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

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF
REGULATIONS Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapters 2. Discrimination in Employment
Article 2. Particular Employment Practices

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) 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.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification. Some changes are not explained below as they are non-substantive, including correcting grammatical and formatting errors, renumbering and relettering provisions, deleting unnecessary citations, and eliminating jargon.

§ 11017, Employee Selection
The purpose of this section is to outline components of the employee selection process during which members of a class protected by the FEHA may be illegally discriminated against. These components are selection and testing; placement; promotion and transfer; and utilizing criminal records, a height standard, or a weight standard. The Council proposes to clarify that business necessity, in addition to job-relatedness, is required if a policy or practice has an adverse impact on a protected class. Moreover, the Council proposes to delete text that would be duplicative with proposed section 11017.1. Finally, the Council proposes to make nonsubstantive changes such as italicizing certain titles and correcting an outdated citation. These changes are necessary to make the regulation consistent with case law and federal regulations, not duplicative of the next section, and clearer.

§ 11017.1, Consideration of Criminal History in Employment Decisions
The purpose of this section is to outline the law governing the consideration of criminal history in employment decisions. The Council proposes to delete the brief guidance given in section

11017(d)(1) and elaborate in this new section. This addition is necessary to clarify a frequently misunderstood and rapidly evolving facet of the law.

§ 11017.1, subd. (a) Introduction

The Council proposes to add this subdivision to contextualize the rest of this section. This subdivision lays out the existence of other laws that prohibit the use of criminal records, how the use of criminal records may be a violation of the FEHA, and what employers and employees need to demonstrate in order to prove compliance or a violation. This addition is necessary to establish that this rulemaking action is within the Council's jurisdiction per Government Code section 12935 and to provide the relevant background to the subsequent subdivisions.

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

The Council proposes to enumerate the prohibitions on using criminal history contained in the Labor Code. This addition is necessary to give a full, clear rendering of related laws and to enable employers to fully comply with the law without having to check multiple sources.

§ 11017.1, subd. (c) Additional Criminal History Limitations, Irrespective of Adverse Impact

Similar to the previous subdivision, the Council proposes to enumerate further limitations on the use of criminal history. The first limitation comes from AB 218 (2013) and applies to government employers; the second one illustrates municipalities' discretion to enact further restrictions. This addition is necessary to distinguish the responsibilities of public versus private employers and to clarify that municipalities can legislate beyond the FEHA because the FEHA is a floor, not a ceiling, on rights.

§ 11017.1, subd. (d) Consideration of Other Criminal Convictions and the Potential Adverse Impact

The Council proposes to add this subdivision to (1) set out the general rule on adverse impact and the corresponding burden of proof, (2) clarify how to define adverse impact according to federal regulations, and (3) clarify that adverse impact is synonymous with "disparate impact" as defined by the EEOC. This addition is necessary because it establishes adverse action based on the use of criminal conviction as a valid (though pre-existing) cause of action, making the regulations consistent with case law, and clarifies that potentially ambiguous terms are to be defined commensurate with federal and case law.

§ 11017.1, subd. (e) Establishing Job-Relatedness and Business Necessity

The Council proposes to add this subdivision to explain (1) the affirmative defense of job-relatedness and business necessity, (2) how to determine when such a defense is warranted and properly asserted, and (3) what procedures employers must follow to use conviction history in an employment decision. This is largely derived from *Green v. Missouri Pac. R.R. Co.* (8th Cir. 1975) 523 F.2d 1290 and subsequent Title VII case law. Section 1786.18 of the California Civil Code informs the "seven year" presumption contained within the subdivision. This addition is necessary because it clarifies employers' and employees' rights and obligations by clarifying that employers can still use conviction history when certain criteria are met and also provides recourse to employees and applicants impacted by factually incorrect information.

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

The Council proposes to add this subdivision to describe instances where use of criminal history is mandated by other laws and therefore lawful, necessarily satisfying the job-relatedness and business necessity components of the affirmative defense. This addition is necessary to maintain consistency between laws and clarify that employers' obligations remain the same.

§ 11017.1, subd. (g) Less Discriminatory Alternatives

The Council proposes to add this subdivision to describe disparate/adverse impact's less discriminatory alternatives doctrine. This addition is necessary to clarify that even if a policy or practice is job-related and consistent with business necessity, it can still be overly broad and more discriminatory than is necessary to accomplish its legitimate goals. This is consistent with the application of this doctrine in other types of disparate/adverse impact contexts.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments clarify existing law without imposing any new burdens. Their adoption 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.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

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 because the regulations codify existing law into a digestible format and promote harmonious relations in the workplace without affecting the supply of jobs or ability to do business in California. Adoption of the proposed amendments 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.