has the same meaning as "disparate impact" as used and defined in the Equal Employment

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Opportunity Commission's Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 2012).

Council Response: The Council's regulations are substantive regulations, not procedural regulations of the Department. Consequently, the Council did not incorporate the commenter's recommendation to address what the Department will accept. However, the Council did address the use of national and state statistics in Section 11017.1(d) and did incorporate the references to the Uniform Guidelines and EEOC publication recommended in the comment.

Comment: Section 11017.1(d) of the proposed regulation provides that, "[a]n adversely affected applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse disparate impact on a basis protected by the Act." In Title VII litigation, the plaintiff carries the burdens of production and persuasion to show that criminal convictions had a disparate impact based on a protected characteristic. However, in EEOC administrative investigations of all discrimination charges, it is the investigator's job to gather information pertinent to the charge, as the charging parties themselves typically lack legal representation. Based on national data reflecting that African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their representation in the general population, the 2012 Guidance recognizes that "[n]ational data ... supports a finding that criminal record exclusions have a disparate impact based on race and national origin ... [and therefore] *provides a basis for the Commission to investigate such Title VII/ disparate impact charges.*" EEOC Guidance, §V(A)(2)(emphasis supplied). We recommend that FEHC assess whether, for purposes of its own administrative investigations only, it should follow the EEOC's approach to producing evidence of disparate impact.

Council Response: The Council's regulations are substantive regulations, not procedural regulations of the Department. Consequently, the Council did not incorporate the commenter's recommendation to address what the Department will accept. However, the Council did address the use of national and state statistics in Section 11017.1(d).

Comment: As currently drafted, Section 11017.1(d) provides little guidance on what a plaintiff must prove in order to establish a prima facie case of adverse impact, and it suggests various complications without clarifying their significance. I recommend that the Council address the relevance of state- and national-level statistics documenting deep, pervasive racial disparities in criminal records. Specifically, the regulations should explain when such statistics can be sufficient to establish a prima facie case. They should suffice absent evidence showing why this robust pattern of disparities may not apply to the particular employer use of criminal records at issue...The ultimate question is whether plaintiffs have shown that, more likely than not, the challenged policy or practice causes an adverse impact. In other words, does it tend to disproportionately exclude applicants with a particular protected status relative to the effects of an otherwise identical hiring process that omitted the criminal record exclusion?... At the very least the Council should make clear that state-level statistics of the sort discussed above are a *sufficient* basis for a reasonable fact-finder to conclude that adverse impact has been shown. Even if that conclusion is not necessary as a matter of law, such un rebutted statistics

should suffice to defeat an employer's motion for summary judgment. That approach is the bare minimum necessary to follow the sound principles articulated in *Dothard* and elsewhere adhered to in the criminal records context.

An example of regulatory language that could achieve this bare minimum would be as follows: An adverse impact may be established based on state- and national-level statistics showing substantial, persistent disparities in criminal records. Circumstances bearing on whether an employer's use of criminal records imposes an adverse impact include (a) whether state- or national-level disparities are large enough that even substantially smaller disparities would still constitute an adverse impact, and (b) whether there is a basis in fact to expect those disparities to be eliminated after accounting for characteristics of (i) the geographic area at issue, (ii) the particular offenses at issue, or (iii) the particular job at issue.

Council Response: The Council agrees with this comment and, utilizing different specific language, addressed the use of state- and national- statistics in Section 11017.1(d). The language incorporated in this Section derives from the U.S. Supreme Court's *Dothard v. Rawlinson* decision identified by the commenter.

Comment: For the sake of clarity and ease of use, we also suggest the Council separate out which party bears the burden of proof to show a "persuasive basis" to expect a different result and which party bears the burden of proof to thereafter establish "an adverse impact ... using conviction statistics that address the particularized circumstances" into subdivisions (1), (2) and (3), and specify which party bears the burden of proof at each step. Simply stating "the burden shifts to the employer" as in subdivision (e)(1) still begs the question of whether just the burden of production (and not the burden of persuasion) has shifted to the employer (as in McDonnell-Douglas burden-shifting)

Council Response: The Council agrees that a clearer explanation was warranted and ultimately spelled out the burdens in clearer terms. The Council incorporated the substance of this comment, but the proposed organization would be unwieldy and the language the Council ultimately adopted is maximally clear.

Section 11017.1(e) – Consideration of Other Criminal Convictions and the Potential Adverse Impact

Comment: There is no necessity to adopt different burdens of proof and definitions for employment selection discrimination based upon the use of criminal backgrounds. The terms "job-related" and "business necessity" are not new or uncommon. They have been applied consistently since the US Supreme Court decisions, and California courts have repeatedly used the federal interpretation in their analysis of FEHA cases. The terms have also already been defined in CCR, Title 2, section 11010(c) and 11017(e) for purposes of employee selection discrimination, as well as affirmative defense discrimination. There is no rationale as to why employment selection policy that utilizes an applicant's criminal background requires a different standard, burden of proof or analysis than any other employment selection policy, such as a fitness for duty test or other examination.

Council Response: The Council disagrees with the underlying premise provided by the comment. The regulations do not propose a different standard of analysis of “job-related and consistent with business necessity.” Rather, they address how this standard can be applied to the specific context of the consideration of criminal history information in employment decisions.

Comment: The proposed regulation seeks to completely re-define “job-relatedness” and “business necessity” for disparate impact cases based upon the use of criminal convictions. The proposed standards are based on the EEOC Enforcement Guidance, which does not have force of law and has not always been given deference by courts. Neither the *Green* case nor the *EI* case referenced the EEOC guidance support the extensive language in the proposed regulations defining the above-mentioned terms. The *EI* Court rejected the approach to interpret Title VII as requiring the standards set forth in the regulations. The California District Court opinion in *Guerrero* is the only California published case to reference the EEOC Guidance but it did not actually analyze a criminal conviction nor did it opine its approval of anything else with regard to the EEOC Guidance.

Council Response: The Council disagrees with the underlying premise provided by the comment. The regulations do not propose a different standard of analysis of “job-related and consistent with business necessity.” Rather, they address how this standard can be applied to the specific context of the consideration of criminal history information in employment decisions. The Council also disagrees with the commenter’s implication that the regulations are inconsistent with federal and state precedents. The regulations are supported both by the available federal and state precedents addressing this issue and by state statutory law.

Comment: There is no authority for the FEHC to adopt a 7-year time frame to consider criminal history and create a rebuttable presumption of discrimination against employers. In proposed section 11017.1(e)(3), it states that a bright-line disqualification policy or practice that does not include an individual assessment and includes conviction related information that is more than seven years old creates a rebuttable presumption that the policy is not job-related or a business necessity. There is no authority to impose this proposed regulation upon employers. Not even the EEOC Guidance includes such a requirement or the creation of a rebuttable presumption. Ca Civil Code Section 1786.18 precludes an investigative consumer reporting agency from containing convictions that are more than seven years old but there is no authority to preclude an employer from seeking this information from an applicant or employee. The *EI* court also recognized that a conviction for murder that is 40 years old may very well be job-related and within the definition of business necessity. In crafting the Labor Code section 432.7 regarding employer requests for criminal history information of an applicant, the California Legislature could have spoken to the consideration of convictions that are over seven years old, yet have not. As such, this section should be deleted.

Council Response: The Council disagrees with this comment. The federal precedents addressing this issue identify the diminishing relevance of dated criminal history and California Civil Code Section 1786.18 provides legislative guidance regarding the appropriate marker for such a presumption. The regulation provides only a “rebuttable presumption” and the Council

acknowledges that utilizing older criminal history may be allowable in certain specific circumstances.

Comment: There is no authority to require an employer to perform an individualized assessment of each applicant with a criminal background as imposed by proposed section 11017(e) (2)-(4). The *EI* Court rejected a request to interpret such a mandate under Title VII. There is no definition of what “individualized assessment” is with regard to criminal convictions, and the EEOC’s definition is actually inconsistent with the language proposed in the regulations. There is no information requiring an employer to conduct an individualized assessment, despite the lack of any information provided by the employee or applicant. We request the FEHC to delete this section from the regulations.

Council Response: The Council disagrees with the comment’s implication that an individualized assessment is mandated by the regulations. Section 11017.1(e) addresses several ways for an employer to demonstrate that its criminal conviction history policy or practice is job related and consistent with business necessity, including both individualized assessment and “bright-line” policy options. The Council does agree with the portion of the comment recommending that an individualized assessment be more clearly defined in this context. The Council added additional detail regarding individualized assessments in Section 11017.1(d)(2)(B).

Comment: We suggest revising Section 11017.1(e) of the Proposed Regulation to track § V(B)(4) of the EEOC Guidance more closely to reflect the following point: If the policy or practice of the screening on the basis of criminal convictions creates a disparate impact on applicants/ employees on a protected basis under the Act, the burdens of production and persuasion then shift to the employer to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.

Council Response: The Council believes that the analytic framework proposed by the comment was already included in the initial draft of the regulations. Additional specifics were added in subsequent drafts in response to this comment and other comments received by the Council.

Comment: We suggest revising Section 11017.1(e) of the Proposed Regulation to track § V(B)(4) of the EEOC Guidance more closely to reflect the following point: The employer must show that its policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

Council Response: The Council believes that the analytic framework proposed by the comment was already included in the initial draft of the regulations. Additional specifics were added in subsequent drafts in response to this comment and other comments received by the Council

Comment: We suggest revising Section 11017.1(e) of the Proposed Regulation to track § V(B)(4) of the EEOC Guidance more closely to reflect the following point: An employer will consistently meet the “job related and consistent with business necessity” defense in one of two circumstances. First, the employer may demonstrate that it validated the criminal conduct

screen for the position at issue, per the UGESP standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible). Or second, the employer develops a targeted criminal record screen that is narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question by taking into account, at least, the following factors: (1) The nature and gravity of the offense or conduct; (2) The time that has passed since the offense or conduct and/or completion of the sentence; and (3) The nature of the specific job held or sought.

Council Response: The Council believes that the analytic framework proposed by the comment was already included in the initial draft of the regulations. Additional specifics were added in subsequent drafts in response to this comment and other comments received by the Council. The Council's regulatory provision regarding "bright-line" criminal record consideration policies is tailored to include California statutory law but is otherwise largely in conformity with comment.

Comment: We suggest revising Section 11017.1(e) of the Proposed Regulation to track § V(B)(4) of the EEOC Guidance more closely to reflect the following point: The employer should then provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity. The individualized assessment would consist of notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.

Council Response: The Council added additional specifics regarding what an individualized assessment should consist of in response to this comment and other comments.

Comment: The Council should clarify that a potential employee may challenge both the accuracy of the background check as well as the accuracy of the interpretation of a finding of job-relatedness. Under proposed regulation 11017.1(e)(4), "the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate." However, even when the written conviction history document is accurate, an employer may still misread or misunderstand the information. An adversely affected person should be able to explain and present evidence which will ensure that the employer understands the information correctly. We believe job-relatedness of a past conviction should be determined by comparing the actual behavior associated with the original conviction and the circumstances of a current job offer. Does the position sought provide similar circumstances and opportunity for illegal behavior as the past conviction? Since most crimes do not occur on-the-job or at job sites, it is appropriate to require a deeper examination of actual behaviors and opportunities presented.

Council Response: The Council disagrees with this comment to the extent it recommends that an individualized assessment should be mandated and does not believe legal authority justifies the recommendation. The Council did provide specifics regarding both individualized assessments and “bright-line” policy requirements in Section 11017.1(e).

Comment: The Council should clarify that internal research related to convictions or arrests also falls under these regulations. When an employer does internal research such as an internet search, the likelihood of learning inaccurate information, or information that is not allowed to be considered, is greatly increased. The regulations should clarify that the protections it affords to adversely affected persons apply also to cases involving information obtained by means of internal research: the right to be notified prior to the adverse action, the right to view the information, and the right to present evidence that the information is factually inaccurate or misinterpreted. Leaving this avenue unregulated creates a large gap in protection.

Council Response: The Council agrees with this comment and “internal research” is included in the provisions of Section 11017.1(e)(3).

Comment: The event which should have occurred within the seven-year look-back period is an arrest or citation, which resulted in a conviction. The arrest is an officially identified time so it would be easy to determine and it is a better proxy for the crime, rather than punishing a person for a slow judicial system causing a later disposition date, for instance.

Council Response: The Council’s provision at Section 11017.1(e)(2)(A) is intended to conform with California Civil Code Section 1786.18 regarding dated criminal history information.

Comment: We have concerns regarding the rulemaking’s requirement that an employer give the impacted individual notice of the disqualifying criminal conviction before the employer may take adverse action to decline to hire, discharge, or decline to promote the individual. As the proposed rule would be applicable to all private employers, this approach assumes that every employer has a black-and-white policy with respect to hiring those with past criminal convictions, which generally is not the case. Additionally, for employers that conduct background screening via Consumer Reporting Agencies (CRAs), the Federal Fair Credit Reporting Act (FCRA) requires a specific adverse action process to be followed any time an employer is potentially making an adverse decision (i.e., denying employment, terminating an employee, deciding not to promote an individual) based in whole or in part on information contained within a background report – which may or may not contain criminal history information. Further, California Civil Code Section 1786.40 requires employers to also follow a specific adverse action process similar to the FCRA’s requirements. By requiring employers to specifically state the fact that the individual’s criminal history is the basis for an adverse decision, the proposed ordinance extends beyond existing federal and state requirements which presents potential compliance challenges for employers that hire in multiple jurisdictions. Based on the foregoing, we respectfully submit that this notice requirement be removed from the proposed rule.

Council Response: The Council disagrees with the comment's understanding that the notice provision assumes employers have black-and-white policies with respect to hiring those with past criminal convictions or is incompatible with criminal history policies that are not black-and-white. The notice provision does not require employers to provide notice to all employees or applicants with convictions, only to those who were adversely affected based on conviction information the employer relied on in the decision-making process. In response to other comments, the provision was also narrowed so that notice is only required when the conviction information being relied upon does not come from the employee or applicant (and thus has the potential of being factually inaccurate). The Council further disagrees with the comment to the extent it concludes that Section 11017.1(e)(3) is incompatible or inconsistent with the Fair Credit Reporting Act or California Investigative Consumer Reporting Agencies Act. The Council did include an additional reference to the requirements of these Acts at Section 11017.1(c)(3) in response to additional comments received.

Comment: We request this provision be removed because these factors and recommendations are substantially similar to existing EEOC Guidance.

Council Response: The Council disagrees that substantial similarity with a parallel federal law is a reason to remove a provision. On the contrary, maximum clarity is achieved by synthesizing, clarifying, and ultimately including guidance that is potentially similar to federal law. Moreover, while the laws are parallel, they are not identical and state law – the FEHA – should be interpreted in the California Code of Regulations, not informally via federal guidance on Title VII of the Civil Rights Act of 1964.

Comment: Employers should not be permitted to apply a double standard by rejecting one level of risk in someone with a criminal record yet accepting that level in someone else. Also, employers routinely balance multiple factors relevant to a hiring decision. Any bright-line disqualification should be required to meet the following standard: the risk indicated by the record is sufficiently great as to justify excluding the applicant no matter how strong the application is in other respects. This standard is suggested by the Proposal's use of the term "unacceptable risk," but that conclusion may be undermined by the immediately following "negative bearing" language. Skepticism that this standard could ever be met is the intuition underlying the EEOC's suggestion that bright-line exclusions almost never will be justified. Individualized considerations may defeat the inference from criminal record to unacceptable risk, even if it holds true on average. Similarly, any individualized assessment should go beyond considering mitigating circumstances relating to the criminal record or post-conviction evidence of rehabilitation. It also should include attention to an applicant's distinctive strengths. Examples of regulatory language that could address these concerns would be as follows:

- To demonstrate that a policy or practice of considering conviction history is job-related, an employer must specify the job-related function or risk implicated by a conviction history and demonstrate that such a history predicts impairment of that function or existence of that risk.
- A bright-line disqualification cannot be justified merely by showing that a conviction history indicates some elevated risk relative to someone similarly situated to the applicant or employee in question but who lacks his or her conviction history. Instead, an employer must

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demonstrate that this specific type and level of risk is unacceptable for any applicant or employee. If the employer would sometimes tolerate similar risks in other employees, including those without a conviction history but with other factors indicating a similar risk, then the employer's conduct demonstrates that the risk, even if real, does not rise to the level of being unacceptable.

-For a bright-line disqualification to be job-related and consistent with business necessity, the specific risk indicated by the conviction history must be sufficiently great as to justify excluding the applicant no matter how strong the application is in other respects. For such a risk to be indicated by the conviction history, it must be sufficiently consistent across all persons with such a conviction history that there is no reasonable likelihood that individualized assessment would indicate a materially lower risk in particular cases. Otherwise, the existence of an unacceptable risk cannot be determined without an individualized assessment.

-An individualized assessment of an employee or applicant with a conviction history must consider whether the employee or applicant's positive qualifications might outweigh any risks indicated by the conviction history. A level of risk that might justify excluding a minimally qualified candidate might not justify excluding an otherwise exceptionally qualified candidate.

Council Response: The Council did add additional detail regarding individualized assessments and "bright-line" disqualification policies in response to this comment and other comments received. While the Council did not include the exact language proposed in the comment, it did address the concerns raised in the comments through its inclusion of an additional provision addressing disparate treatment at Section 11017.1(h) and believes that the "less discriminatory alternatives" provision in Section 11017.1(g) also addresses some of the concerns raised by the comment.

Section 11017.1(f) – Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History

Comment: Section 11017.1(c)(2) of the Proposed Regulation provides that "employers may also be subject to local laws or city ordinances that provide additional limitations." Section 11017.1(f) provides that "[c]ompliance with [federal or state laws or regulations that impose licensing restrictions or otherwise limit employment opportunities for individuals with criminal records] is a form of job-relatedness, is consistent with business necessity, and constitutes a defense to an adverse impact claim under the Act." This language would protect employers from liability under this new California regulation if they are complying with contrary state, city, local or federal restrictions or licensing requirements for people with criminal records. We would note, however, that this provision applies only to California law; it does not create an affirmative defense to a violation of Title VII.

Council Response: The Council acknowledges and appreciates the guidance on and the distinction between state and federal law.

Comment: The Council should withdraw this subdivision for three reasons. First, it fails to acknowledge that the proposed employer defense to an adverse impact claim does not apply to a federal claim of discrimination under Title VII. Second, the proposed exception threatens to

swallow the critical new protections, given the vast number of state and local laws in place requiring background checks for employment. Third, it conflates state law screening processes that explicitly require employers to do background checks and contain mandatory disqualifications of persons with certain conviction histories with those laws that provide more flexibility.

Council Response: The Council disagrees with removing Section 11017.1(f), but did make clarifications to the Section to indicate that the defense is rebuttable and to clarify that the rebuttable defense addressed applies to “mandatory” criminal history screening processes in response to this comment and similar comments.

Section 11017.1(g) – Less Discriminatory Alternatives

Comment: Under this provision of the Proposed Regulations, in which individuals may still “prevail under the Act” if they can establish a “less discriminatory policy or practice,” there is a significant concern as to interpretation and additional burdens placed on employers. We are not aware of any other state law that includes similar language and requirements and we believe employers are in the best position to determine what information is relevant to a hiring decision, and that this provision would place employers in uncharted territory.

Council Response: The Council disagrees with this comment. The “less discriminatory means” analysis is a part of both federal and state disparate impact frameworks and is not a new or additional burden being placed on employers through these regulations.

General

Comment: Imposing these additional burdens, specified definitions, and onerous standards on employers with employment selection policies that include criminal background checks will likely create a disincentive to inquire into such information during the hiring, selection or promotion process in order to avoid a claim of discrimination under FEHA. This disincentive, however, will increase the risk of an employer being sued for negligent hiring. California exposes employers to liability for hiring an individual that the employer “knew or should have known” had a dangerous propensity and that danger materializes itself in the employment relationship. *See Phillips v. TLC Plumbing Co.*, 172 Cal.App.4th 1133 (2009); *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828 (1992).

Council Response: The Council disagrees with this comment to the extent it suggests the regulations create new substantive obligations. The regulations clarify and address pre-existing FEHA rights and responsibilities in the context of criminal history information consideration.

Comment: We do not believe there is any legal authority for these proposed regulations. The cases cited do not actually support the proposed language and the EEOC April 2012 guidance, “*Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII Of the Civil Rights Act of 1964*” (EEOC Guidance) referenced is simply “guidance” for internal EEOC investigations that was not promulgated through regulations with public comment.

In fact, the EEOC Guidance is currently being challenged in federal court for failure to comply with the Administrative Procedure Act. On June 27, 2016, the Fifth Circuit Court of Appeals determined that the State of Texas had constitutional standing to challenge the EEOC Guidance as the Guidance “forces Texas to alter its hiring policies and incur significant costs.” *See State of Texas v. Equal Employment Opportunity Commission*, 2016 WL 3524242 (June 2016). The Fifth Circuit also concluded that the EEOC Guidance is a “final agency action” for purposes of review under the APA. Given that the proposed regulations are so heavily based upon the EEOC Guidance, these regulations should be withdrawn until the final determination of this litigation.

Council Response: The Council disagrees with this comment. The regulations are amply supported by state law and both state and federal precedent. Also, the case cited in the comment is inapplicable, since these regulations have gone through an extensive APA public comment process.

Comment: The Council should use the term “conviction” history, rather than “criminal” history. It is both a more accurate description of what is being ordered and less stigmatizing.

Council Response: The Council partially agrees with this comment. Depending on the context the terms are being used in, “conviction” or “criminal” is the appropriate term. The Council believes the regulation’s provisions utilize the appropriate term in each context.

Comment: Employers should only be able to access background checks once they have made a conditional offer.

Council Response: The Council disagrees that a universal “ban the box” requirement is supportable through FEHA regulations, but did highlight a more limited “ban the box” requirement contained in the Labor Code in Section 11017.1(c)(1).

Comment: The Council should require that documentation of investigations include specific identification of the employer and the background check company (when used) and that the information about the employer and the background check company is publicly available information.

Council Response: This comment is not responsive to the noticed text. The Council does not have the resources, proof of necessity, or authority per Government Code section 12935 to institute such a requirement. That would be most appropriately addressed by the legislature.

Comment: The Council should make a statement of policy about the crucial need, in principle, for accountability of background check companies

Council Response: This comment is not responsive to the noticed text. Statements of policy, such as those found in the preamble to bills, are most appropriately addressed by the legislature.

Comment: The Council should bring about a study of whether certifying background check companies is both feasible and would not undermine other consumer protections. If the study shows that it is feasible and would not undermine other consumer protections, we urge the Council or DFEH to implement certification of background check companies.

Council Response: This comment is not responsive to the noticed text. The Council does not have the resources, proof of necessity, or authority per Government Code section 12935 to commission studies or certify background check companies. That would be most appropriately addressed by the legislature.

Comment: The Council should reiterate that people have a right to a copy of their conviction history anytime it is produced for the employer. Although current law states that every person on whom a conviction history check is performed has the right to a copy of the background check, the proposed regulations fail to specify that this is in fact the case. The regulations should simply and clearly state that a job applicant has a right to a copy of his or her conviction history anytime it is run, and that he or she must be given a copy if he or she suffers an adverse action.

Council Response: The Council did include a cross reference to the requirements of the Fair Credit Reporting Act and California Investigative Consumer Reporting Agencies Act in Section 11017.1(c)(3) in response to this comment and similar comments.

Comment: I believe this statute should be amended to add language which would allow employers to determine that a person who, for example, was convicted of child molestation, would not be qualified to teach elementary school, based on that conviction. It seems this bill would not allow an employer to ask.

Council Response: These regulations do not interfere with the sentiment and the Council believes that application of criminal convictions is sufficiently addressed more generally in Section 11017.1(e). The Council disagrees that outlining the specific factual scenario provided by the comment is a necessary or appropriate addition to the regulations.

Comment: We recommend the Council add a new subsection to read as follows:
Individualized assessment means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job-related and consistent with business necessity. The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;

- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education or training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Council Response: The Council agrees generally that additional detail regarding individualized assessments was warranted and provided additional detail at Section 11017.1(e)(2)(B). The Council does not believe that the nonexhaustive list of potentially relevant facts was necessary or appropriate for the regulations.

Comment: The Council should require the state licensing boards to evaluate the adverse impact of the state background checks.

Council Response: The Council believes that this comment is outside the scope of these regulations, but will consider them more generally with respect to potential future projects of the Council.

Comment: We urge the Council to include measures that will help to monitor employer compliance with the regulations and require data tracking, like describing procedures the agency will follow to track investigations and document employer compliance and requiring that employers retain all documentation related to their consideration of applicants with criminal records for a specified period of time.

Council Response: The Council did not add the suggested new section(s) for at least three reasons. First, the proposal would be cost-prohibitive to employers and make an otherwise set of cost-neutral regulations expensive for employers. Second, the proposal is outside of the FEHA and would require legislation, so it is therefore outside of the Council's jurisdiction. Finally, this comment is unresponsive to the noticed text. Also, to the extent the comment is requesting procedural regulations applicable to the Department, such a regulation is not within the authority of the Council.

Comment: I am in favor of removing blocks to employment such as the felony box on applications; Implement the proposed rule changes and the "Ban the Box" legislation.

Council Response: The Council appreciates the feedback, but urges this commenter to contact members of the legislature if she wants to enact or amend statutes. The Council disagrees that a universal "ban the box" requirement is supportable through FEHA regulations, but did highlight a more limited "ban the box" requirement contained in the Labor Code in Section 11017.1(c)(1).

Comment: The Proposal omits any provisions directed at disparate treatment in an employer's use of conviction history information. As the EEOC Guidance notes, that is an important way, in addition to disparate impact, that employers might use criminal records in violation of the Act. An example of regulatory language that could identify disparate treatment in use of criminal history records would be as follows, as a new Section 11017.1(c)(3):

An employer may not consider any aspect of a criminal history when the action taken on that basis is also substantially motivated by an enumerated basis, as provided in Section 11009(c). This would occur if the same criminal history were treated differently depending on, for instance, the race of the applicant or employee in question.

With regard to individualized assessment, an example of regulatory language would be as follows, at the end of Section 11017.1(d)(2):

Any individualized assessment must itself be conducted in a nondiscriminatory fashion, including as noted in subsection (c)(3) above.

Council Response: The Council agrees with this comment generally and added Section 11017.1(h) which addresses disparate treatment.

Comment: We share the concern about ensuring that the regulations prohibit disparate treatment based on a protected characteristic. For this reason, we ask the Council to add to subdivision (e)(4) the underlined language:

(e)(4) Before an employer may take an adverse action such as declining to hire, discharging to promote or transfer an adversely impacted applicant or employee based on conviction history obtained (e.g., through a credit report or internally generated research), the employer must give the impacted individual (1) notice of the disqualifying conviction; and (2) a reasonable opportunity to present evidence that the information is factually inaccurate the impacted individual should not, because of his or her particular circumstances, be excluded from employment, transfer or advancement as a result of the employer's screening process; and (3) evidence of the employer's consideration as to whether the additional information provided by the impacted individual warrants an exception to the exclusion and shows that the policy as applied to that impacted individual is not job-related and is consistent with business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. If the applicant or employee establishes that the record is factually inaccurate his or her circumstances warrant an exception to the exclusion, then that record the impacted individual's criminal history cannot be considered in the employment decision.

Council Response: The Council appreciates the commenter's concerns regarding disparate treatment and added Section 11017.1(h), which addresses disparate treatment. The Council disagrees with this comment to the extent it recommends that an individualized assessment should be mandated and does not believe legal authority justifies the recommendation. The Council did provide specifics regarding both individualized assessments and "bright-line" policy requirements in Section 11017.1(e).

Comment: The Council received information from the San Francisco Human Rights Commission on the City of San Francisco's Fair Chance Ordinance.

Council Response: The Council greatly appreciates the positive feedback and information on the related municipal ordinance.

Comment: Employers should be able to choose who they associate with, criminal convictions or not.

Council Response: The Council agrees; however, these regulations do not force any association and the Council did not make any corresponding changes.

Comment: The Council does not have authority to promulgate these regulations.

Council Response: The Council disagrees. Government Code section 12935(a) grants the Council broad rulemaking authority over the Fair Employment and Housing Act (the statute refers to it as "this part"). The FEHA prohibits both intentional discrimination and the type of disparate impact discrimination these regulations principally address. *See e.g., Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 354, fn. 20 (2000).

Ample research supports a finding that criminal record exclusions have a disparate impact based on protected characteristics in the FEHA, such as race and national origin. As is detailed in the EEOC's *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged. This rate climbs to 1 in 6 (or 17.2%) for Hispanic men. For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%). Similar race, ethnicity, and gender disparities in conviction and incarceration rates exist in the California, as reflected in the data made available by the California Attorney General's Criminal Justice Statistics Center and its OpenJustice initiative.

FEHA rulemaking has long included various disparate impact topics, including criminal history, height standards, and weight standards. *See* 2 CCR § 11017 (renumbering 2 § CCR 7287.4 (1980)). Similarly, the Equal Employment Opportunity Commission, the Council's rulemaking counterpart for the federal Title VII law, which also prohibits disparate impact discrimination, has addressed disparate impact topics in its regulations. *See* 29 C.F.R. § 1607 et seq.

COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Sections 11017(a) and throughout 11017.1 – “Job-Related and Consistent with Business Necessity”

Comment: The proposed regulations require that the use of conviction records when there is adverse impact be proven to be "both job related and consistent with business necessity" - this falsely implies that selection criteria can be job related without being consistent with business necessity. I suggest you ask yourself the following question - Under what circumstances could the use of conviction records be job related, and not be consistent with business necessity? Job related means that the selection criteria accurately predicts success on the job. Proving job relatedness is how an employer proves business necessity. Implying that some unspecified quantum of proof beyond job relatedness is necessary will create much mischief, is inconsistent with existing federal and state case law, and will result in legal challenges to your regulations. You should delete the word "both" and indicate that normally if the use of conviction records is job related it will be consistent with business necessity without more.

Council Response: The Council agrees with the comment’s recommendation of removing “both” before “job related and consistent with business necessity” so that the reference is consistent with the phrase used in other contexts addressing disparate impact.

Section 11017.1(a) – Introduction

Comment: To clarify that the traditional burden-shifting analysis in adverse impact cases is not affected by the regulations, the language “~~and the employer cannot demonstrate that the criminal history~~” should be replaced with: “*the employer cannot prove is,*” and for grammatical purposes the following “*not*” should be deleted.

Council Response: The Council agrees and changed the language accordingly.

Section 11017.1(b) – Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact.

Comment: This proposed section suggests that Labor Code Section 432.7 imposes a blanket prohibition on all employers with regard to the consideration of arrests that do not result in a conviction. However, Labor Code Section 432.7 actually provides several exceptions to when arrests that do not result in a conviction may be inquired into by an employer. Specifically, Labor Code Section 432.7(a) states “nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance.” Labor Code Section 432.7(f)(1) states that nothing in this section shall prohibit a health facility as defined in Section 1250 of the Health and Safety Code from asking an applicant who will have regular access to patients about arrests under Section 290 of the Penal Code or from asking an applicant who will have regular access to drugs and medication to disclose an arrest under any section specified in Section 11590 of the Health and Safety Code.

Accordingly, to the extent the FEHC is relying upon Labor Code Section 432.7 to recite existing law regarding the consideration of criminal history in employment decisions, we respectfully request the FEHC to include all provisions in Labor Code Section 432.7 to avoid any unnecessary confusion.

Council Response: This comment is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Comment: If the Council adds “lay-off” here, it should also add “lay-off” to the list of adverse employment actions in (e)(3) and elsewhere so as to avoid the argument that by failing to amend (e)(3), the Council intended to exclude lay-offs. Alternatively, we suggest stating only “adverse employment action” and rely on (or cross-reference) a definition of “adverse employment action” set forth in the section that defines the terms used in FEHA and CFRA regulations.

Council Response: The Council agrees with the comment and added “laying off” to Section 11017.1(e)(3).

Comment: “~~provided~~” (and the preceding “permitted”) should be replaced with “mandated”. Permitting other laws that only “provide” for (or “permit”) the consideration of criminal history information to justify a departure from the proposed regulations could eviscerate the regulations’ safeguards against unlawful discrimination against persons with criminal records. Replacing that terminology with “mandated” would clarify that the prohibitions and considerations set forth in the proposed regulations may not be overridden by other laws that are merely permissive. Indeed, if the proposed regulations’ limitations on the consideration and use of criminal history are observed, the inquiries contemplated by the other laws will only become more tailored to and probative of their intended purposes. Moreover, this change would harmonize this section with proposed § 11071.1(f)’s language that “[c]ompliance with federal or state laws or regulations that *mandate* particular criminal history screening processes . . . constitutes a defense to an adverse impact claim under the Act.” (emphasis added)

Council Response: The Council disagrees with this recommendation as applied to the section being addressed. Section 11017.1(b) addresses other laws that may be applicable to this topic area, irrespective of disparate impact. In that context, “permitted” most appropriately and accurately summarizes the legal landscape.

Section 11017.1(c)(2) – Article 49 of the San Francisco Police Code

Comment: This proposed section indicates that Article 49 of the San Francisco Police Code prohibits employers from considering an infraction or misdemeanor that is more than 7 years old unless the position being considered supervises minors, dependent adults, or a person 65 years or older. This statement is incomplete and therefore inaccurate. Specifically, Article 49 of the San Francisco Police Code does not have a blanket prohibition on considering infractions as indicated in the proposed regulations. Rather, it specifically allows employers to consider an infraction or infractions “contained in an applicant or employee's driving record if driving is

more than a de minimis element of the employment in question.” We respectfully request the FEHC to clarify these issues in the proposed regulation to avoid any unnecessary confusion.

Council Response: The Council ultimately agrees and changed the language accordingly.

Section 11017.1(d) – Consideration of Other Criminal Convictions and the Potential Adverse Impact

Comment: This proposed section sets forth the basis for which an applicant or employee may prove “adverse impact” with regard to criminal convictions. The referenced support for this language is the EEOC Guidance. First, the EEOC Guidance regarding how the agency conducts investigations is not binding or persuasive authority for which to develop evidentiary standards for discrimination cases in civil litigation. *See Vance v. Bell State University*, 133 S.Ct. 2434, 2461 (2013); *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *El v. SEPTA*, 479 F.3d 232, 244 (3rd Cir. 2007). Second, although the EEOC Guidance indicates that national conviction statistics provides a basis for the EEOC to conduct an investigation, it does not reference or include the proposed language for purposes of a plaintiff applicant or employee proving “adverse impact” in civil litigation. Third, there is no definition in the EEOC Guidance or any other cited legal authority for the term “persuasive basis.” This is not a known or established evidentiary standard and will create confusion in its application in civil litigation. Accordingly, we respectfully request the FEHC to delete this section.

Council Response: The Council’s regulation addressing state- and national- statistics relies on available state and federal legal precedents, not merely the EEOC Guidance. The Council agrees with the comment’s recommendation of replacing the reference to “persuasive basis” and ultimately changed the standard to mirror the standard outlined in the U.S. Supreme Court’s *Dothard v. Rawlinson* decision.

Comment: Proving adverse impact through national level statistics is totally inconsistent with current interpretations of the existing federal and state statutes. Your proposed regulations in Section 11017.1 state that national level statistics can be used to prove impact unless the employer can prove “persuasively” that there should be a different pool. This makes no sense. It is difficult to conceive of any jobs other than entry level manual labor positions for which national conviction statistics (i.e., percentage of convictions attributable to various protected classes) would have any relevance whatsoever. Very, very few pools of applicants will reflect national conviction statistics. Your regulation is logically absurd, and totally inconsistent with existing case law.

Council Response: The Council disagrees with the comment’s understanding of the regulatory provision’s substantive requirements and with the comment’s assessment regarding interpretations of existing federal and state statutes. In response to separate comments, the Council did change the reference to “persuasive basis” to “a reason to expect a markedly different result” to mirror the language in the U.S. Supreme Court’s *Dothard v. Rawlinson* decision.

Comment: Parts of this section are ambiguous as to which party bears the burden of proof to show a “persuasive basis” to expect a different result and which party bears the burden of proof to thereafter establish “an adverse impact ... using conviction statistics that address the particularized circumstances.” Similarly, the meaning of “persuasive basis” unclear. If the Council intends to adopt this standard as a “burden of proof” then it would be clearer if the Council utilized that language. For the sake of clarity and ease of use, we also suggest the Council separate these steps out as subdivisions (1), (2) and (3), and specify which party bears the burden of proof at each step. Simply stating “the burden shifts to the employer” as in subdivision (e)(1) still begs the question of whether just the burden of production (and not the burden of persuasion) has shifted to the employer (as in *McDonnell-Douglas* burden-shifting).

Council Response: The Council agrees and clarified the burden of proof and replaced “persuasive basis” with “a reason to expect a markedly different result” to mirror the language in the U.S. Supreme Court’s *Dothard v. Rawlinson* decision.

Comment: The double-underlined language in this section should be modified to clarify there is no presumption that in order to show adverse impact, a plaintiff should rely on state- or national-level statistics in preference to other types of data. As currently drafted, portions of this language appear to suggest that the use of other types of data is appropriate only if state- or national-level data are insufficient to demonstrate adverse impact. Although there is an acknowledgement that “an applicant or employee [may elect] to provide evidence beyond state- or national-level statistics in the first instance,” any suggestion to the contrary should be eliminated through rewording, as it has no support in the law.

Council Response: The Council’s subsequent changes render this comment moot and satisfy the commenter’s concerns.

Comment: The double-underlined language should be modified to eliminate the requirement that a plaintiff who does not make a showing of adverse impact based on state- or national-level statistics must demonstrate that “there is a persuasive basis to expect a different result [i.e., absence of adverse impact using state- or national-level statistics] after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.” This would compel plaintiffs choosing to demonstrate adverse impact without using state- or national-level statistics to explain—in addition to making their own demonstration of adverse impact—*why* state- or national-level statistics did *not* reflect an adverse impact, even though such statistics were not part of their case. Such a requirement has no basis in existing law. We discern no reason for the regulations to selectively impose upon plaintiffs in the criminal records context what would be in effect a doubled burden of proof as to adverse impact.

Council Response: The Council agrees with this comment and added clarifying language to address the potential source of confusion identified in the comment.

Comment: The double-underlined language should be revised to eliminate any suggestion that a plaintiff's decision not to rely on state- or national-level statistics creates a negative inference as to the challenged practice's adverse impact.

Council Response: The Council agrees with this comment and added clarifying language to address the potential source of confusion identified in the comment.

Section 11017(e) Establishing "Job-Related and Consistent with Business Necessity."

Comment: Proposed Section 11017. 1(e) ("measure the person's fitness for the specific job, not merely to evaluate the person in the abstract") is inconsistent with later discussions of "bright line" disqualifications. Some employers evaluate thousands of applicants for dozens of different jobs and before deeming the applicant "okay for hire" require an acceptable lack of material convictions. Such employers have little choice but to use a "bright line" test. But the quoted language "measure the person's fitness for the specific job, and not merely to evaluate the person in the abstract" appears inconsistent with your later discussion of "bright line" disqualifications. Your apparent view that in every instance there is one applicant and one job is totally unrealistic. The quoted language should be deleted.

Council Response: The Council disagrees with the comment. The regulations addressing the factors that need to be considered in evaluating the utility of criminal history information are consistent with the available federal authorities addressing this issue.

Section 11017.1(e)(2) – Authority

Comment: This proposed section states that any bright-line disqualification policy for a conviction that is more than 7 years old is presumed to be insufficiently tailored to be job-related and consistent with business necessity for an affirmative defense, unless the employer can prove otherwise. Such a prohibition on bright-line disqualification standards was specifically rejected by the court in *El, supra*. Specifically, in *El v. SEPTA*, the court determined whether an employer's decision to terminate an employee based upon a 40-year old homicide conviction was discrimination under Title VII. In reviewing the EEOC's Guidance with regard to criminal convictions, the Court stated:

"The EEOC has spoken to the issue in its Compliance Manual, which states that an applicant may be disqualified from a job on the basis of a previous conviction only if the employer takes into account: (1) The nature and gravity of the offense or offenses; (2) The time that has passed since the conviction and/or completion of the sentence; and (3) The nature of the job held or sought. (Citations omitted) The EEOC clarifies that „nature and gravity of the offense“ means for employers to consider the circumstances of that offense. The EEOC's Guidelines, however, do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a **lifetime ban** . . . *In addition, it does not appear that the EEOC's Guidelines are entitled to great deference.*" (emphasis added). *El*, 479 F.3d at 244. See also *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (rejecting the EEOC Guidance regarding English-Only guideline and stating "[w]e will not defer to „an administrative

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construction of a statute where there are „compelling indications that it is wrong“.” (citations omitted).

Accordingly, creating a presumption that any bright-line policy that disqualifies an applicant who has a conviction that is more than 7 years old is discriminatory lacks any legal authority. As set forth in *El, supra*, not even the EEOC Guidance speaks to this issue.

Moreover, neither California Civil Code Section 1786.18 nor Labor Code Section 432.7 provides any authority for the FEHC to presume that a conviction that is more than 7 years old is insufficiently tailored to be job-related or a business necessity. While California Civil Code Section 1786.18 precludes an investigative consumer reporting agency from containing convictions that are more than seven years old, there is no authority referenced to preclude an employer from seeking this information from an applicant or employee. In fact, as referenced by the Court in *El, supra*, a conviction for murder that is 40 years old may very well be job-related and within the definition of business necessity. Finally, when crafting Labor Code Section 432.7 regarding employer requests for criminal history information of an applicant, the California Legislature certainly could have spoken to the consideration of the convictions that are over seven years old, yet have not. Accordingly, we respectfully request the FEHC to delete this section from the regulations.

Council Response: The Council disagrees with this comment. The federal precedents addressing this issue identify the diminishing relevance of dated criminal history and California Civil Code Section 1786.18 provides legislative guidance regarding the appropriate marker for such a presumption. The regulation provides only for a “rebuttable presumption” and the Council acknowledges that utilizing older criminal history may be allowable in certain specific circumstances.

Section 11017.1(e)(2)(A) – “Bright-Line” Conviction

Comment: The attempt to define “bright-line” conviction by adding “(that doesn’t consider individualized circumstances)” creates confusion. Please make clear that the words in the parenthesis constitute a definition of “bright-line.” This can be done most simply by revising the words in the parenthesis to state: “(that is, a conviction disqualification that does not consider individualized circumstances).” Further, legal language should be formal, so contractions, such as “doesn’t,” do not belong in regulations.

Council Response: The Council agrees and changed the language accordingly.

Comment: This section alternates between reference to “applicants and employees” and “individuals.” It appears that the Council is intending for the references to be interchangeable, but it raises the question as to whether the Council is intending to attach different meanings. We suggest replacing the references to “individuals” with “applicants and employees.”

Council Response: This section does not use the term “individuals.” If the commenter meant Section 11017.1(e)(2)(B), then the Council disagrees with the comment since it is sufficiently clear that the individuals in question are the applicants or employees who are being individually

analyzed. Using the longer “applicants or employees” would not make the regulation clearer and would potentially have the opposite effect by making it longer.

Comment: “Bright-line conviction disqualification policies or practices that include conviction-related information that is seven or more years old” should be replaced with *“Bright-line conviction disqualification policies or practices, or policies or practices that include conviction-related information that is seven or more years old.”* If left unchanged, the double-underlined language would give rise to questionable interpretations. For example, it could be read as inferentially approving of “bright-line” disqualification policies so long as they were based on information that was less than seven years old. The entire thrust of the proposed regulations, of course, runs counter to the use of bright-line disqualification policies of any sort, and instead requires employers to examine the circumstances of each applicant’s criminal history in a contextualized, individualized, and job-specific manner. In addition, substantial authority indicates that conviction-related information that is seven or more years old is not predictive of recidivism. *See, e.g., Guerrero v. California Dept. of Corrections and Rehabilitation*, 119 F.Supp.3d 1065, 1081 (N.D. Cal. 2015)² (“plaintiff’s expert witness testified (and this order so finds) that there is no heightened risk of recidivism after seven years compared to an ordinary citizen.”); EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (*available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) at n.118 and associated text. Ample reason therefore exists to bar *per se* the consideration of such information.

Council Response: This Council disagrees with the comment’s suggestion that the provision is unclear regarding the rebuttable presumption. The Council agrees more generally with the comment’s observations regarding the various authorities that discuss the diminishing predictiveness of recidivism applicable to older convictions.

Section 11017.1(e)(2)(B) – Authority

Comment: In proposed Section 11017.1(e)(2)(B), the regulations impose a requirement for an employer to conduct an “individualized assessment” of the circumstances or qualifications of the applicants or employees excluded by the conviction screen. First, there is no authority for this mandate. EEOC Guidance is not binding authority and the court in *El, supra*, specifically rejected a request to interpret such a mandate for individualized assessments under Title VII. *Id.* at 25 (responding “[w]e decline to go so far.”) (emphasis added). Even if EEOC Guidance was binding authority, the proposed language is insufficient as it fails to include additional language from the EEOC Guidance that states “[i]f the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decision without the information.” Accordingly, we respectfully request the FEHC to delete this section from the proposed regulations.

Council Response: The Council disagrees with the comment’s assertion that the regulations require an individualized assessment. Section 11017.1(e) outlines both individualized assessment and “bright-line” policy options.

Section 11017.1(e)(2)(B) – Uncertainty

Comment: Proposed Section 11017.1(2)(2)(B) requires an employer to conduct an individualized assessment for applicants or employees who are excluded from a position due to a conviction screen. The individualized assessment requires the employer to provide notice to the applicant or employee and an opportunity for the applicant or employee to “demonstrate” that the exclusion should not be applied due to their particular circumstances, and that the information provided shows the policy is not job-related or consistent with business necessity. How much time does an employer have to provide an applicant or employee an opportunity to provide this information? If the employer has hundreds of applicants who have been screened out for a conviction, does the employer have to do this for all applicants or face a separate discrimination lawsuit for unequal treatment? This standard would create a significant delay in actually offering individuals immediate employment.

What if the applicant or employee has been denied the position not just based upon the conviction but also other omissions, such as a lack of a required license, degree, experience, or training? Does the employer also have to do an individualized assessment on such applicants even though the applicant or employee would never have been offered the position regardless of the conviction? Such a mandate would require an unnecessary burden on internal resources that will ultimately still not result in the employment of the individual.

What is the standard an employer should utilize to determine at the conclusion of the individualized assessment as to whether the information offered does or does not demonstrate that the policy is narrowly tailored, job-related and consistent? If the employer makes a “good faith,” honest decision that the information provided does not counter the application of the policy, is the employer subject to litigation based upon this decision? Or, will such a management decision be treated in the same manner as other management-related decisions that even if incorrect, are not a basis for discrimination? *See Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 358 (2000) (stating an employer’s decision that is neither wise nor correct is not the analysis for a discrimination claim, but rather, was the decision motivated by an improper intent).

All of these issues need to be resolved so that employers can efficiently hire employees in a timely manner without the constant risk of litigation. Accordingly, we respectfully request the FEHC to withdraw these regulations for further consideration.

Council Response: The Council disagrees with the comment’s recommendation that the regulations be withdrawn for further consideration. The regulations are the product of a significant amount of public comment and consideration. The Council also disagrees with the comment’s assertion that the regulations require an individualized assessment. Section 11017.1(e) outlines both individualized assessment and “bright-line” policy options.

Section 11017.1(e)(3) – Authority & Uncertainty

Comment: This proposed section states that, even if an employer does not have a bright-line policy or conducts an individualized assessment, the employer must still provide notice to the employee of the disqualifying conviction and an opportunity to present evidence that the information is factually inaccurate. First, there is no authority for such a proposal. Even the EEOC Guidance only requires such notice and an opportunity to respond if the employer has a Final Statement of Reasons for Consideration of Criminal History in Employment Decisions Regulations

policy that disqualifies an applicant on the basis of criminal convictions. Second, if the employer has conducted an individualized assessment as required in proposed Section 11017.1(e)(2)(B), the employer should not have to provide a second notice and opportunity to respond. Third, this requirement is confusing with regard to information regarding a conviction that is “obtained” through an application completed by the applicant. There is no authority or basis to require an employer to provide notice and an opportunity for the applicant to provide contradictory evidence if the applicant is the individual who actually disclosed the information regarding the conviction on the application. Fourth, what is a “reasonable opportunity,” and how long does the employer need to conduct this analysis before hiring another applicant? Fifth, if the applicant or employee lacked other qualifying credentials for the position, does the employer still need to conduct this additional review? Finally, as set forth above, what standard does the employer utilize to determine if the information is factually accurate or inaccurate? If the employer has two competing documents, one that states the employee has been convicted of a crime that is job-related and consistent with business necessity, and another document that indicates the applicant has not been convicted, is the employer liable for discrimination if it ultimately determines that the employee has failed to present sufficient evidence that the information is factually inaccurate? We respectfully request the FEHC to delete this section from the regulations for further consideration.

Council Response: The Council disagrees that the provision addressed in the comment is inconsistent with available authority addressing this issue. If a decision is made based on an incorrect understanding of an applicant or employee’s criminal history, then the decision may not be seen as one justified by business necessity. If the employer is not considering or relying on the criminal history in reaching its employment decision, the process of verifying the factual accuracy of the information is moot and thus not required. The Council agrees with the portion of the comment pointing out that this process should not be required where the applicant or employee is the source of the criminal history information being considered and has modified the provision accordingly.

Comment: You should correct proposed section 11017.1(e)(3) to make it clear that if an employer is rejecting an applicant based on convictions disclosed in the application, there is no requirement of notice and an opportunity to correct. Your proposed Section 11017.1(e)(3) states that before an employer can take adverse action based on a conviction history obtained through a credit report or internally generated research, notice and an opportunity to correct must be given to the employee. I do not believe that you intend that such notice has to be given if the rejection is based on a conviction disclosed in the application, as opposed to obtained through research, but it would be nice if you would clarify the ambiguous wording.

Council Response: The Council agrees with the comment and has modified the provision accordingly.

Section 11017.1(f) – Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History

Comment: The double-struckthrough “~~is~~” in the last sentence of this proposed section should be replaced with “*rebuttable*”. This would clarify that a challenged practice is not entitled to an absolute defense because it is argued to be required by or consistent with federal or state laws or regulations that purport to mandate particular criminal history screening processes.

Council Response: The Council agrees and changed the language accordingly.

Comment: We strongly recommend that the final regulations remove the phrase “or permitted.” The inclusion of the term “permitted” creates the opportunity for employers to claim a defense where the occupational licensing law is discretionary rather than mandatory. Thus, the employer could apply a discretionary screening process to reject an applicant, and then claim as a defense that they used a process that they were permitted, but not required to use. For example, a particular state law regulating certain health workers may allow the employer to background check its workers by accessing the state records system, but does not require the employers to do so. Under the “permitted” language of the proposed regulation, the employer would be entitled to claim a defense, even if it discriminates against people of color in its hiring decisions, despite the fact that the law did not prescribe any specific action by the employer. In order to protect against this abuse, the defense should be strictly limited to situations where the employer was *required* to follow a screening process that disqualified the applicant.

Council Response: The Council agrees that only those requirements that are mandatory should fall within the presumption defense outlined in the provision and modified the language accordingly.

Comment: We recommend that instead of the term “screening process,” the final language use the term “disqualifications,” since that makes clear that the employer may only have a defense to the Act when it is required to disqualify the applicant based on another law. The current term “screening process” suggests a level of discretion for the employer to exercise that is both too vague and open to interpretation. We appreciate the need for a process that allows the hiring employer to require the applicant to obtain the necessary license or approval, and base its hiring decision according to whether or not the applicant can obtain the license. However, the current language should clarify that the employer may not make the hiring decision based on whether it simply believes the applicant cannot obtain the required license. The ultimate licensing decision rests with the licensing board, and the employer should not substitute its judgment for that of the licensing board and be able to claim that as a defense. It should only be a defense for the employer if the applicant is, in fact, not able to obtain the license, and the employer withholds or revokes a job offer as a result.

Council Response: The Council disagrees that the term “screening process” in this context of the provision renders the provision unclear. The Council did add language clarifying that it is the failure to obtain the required occupational license that is encompassed by the rebuttable defense.

Comment: The provision does not acknowledge that the proposed employer defense to an adverse impact claim does not apply to a federal claim of discrimination under Title VII. As detailed in the EEOC Enforcement Guidance and the comments to the proposed regulations submitted by the EEOC, the proposed language of the regulations “applies only to California law; it does not create an affirmative defense to a violation of Title VII.” Title VII preempts state and local laws that require or permit an act prohibited under Title VII. Therefore, a California employer is still subject to Title VII liability, even if it has a policy or practice subject to the defense under proposed regulation section 11017.1(f). Thus, the regulations should clarify that employers may still be subject to Title VII liability, even if they are in compliance with California law. Such a clarification would ensure that employers understand that their obligations are to federal as well as state antidiscrimination laws.

Council Response: The Council agrees generally regarding the preemption potential of Title VII, but disagrees that the proposed addition is necessary in the regulations addressing FEHA or that they would provide additional clarity to the regulations.

Section 11017.1(g) – Less Discriminatory Alternatives

Comment: Proposed section 11017.1(g) should delete the example given “such as more narrowly targeted list of convictions ” The above subsection states that even if considering conviction history is job related, the plaintiff can still prevail if it can demonstrate a less discriminatory alternative “such as a more narrowly targeted list of convictions ” This will lead plaintiffs' attorneys to argue that even if the employer's conviction policy is generally job related, if they can demonstrate that one of the types of convictions historically considered by the employer should not, in the view of the jury, have been included on the list, the entire job related process gets thrown out, and an entire class disqualified for legitimate reasons can prevail. This is not the case. You should delete the example “such as a more narrowly targeted list of convictions ”

Council Response: The Council disagrees that the removal of the example is necessary or would aid the clarity of the provision. Less discriminatory alternatives is part and parcel of disparate impact analysis in general, and the example provided is a logical example to include given the topic area covered by the regulations.

General

Comment: As set forth in our initial comments submitted on April 7, 2016 regarding the Fair Employment and Housing Council’s Proposed Consideration of Criminal History in Employment Decisions Regulation, we do not believe there is any legal authority for these proposed regulations. The cases cited do not actually support the proposed language and the EEOC April 2012 guidance, “*Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII Of the Civil Rights Act of 1964*” (EEOC Guidance) referenced is simply “guidance” for internal EEOC investigations that was not promulgated through regulations with public comment.

In fact, the EEOC Guidance is currently being challenged in federal court for failure to comply with the Administrative Procedure Act. On June 27, 2016, the Fifth Circuit Court of Appeals

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determined that the State of Texas had constitutional standing to challenge the EEOC Guidance as the Guidance “forces Texas to alter its hiring policies and incur significant costs.” *See State of Texas v. Equal Employment Opportunity Commission*, 2016 WL 3524242 (June 2016). The Fifth Circuit also concluded that the EEOC Guidance is a “final agency action” for purposes of review under the APA. Given that the proposed regulations are so heavily based upon the EEOC Guidance, these regulations should be withdrawn until the final determination of this litigation.

Council Response: The Council addressed this comment above.

Comment: Imposing these additional burdens, specified definitions, and onerous standards on employers with employment selection policies that include criminal background checks will likely create a disincentive to inquire into such information during the hiring, selection or promotion process in order to avoid a claim of discrimination under FEHA. This disincentive, however, will increase the risk of an employer being sued for negligent hiring. California exposes employers to liability for hiring an individual that the employer “knew or should have known” had a dangerous propensity and that danger materializes itself in the employment relationship. *See Phillips v. TLC Plumbing Co.*, 172 Cal.App.4th 1133 (2009); *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828 (1992).

Council Response: The Council addressed this comment above.

Comment: The most common reason for rejection of an applicant on the basis of convictions is where the applicant has lied on his application, claimed a clean conviction record, when the actual conviction record demonstrates the lie. All or virtually all employers will not hire individuals who lie in an effort to mislead the employer into hiring them. The law is absolutely clear: “Employers may refuse to hire persons who give false or incomplete answers to inquiries concerning previous convictions. [citations omitted].” Your regulations should advise applicants and employers alike that lying about a conviction record is a legitimate ground for refusing to hire the individual.

Council Response: The Council agrees with the general proposition that lying on a job application is often a legitimate reason to refuse to hire an applicant and does not believe anything in the regulations is inconsistent with that proposition. The Council does not believe that this proposed addition is necessary or that it would aid the topics being addressed in the regulation.

Comment: A final note regarding the standardization of gender neutral language in the modified text. We applaud the Council’s efforts in this regard. However, to ensure no misinterpretation of the Council’s intent, we request the Council include an explanation in the Final Statement of Reasons that where plural pronouns are used, they are also intended to cover individual employees or applicants as opposed to limiting coverage to group or collective actions.

Council Response: The Council agrees that plural pronouns are not meant to only apply to groups; individuals are covered too. The convention of using gender neutral pronouns is present throughout much of the California Code and in no way changes the Code's substantive meaning.

Comment: We urge the Council to include measures that will help to monitor employer compliance with the regulations and require data tracking, like describing procedures the agency will follow to track investigations and document employer compliance and requiring that employers retain all documentation related to their consideration of applicants with criminal records for a specified period of time.

Council Response: The Council did not add the suggested new section(s) for at least three reasons. First, the proposal would be cost-prohibitive to employers and make an otherwise set of cost-neutral regulations expensive for employers. Second, the proposal is outside of the FEHA and would require legislation and/or amount to proposed Department procedural regulations, so it is therefore outside of the Council's jurisdiction. Finally, this comment is unresponsive to the noticed text.

Comment: The Council received information from the San Francisco Human Rights Commission on the City of San Francisco's Fair Chance Ordinance.

Council Response: The Council greatly appreciates the positive feedback and information on the related municipal ordinance.

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11017.1(b) – Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact.

Comment: We respectfully request the FEHC to include all provisions in Labor Code Section 432.7 to avoid any unnecessary confusion.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. However, for the sake of clarity, the Council incorporated the contents of AB 1843 (Stats. 2016, ch. 686) into subdivision (b) and may satisfy the commenter's concerns.

Comment: We renew our suggestion the regulations ensure that the only exceptions to the prohibitions on the particular inquiries listed in subsections (1) through (4) be in those cases where those inquiries are mandated or required by law. The prohibitions set forth in those statutes do not admit of generalized exceptions but, instead, contain exceptions pertaining to highly particularized circumstances.¹ Neither "specifically permitted" nor "provided", the terms most recently utilized in the proposed language, would sufficiently reflect the evident intent of the Legislature that those prohibitions not be overridden except in weighty or highly

circumscribed situations; to the contrary, such wording would be in plain tension with that intent. That intent, indeed, is made explicit at Labor Code § 432.7(m)(1), which makes an exception permitting disclosure of conviction information in cases where “[t]he employer is required by law to obtain information regarding a conviction of an applicant.” (emphasis added) The comparatively permissive language in the current revision would in this instance create a plain, if unintended, conflict with the statute on its face.

Council Response: This comment is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Section 11017.1(c)(2) – Article 49 of the San Francisco Police Code

Comment: This proposed section indicates that Article 49 of the San Francisco Police Code prohibits employers from considering an infraction or misdemeanor that is more than 7 years old unless the position being considered supervises minors, dependent adults, or a person 65 years or older. This statement is incomplete and therefore inaccurate. Specifically, Article 49 of the San Francisco Police Code does not have a blanket prohibition on considering infractions as indicated in the proposed regulations. Rather, it specifically allows employers to consider an infraction or infractions “contained in an applicant or employee’s driving record if driving is more than a de minimis element of the employment in question.” We respectfully request the FEHC to clarify these issues in the proposed regulation to avoid any unnecessary confusion.

Council Response: The Council agrees and changed the language accordingly.

Section 11017.1(d) – Consideration of Other Criminal Convictions and the Potential Adverse Impact

Comment: This proposed section sets forth the basis for which an applicant or employee may prove "adverse impact" with regard to criminal convictions. The referenced support for this language is the EEOC Guidance. First, the EEOC Guidance regarding how the agency conducts investigations is not binding or persuasive authority for which to develop evidentiary standards for discrimination cases in civil litigation. See *Vance v. Bell State University*, 133 S.Ct. 2434, 2461 (2013); *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *El v. SEPTA*, 479 F.3d 232, 244 (3rd Cir. 2007).

Second, even within the EEOC Guidance, there is absolutely no legal support or authority to establish an evidentiary presumption of adverse impact based upon national or state statistics as proposed in these regulations. Specifically, the proposed language that state or national statistics are "presumptively sufficient" to establish an adverse impact is not based upon any standard in the EEOC Guidance. In fact, the EEOC Guidance indicates that national conviction statistics only provide a factor that the EEOC will consider in assessing whether to conduct an investigation in addition to other relevant evidence. The Guidance does not reference or include the proposed language for purposes of a plaintiff applicant or employee proving adverse impact in civil litigation solely through the use of conviction statistics, much less creating an evidentiary presumption of liability as proposed.

The cases cited as authority for these proposed regulations do not support a "presumptively sufficient" standard regarding the use of national or state statistics to prove adverse impact. In

Green v. Missouri Pac. R.R. Co., 523 F.2d1290 (8th Cir. 1975), the Court only considered statistics in the metropolitan area from which employee applicants were drawn to determine if the plaintiff had adequately established a prima facie case of discrimination. The Court never opined that national, state, or even local statistics regarding criminal convictions would either: (1) create a rebuttable presumption of adverse impact/discrimination; or (2) prove adverse impact in a narrower geographical area where the alleged discrimination occurred. Similarly, in *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988), the Supreme Court cautioned against relying too heavily on statistical evidence produced by plaintiffs in disparate impact employment cases. Third, there is no definition in the EEOC Guidance or any other cited legal authority for the term "persuasive basis." This is not a known or established evidentiary standard and will create confusion in its application in civil litigation. Based upon the FEHC's August 31, 2016 hearing, it appears the "persuasive basis," standard was derived from the scholarly writings and comments of Professor Noah Zatz. We are not aware of any authority for the FEHC to develop new regulations and law that is based upon academic opinions. Accordingly, we respectfully request the FEHC to delete this section.

Council Response: This comment is addressed above. No further response is required as per Government Code section 11346.9(a)(3). The Council also adds that the comment's presumption regarding the sources of authority for the provision is incorrect. As noted in the authority note, supportive authority includes a number of additional authorities, including the U.S. Supreme Court's *Dothard v. Rawlinson* decision.

Comment: After the clause "presumptively sufficient to establish an adverse impact", we suggest the sentence conclude at that point. The comma and "unless" should be deleted. The next sentence should then read: "This presumption may be rebutted by a showing that there is a persuasive basis . . ." and continue on as presently written.

Council Response: The Council agrees and changed the language so that it is consistent with the proposal.

Comment: this section as revised might be worded differently for purposes of clarity and to eliminate redundancy as follows (italics indicate wording changes; no substantive modifications intended):

(d) [maintain as drafted, except delete "adversely affected" and the sentence "**The applicant(s) or employee(s) bears the burden of proving an adverse impact.**", and insert paragraph break after ". . . (Apr. 2012).]

(1) An adverse impact may be established through the use of conviction statistics, or by offering any other evidence that establishes an adverse impact.

(2) State- or national-level statistics showing substantial disparities in the conviction records of one or more categories of *persons* enumerated in the Act, *though not required*, are presumptively sufficient to establish an adverse impact, unless there is a persuasive basis to expect a different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue. *Where such a persuasive basis is*

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demonstrated to exist, an applicant or employee may nonetheless establish an adverse impact by refuting the relevance or effect of the stated particularized circumstances.

Council Response: The Council largely agrees with the proposed clarifications in (d) and (1) and modified the text in response to this comment and similar comments. The comments regarding the language proposed at the conclusion of (d)(2) was rendered inapplicable given the other changes made to the sentence being addressed.

Section 11017.1(e)(1) – Public Safety

Comment: This proposed section indicates that an employer must prove that a criminal conviction policy is job-related and consistent with a business necessity, and specifically measure's the person's fitness for a specific position. While "fitness" for the specific position is important, this section also needs to recognize and explicitly state that "fitness" for the specific position includes consideration by the employer as to whether the person poses an unreasonable risk of harm to the public or fellow staff with which the position requires interaction. In *El, supra*, 4.79 F.3d 232, the Court recognized that the defendant transit company's bright-line policy that excluded applicants with certain convictions from employment as a driver satisfied the "business necessity" standard given expert evidence produced that individuals with a history of such convictions posed a higher risk of safety to the public than individuals without that history. New York law also recognizes this consideration as appropriate to maintain the safety and welfare of the public. See New York Correctional Law Article 23-A ("the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.") We respectfully request the Council to include similar language to this section.

Council Response: The Council agrees with the comment's conclusion that safety considerations can be used to demonstrate that a policy is job related and consistent with business necessity in appropriate circumstances but believes that the regulations in Section 11017.1(e)(1) and (e)(2) are sufficiently clear and are not inconsistent with the comment's understanding on this issue.

Section 11017.1(e)(2)(A) – Authority

Comment: We incorporate herein by reference our comments submitted regarding this section on July 22, 2016 and respectfully request the FEHC to delete this section from the regulations as there is no legal authority to create a rebuttable presumption that a bright-line disqualification policy for any conviction that is more than seven years old is discriminatory.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Section 11017.1(e)(2)(A) – Clarification of Convictions Seven Years Old

Comment: The proposed modification appears to have combined former section 11017.1(e)(2)(B)(3) with section 11017.1(e)(2)(A), to create one subdivision. However, when
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combining the two sections together, significant language regarding convictions that are seven or more years old was omitted. Specifically, the language deleted from section 11017.1(e)(2)(B)(3) that specifies the date upon which the seven years is measured is "from the date of disposition, release, or parole" should be amended back into this section to provide clarity for employers regarding what convictions fall within the proposed rebuttable presumption. We respectfully request the FEHC to amend Section 11017(e)(2)(A) to include this language.

Council Response: The Council's regulation is intended to conform with California Civil Code Section 1786.18 regarding dated criminal history information. The reference to "date of disposition, release, or parole" was deleted in response to other comments raising concerns that the phrase was confusing in the context of the broader reference to conviction history appearing in the regulations. Specifically, people were confused about which seven-year period was being referenced when the disposition date and release or parole dates were different. In the specific context of consumer reports being addressed by the Civil Code provision, the phrase provides more clarity since the phrase is tailored to the format that criminal history data can appear in publicly available records included in consumer reports. In the context of these regulations, where the reference is to conviction information that could come from sources beyond consumer reports, the modified language creates additional clarity by simplifying the phrase so that any conviction related information, be it information related to a disposition or to a release, that is seven or more years old is subject to the rebuttable presumption if it is being utilized by an employer as part of a bright-line disqualification or consideration policy. Ultimately, the reference in the regulation mirrors the criminal history that is legally available to employers through consumer reports under the Civil Code, but does so in a clearer fashion better suited to the broader conviction history context being addressed in the regulations.

Comment: In view of the strong policy reasons favoring appropriately tailored and individualized assessments, we propose the Council establish that all "bright-line" conviction disqualifications be subject to a rebuttable presumption of not being sufficiently tailored for business necessity purposes, not just those reliant on information more than seven years old. This is already implicit in the requirement at § 11017.1(e)(1) that any consideration of criminal history *must* take into account at least the three *Green* factors set out at (A)-(C).

Council Response: The Council disagrees that the expanded presumption proposed in the comment is compelled or supported by the available state and federal authorities addressing this issue.

Section 11017.1(e)(2)(B) – Authority & Uncertainty

Comment: We incorporate herein by reference our comments submitted regarding this section on July 22, 2016 and respectfully request the FEHC to delete this section from the regulations as there is no legal authority to require an employer to conduct an individualized assessment of the circumstances or qualifications of the applicants or employees excluded by a conviction screen.

We incorporate herein by reference our comments submitted regarding this section on July 22, 2016 and respectfully request the FEHC to delete this section from the regulations as this section will create significant uncertainty, confusion and, ultimately, litigation regarding how much time to provide an applicant or employee to respond, whether an employer needs to conduct an individualized assessment when there are other motivating factors for the employment decision, or the standard upon which the employer should consider the information provided by the employee/applicant. All of these issues need to be resolved so that employers can efficiently hire employees in a timely manner without the constant risk of litigation.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Section 11017.1(e)(3) – Authority & Uncertainty

Comment: We incorporate herein by reference our comments submitted regarding this section on July 22, 2016 and respectfully request the FEHC to delete this section from the regulations as this section will create significant uncertainty, confusion and, ultimately, litigation.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Section 11017.1(f) – Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History

Comment: The modified regulations provide that an employer will have a "rebuttable defense" to a claim of adverse impact/discrimination if the employer is required by state or federal law to exclude individuals with a criminal record from holding certain positions. The term "rebuttable defense" is a foreign term in the employment legal context. The more widely accepted legal standard is the McDonnell Douglas burden-shifting analysis for disparate impact discrimination cases. See *Guz v. Bechtel National Inc.*, 24 Cal.4th 317 (2000). Under this analysis, the employee carries the burden of proof to establish the adverse/disparate impact. If successful, the burden then shifts to the employer to prove a legitimate, nondiscriminatory reason for the action. Thereafter, the burden shifts back to the employee to prove the proffered reason is pretext for discrimination. This analysis is widely accepted and provides an employee the necessary opportunity to challenge the employer's evidence regarding the basis for its adverse employment decision. There is no legal justification or authority to create a new standard of "rebuttable defense" that could be interpreted differently than the McDonnell Douglas framework. We respectfully request the FEHC to delete this term from this section to avoid any unnecessary confusion and litigation.

Council Response: The Council disagrees with the comment's evaluation of the McDonnell Douglas burden-shifting analysis and believes that the text contains a clear, succinct, and accurate explanation of the analysis used in adverse impact cases.

Comment: We appreciate the addition of the word “rebuttable,” but still strongly recommend that the final regulations remove the italicized phrase “or permitted.” If necessary, the parenthetical list of examples included should be modified to only contain laws that do in fact require certain screening processes. Although the sentence containing the phrase “or permitted” is simply stating facts, it raises the question of why the regulations are including examples and language that should not be applicable to the goal of the current regulations, namely to make clear that employers must follow these standards unless they are *required* to follow another procedure by law. The inclusion of the term “or permitted” creates the impression that the regulations are offering the example of discretionary screening processes as a possible defense for employers to an adverse impact claim. Thus, the employer could apply a discretionary screening process to reject an applicant, and then claim as a defense that they used a process that they were permitted, but not required to use. Making that defense rebuttable requires the plaintiff to go through that extra step, but if it were clear that only mandatory (as opposed to discretionary) screening processes were a defense, rebuttable or otherwise, that reduces the burden on the plaintiff.

Council Response: The Council disagrees with the comment’s conclusion that statutes explicitly permitting particular screening processes could not be used by an employer in support of its defense and believes the language addressing rebuttable defenses is clear as written.

Comment: The provision does not acknowledge that the proposed employer defense to an adverse impact claim under state law does *not* apply to a federal claim of discrimination under Title VII. As detailed in the EEOC Enforcement Guidance and the comments to the proposed regulations submitted by the EEOC, the proposed language of the regulations “applies only to California law; it does not create an affirmative defense to a violation of Title VII.” Title VII preempts state and local laws that require or permit an act prohibited under Title VII.3 Therefore, a California employer is still subject to Title VII liability, even if it has a policy or practice subject to the defense under proposed regulation section 11017.1(f). Thus, the regulations should clarify that employers may still be subject to Title VII liability, even if they are in compliance with California law. Such a clarification would ensure that employers understand that their obligations are to federal as well as state antidiscrimination laws.

Council Response: This comment is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Comment: We appreciate the intention behind the proposed change from “otherwise provided by law” to “otherwise specifically permitted by law,” but believe this sentence could be even more narrowly drafted to limit the exceptions. We recommend the language be: ““Except if otherwise specifically required by another law,...” in order to make clear that this exception will only apply in cases where an employer is actually required to consider information that these regulations otherwise forbid the employer from considering.

Council Response: The Council believes the current language more accurately describes the law in the context of the provision the comments are addressing.

General

Comment: The EEOC Guidance upon which these proposed regulations so heavily rely is currently being challenged in federal court for failure to comply with the Administrative Procedure Act. On June 27, 2016, the Fifth Circuit Court of Appeals determined that the State of Texas had constitutional standing to challenge the EEOC Guidance as the Guidance "forces Texas to alter its hiring policies and incur significant costs." See *State of Texas v. Equal Employment Opportunity Commission*, 827 F.3d 372 (5th Cir. 2016). The Fifth Circuit also concluded that the EEOC Guidance is a "final agency action" for purposes of review under the APA. The case was remanded to a federal district court where the court will decide if the EEOC exceeded its authority in issuing the EEOC Guidance. Given that the proposed regulations are substantially based upon the EEOC Guidance, we strongly urge the FEHC to withdraw or hold these regulations until the final determination of this litigation. At the FEHC public hearing on August 31, 2016, the Council indicated that the EEOC legal challenge was essentially irrelevant as: (1) the decision focused on whether the EEOC Guidance was a "final agency act," not whether the EEOC overstepped its authority; (2) the FEHC is simply clarifying disparate impact and not creating any new standards; and, (3) other published cases support the proposed regulations being offered. We respectfully disagree. First, while the Fifth Circuit decision focused on whether the EEOC Guidance was a "final agency action" for purposes of determining whether the State of Texas had legal standing to challenge the Guidance, the federal district court to which the case was remanded will decide whether the EEOC overstepped its jurisdiction in adopting the EEOC Guidance. See: <http://www.bna.com/15th-cir-revives-n579820762551> "The decision clears the way for a potential district court ruling on whether the EEOC's guidance exceeds the agency's authority under Title VII of the 1964 Civil Rights Act;" <http://www.mybinc.com/blog/texas-criminal-background-check/#.V-GGavEm4Z4> "This decision means that the EEOC will be required to substantiate its legal basis for the enforcement they highlight in the guidance." If the EEOC Guidance is struck down as unlawful due to the EEOC failing to adhere to the APA in its issuance of the Guidance, then the Guidance cannot serve as a valid basis for establishing these proposed regulations. Second, the other cases cited as authority do not actually support the entirety of regulations as proposed. In fact, *El v. SEPTA*, 479 F.3d 232, 244 (3rd Cir. 2007) rejected the proposal to adopt a prohibition on any bright-line rule that excludes individuals convicted of certain convictions from employment. Specifically, the Court in *El* rejected the employee's request to issue any holding that Title VII prohibits a bright-line policy with regard to criminal convictions or that an employer must individually assess each applicant's circumstances. The Court stated "[w]e decline to go so far." *Id.* at 25 (emphasis added). None of the other cases cited by the FEHC support all of the new standards proposed in these regulations either. Finally, the FEHC is not just clarifying the standards of disparate impact with regard to criminal convictions/criminal history. Rather, the FEHC is proposing entirely new standards that are not specified in statute, case law, or even the EEOC Guidance, including: (1) an evidentiary presumption of adverse impact based upon national/state statistics; (2) a new definition of "business necessity" for criminal convictions that is entirely different than used in other pre-employment selection procedures; (3) a

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presumption that any policy that considers any conviction that is more than 7 years old is inconsistent with business necessity and not job-related; (4) mandating employers to conduct "individualized assessments" of each employee subject to a criminal history/conviction "bright-line" screening policy; and, (5) changing the burden-shifting framework outlined in McDonnell Douglas to a "rebuttable defense" for an employer who is mandated by federal or state law to exclude certain individuals from positions if they have criminal convictions. These are new standards that create a significant new burden on the employer community, and are not based on any valid legal authority. Accordingly, we respectfully request the FEHC to hold these regulations until the litigation regarding the EEOC Guidance is concluded.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Reference Note

Comment: The Westlaw citation to *Guerrero v. California Dept. of Corrections and Rehabilitation* should be updated to reflect its publication in the Federal Supplement at 119 F.Supp.3d 1065 (N.D. Cal. 2015).

Council Response: The Council agrees and changed the language accordingly.

COMMENTS RECEIVED DURING THE THIRD 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Sections 11017(a) and throughout 11017.1 – “Job-Related and Consistent with Business Necessity”

Comment: In proposed sections 11017 (a) and 11017.1 in multiple places you use the phrase “job-related and consistent with business necessity” - indeed, in the former location you have added the word "both" so that it reads "both job-related and consistent with business necessity." What you fail to recognize is that proof of job relatedness is how one proves business necessity. If a test is proven to be job related, that means that it accurately predicts success on the job. Accurately predicting success on the job is always business necessity. There has never been a case where a policy is job related and found not to constitute business necessity. A recent reiteration of this principle occurred a few months ago in *Lopez v. City of Lawrence*, 823 F. 3d 102 (1st Cir. 2016), a case dealing with the validity of police officer promotion tests. The court stated the rule followed by all courts - it stated that the issue of whether a test is "job related and consistent with business necessity" is whether or not it is valid, which is to say "whether it materially enhances the employer's ability to pick individuals who are more likely to perform better...." To avoid confusing employers and the courts, it is essential that you add a recognition that if a practice is proven to be job related, that in and of itself establishes "consistent with business necessity."

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code

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section 11346.9(a)(3). The Council also notes that the comment appears to be misreading the amended text, since the term “both” was removed in response to past comments addressing this issue.

Sections 11017(a) – Adoption of the *Uniform Guidelines on Employee Selection Procedures*

Comment: You purport to adopt the federal "Uniform Guidelines on Employee Selection Procedures" (29 C.F.R. 1607 (1978)). These guidelines are almost 40 years old, in many places very outdated, and recent court decisions under federal law have found them non-binding. See, e.g., *Lopez v. City of Lawrence*, 823 F. 3d 102 (1st Cir. 2016) (the federal "Uniform Guidelines on Employee Selection Procedures" are not inflexible and binding legal standards that must be rigorously applied - a recent Supreme Court decision never mentioned the Guidelines in finding a promotional exam job related).

Council Response: The Council’s regulations had already adopted the widely-cited guidelines; that adoption predates this rulemaking. Therefore, this comment is not responsive to the noticed, proposed amendments.

Sections 11017.1(d) – Adverse Impact & Statistics

Comment: In section 11017.1 (d), you state that adverse impact can be established through "conviction statistics". It has always been black letter law that the burden is on the plaintiff to establish adverse impact, and you purport to recognize this. However, the fact that African Americans on a percentage basis are convicted more often than other races establishes nothing with respect to the particular applicant flow at a particular employer. In effect, you are writing out of the law the requirement to establish adverse impact with respect to the applicant flow at a particular employer, thus rendering the entire process you envision susceptible to a federal due process challenge.

Council Response: This comment is not responsive to the text noticed for the 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3). The Council also notes that the provision addressed in the comments is consistent with U.S. Supreme Court precedent addressing adverse impact in a similar context. See *Dothard v. Rawlinson* (1977) 433 U.S. 321.

Sections 11017.1(e) – “The Nature of the Job Held or Sought”

Comment: In proposed section 11017.1 (e) ("Establishing Job-Related and Consistent with Business Necessity"), you require that the practice of considering criminal convictions must evaluate the criminal conviction in question in relation to “the nature of the job held or sought.” What you fail to realize is that in the real world, in many if not most businesses, an individual will fill out an application and in terms of "jobs sought" will specify "anything that is available." You should add language recognizing that if the applicant has not applied for a specific job, the employer cannot be expected to individually consider "the nature of the job held or sought."

Council Response: The Council disagrees with the comment's conclusion and believes the text is consistent with the available federal precedent addressing this issue. This comment is also not responsive to the text noticed for the 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

General

Comment: I'd like your agency to get rid of the Rebuttable Presumption of Discrimination Against Employers. California already has so much litigation abuse by attorneys who file frivolous complaints against businesses hoping to scare them into settlement. These type of rebuttable presumptions just encourage those type of shake-down tactics and ultimately just harm good employers who are trying to do the right thing. Rebuttable presumptions basically just make folks like us more gun shy about excluding people who do have convictions in their background that should realistically disqualify them from working with our type of clients.

Council Response: The Council disagrees that all rebuttable presumptions are inappropriate since there is no authority to support this and rebuttable presumptions are found throughout the California Code. Alternatively, the commenter may be referring to one of the two specific rebuttable presumptions in the regulations: (1) State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact; or (2) Bright-line conviction disqualification or consideration policies or practices that include conviction related-information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense. These presumptions are declarative of existing law and stated in order to synthesize and clarify a diverse body of law. The Council hopes that the clarifications regarding rights and responsibilities under FEHA offered by the regulations lead to greater compliance and less litigation. This comment is also not responsive to the text noticed for the 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

PUBLIC HEARING COMMENTS MADE APRIL 7, 2016 [Government Code Section 11346.9(a)(3)].

Nayantara Mehta, Aaron Burriss, Karen Shain of the San Francisco Reentry Council, and Noah Lebowitz commented on the text originally noticed to the public. Ms. Mehta, Ms. Shain, and Mr. Lebowitz submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above. Mr. Burriss' comments about his experiences after being released from prison prompted a constructive dialogue and were much appreciated by the Council, but were not responsive to the noticed regulations and therefore do not warrant responses in this final statement of reasons.

PUBLIC HEARING COMMENTS MADE JUNE 27, 2016 [Government Code Section 11346.9(a)(3)].

No oral comments were made at this meeting.

PUBLIC HEARING COMMENTS MADE AUGUST 31, 2016 [Government Code Section 11346.9(a)(3)].

Nayantara Mehta, Noah Lebowitz, and Christopher Ho commented on the text noticed for the second 15-day comment period. They all submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE NOVEMBER 15, 2016 [Government Code Section 11346.9(a)(3)].

Jennifer Barrera and Noah Lebowitz commented on the text noticed for the third 15-day comment period. They both submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE JANUARY 10, 2017 [Government Code Section 11346.9(a)(3)].

No oral comments were made at this meeting.

There is not a subsequent notice of modifications or another 15-day public comment period because all of the changes presented at this meeting were non-substantive and/or non-substantial and the Council unanimously voted to submit this draft to the Office of Administrative Law as the final version of the regulations.