DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
AMENDMENTS TO THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING PROCEDURAL REGULATIONS

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 1. Procedures of the Department of Fair Employment and Housing

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

This rulemaking action clarifies, makes specific, and supplements the Department's practice and procedure for administering complaints of employment, housing and public accommodation discrimination and hate crimes set forth in Government Code sections 12960 through 12976 and 12980 through 12989.3.

The Department 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 Department has concluded that these are the only regulations that concern the Department's procedures and the Fair Employment and Housing Act.

No one requested a public hearing on the originally proposed text.

The following list summarizes the Department's notable amendments to the originally proposed text:
- in the employment context, clarifying the meaning of "merit" to "merit under the relevant legal standard" in sections 10001(o), 10025(d), 10026(f), 10030(b), 10030(c), 10031(a), and 10033(b) to acknowledge that the standard is not subjective;
- in the housing context, clarifying the meaning of "merit" to "reason to believe that discrimination has occurred or is about to occur" in sections 10057(d) and 10063(a) because that is the precise Fair Housing Act/Fair Employment and Housing Act standard;
- elaborating upon the ways one may file a pre-complaint inquiry with the Department ("by telephone, in person, by mail, or on the department's Web site at www.dfeh.ca.gov") in section 10002(a);
- clarifying that the Department may investigate a complaint in certain circumstances where a right-to-sue notice has already been issued in section 10005(b) ("Notwithstanding the above, upon request by the complainant, the department may in its discretion investigate a complaint where a right-to-sue notice has already been issued if doing so would be consistent with section 10012(d). In such cases, the original right-to-sue notice date shall remain in effect.") to account, for example, for situations where a request-to-sue was erroneously requested or the state has an interest in the matter. The purpose of this regulation is to prevent discrimination where a large number of persons would be affected, when an important legal issue is at stake, and/or when civil rights are at stake. Without this clarification, the regulation may be misconstrued to foreclose department action in

one of the aforementioned circumstances and ultimately hinder civil rights enforcement. Moreover, adding "by the complainant" clarifies that the complainant is the only person who can request the investigation and it is necessarily complainants, i.e. "the person claiming to be aggrieved" in Government Code section 12965, who file for right-to-sue notices. Finally, the reference to section 10012(d) regarding director's complains is necessary to harmonize section 10005(b) with that section because they both pertain to criteria used to evaluate complaints and it would be inconsistent to use different criteria based solely upon how the complaint is filed. The discretion to investigate in section 10005 is the same discretion exercised by the director in filing a complaint for investigation pursuant to section 10012(d);
- clarifying that if settlement agreements are to be public, it would be in "accordance with the department's Public Records Act policy" (sections 10025(h) and 10057(h)(1));
- in the employment dispute resolution context, clarifying that settlement agreements shall be made public records "unless the parties request nondisclosure and the director, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department" (section 10025(h));
- deleted "[o]ffering a reasonable opportunity to mediate satisfies the department's obligation under sections 12963.7 and 12965 of the Government Code to eliminate the unlawful practices through conciliation or mediation even if one or both of the parties refuse to participate" from section 10025(d) to be consistent with Government Code section 12965;
-deleted "[o]ffering a reasonable opportunity to mediate satisfies the department's obligation under section 12981 of the Government Code to eliminate the unlawful practices through conciliation or mediation even if one or both of the parties refuse to participate" from section 10057(d) to be consistent with Government Code section 12981;
- clarifying that a "civil action may be filed, if at all, only after the department has required mandatory dispute resolution" in section 10031(b) in order to maintain consistency with the second sentence in Government Code section 12965(a);
- adding identical, pre-existing language ("When an appeal is completed after the statutory time limit and the complaint has been found meritorious under the relevant legal standard, the department shall schedule a conciliation or mediation conference.") from section 10030(b) regarding Investigations Not Completed Within Statutory Time Limit to section 10033(b) regarding Departmental Appeal in order to make it easier to find guidance that is equally applicable to investigations not completed within the statutory time limit as it is to departmental appeals and to remind the reader about an important rule. It is necessary to clarify what happens in the unlikely event that the Department does not have any more time, per Government Code section 12965, to investigate a complaint, but still seeks to address potential civil rights violations;
- in the housing dispute resolution context, clarifying who needs to approve nondisclosure if requested by the parties - "In pre-investigation mediation…the chief of dispute resolution, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department" and "[i]n mandatory dispute resolution, the director, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department" (section 10057(h)(1)(A)-(B));
- in the housing dispute resolution context, enumerating examples of circumstances that may result in partial or complete nondisclosure, e.g. "Claims involving allegations of sexual harassment…A complainant's physical or mental condition, or medical diagnoses…[or] Claims involving

circumstances that, if disclosed, could create a safety risk, including the fact that a complainant is a resident in a domestic violence shelter or other protected residence" (section 10057(h)(2)(A)-(C));
- in the housing dispute resolution context, enumerating that "Affirmative relief may include individual relief to make the complainant whole such as approving or restoring a housing opportunity, approval of a reasonable accommodation request, and relief in the public interest to prevent future discrimination or harassment such as training, the development of policies or practices, and affirmative advertising" (section 10057(j));
- deleting section 10062, titled "Investigations Not Completed Within Statutory Time Limit," because it conflicts with federal law;
- change "offered" to "required" in section 10063 to be consistent with Government Code section 12981;
- clarifying that an "action may be filed, if at all, only after the department has required mandatory dispute resolution" in order to maintain consistency with Government Code section 12981;
- in the housing departmental appeal context, adding "[w]hen an appeal is completed after the statutory time limit and the department has determined that discrimination has occurred or is about to occur, the department shall schedule a conciliation or mediation conference" in section 10065(b). This is necessary to harmonize the department's internal appellate process with that of employment cases as spelled out in section 10033 to ensure that the department can still prevent discrimination after the statutory time limit and maximize efficiency between similar processes.

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 Department 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 Department's response, the Department 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 Department anticipates that the adoption of these regulations will not impact the creation or elimination of jobs or housing, the creation of new businesses or housing or the elimination of existing businesses or housing, or the expansion of businesses or housing currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees, employers, housing providers, owners, and tenants to understand their rights and obligations and reducing litigation costs.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially 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 10001(b):

Comment: The definition of "complainant" should be changed to reflect the definition of "aggrieved person" under § 12927 (g) of the Fair Employment and Housing Act, which is substantially equivalent to the Fair Housing Act.

Department response: The Department declines to follow this suggestion because it is not entirely correct – an aggrieved person may or may not file a complaint and therefore may or may not be a complainant. Nevertheless, to illustrate the partial overlap between terms, the Department added "or 12927(g)."

Section 10001(o):

Comment: For housing cases, the correct standard is not whether the complaint "has merit," but whether "reasonable cause exists to believe that an unlawful practice…has occurred or is about to occur." (See e.g., § 12981.1, and § 12989.3 of the Fair Employment and Housing Act). So then in Subchapter 2 (Housing), every reference to "complaint has merit" or "being meritorious" should be changed to reflect the proper standard – "reason to believe that discrimination has occurred or is about to occur."

Department response: This subdivision is not offering a legal standard of merit and instead uses "merit" in the general sense of "the case's disposition has not been determined." Nevertheless, to ensure maximum clarity, the Department added "under the relevant legal standard" in this subdivision and throughout Subchapter 1 after "merit" and added the commenter's standard – "reason to believe that discrimination has occurred or is about to occur" – in Subchapter 2 in lieu of "merit." The Department erroneously omitted the word "legal" once – in this subdivision – and added it back into the final text for consistency since the relevant standard IS the relevant *legal* standard.

Section 10001(r):

Comment: Respondent also includes "any other person or entity identified during investigation and notified as required." (See, § 802 (n) of the Fair Housing Act).

Department response: The Department declines to follow this proposed addition because it is overly broad. The existing definition is already clear, and if the commenter was concerned with how additional respondents can be added to a complaint, that is addressed in sections 10022 and 10054.

Section 10001(s):

Comment: The regulatory scheme is inconsistent regarding whether a complaint has to be signed to be verified. In section 10001(s), "Verified complaint" is defined. Then, throughout the regulatory scheme, the word "signed" has been struck and "verified" has been inserted. As written, this section seems to state that a complaint is verified if it contains certain language. However, a verified complaint usually requires both the specified language (that the complaint is true or made on information and belief of the truth) and the complainant's signature.
These sections illustrate some inconsistent usage. In order to obtain a right to sue notice under Section 10005, a complainant must provide a "signed" verified complaint unless electronically submitting it -when the verification language must still be in the electronically submitted complaint. Under other sections, the distinction for receiving a "signed" verified complaint is not made and the word "signed" has simply been struck and "verified" substituted. Then, under Section 10021(h), in order to rescind a verified complaint, a complainant must submit a "signed" written verification.

We suggest that the definitions Section 10001(s) for "Verified complaint" be further amended to clarify that a complaint must both have the specified language and be signed. For an electronically submitted complaint, it must have the verification language but a signature is not required. However, it should also include a statement that the electronic filer has read the verification and understands that submitting their electronic filing is treated as a signature for the purposes of intake and investigation - or some such provision. Then it should specify that any electronically submitted complaint without a signature must be signed before it is served on the Respondent. That would make it consistent with the language under Section 10008(b) which requires a complaint be "verified" before it is served on the Respondent - even when the statute of limitations is about to expire.

Department response: The Department disagrees that a signature should be a component of a verified complaint. Because the definition of "verified complaint" contains the requirement of an oath or affidavit stating that to the best of the complainant's knowledge, all information contained in the complaint is true and correct, a signature is superfluous and could be infeasible for the Department to acquire. The procedure for an immediate right-to-sue and the commenter's other examples is different because as a general matter the Department does not conduct any screening on right-to-sues. Finally, a primary purpose of this regulation is to enable electronic complaints in the future and requiring a signature would prevent the use of time- and resource-saving technologies.

Comment: Under § IV (C) of the Memorandum of Understanding (MOU) between the DFEH and HUD, "Each complaint must be in writing and must be signed and affirmed by the aggrieved person filing the complaint. Information can be provided by telephone and reduced to writing by an Agency employee (See 24 CFR 103.40(b)) and the signature and affirmation may be made at any time during the investigation (See 24 CFR 103.30(a))." While the signature and affirmation may be made

during the investigation, the signature is still a requirement under the MOU and federal regulations and DFEH must ensure that it collects a signature eventually.

Department response: The Department declines to further amend the proposed language since it does not prevent the Department from obtaining signatures; it merely gives the Department the option to use paperless options in the future. To the extent the Department is contractually obligated to collect signatures, it will continue to do so.

Section 10025(h) and 10057(h):

Comment: This subdivision should be rewritten as follows:
Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. However, mandatory mediations pursuant to SB 1038 settlement agreements shall be made public unless the parties request nondisclosure and the DFEH, *through its designated representative*, determines that disclosure is not required to further the purposes of the laws enforced by the department.

Department response: The Department agrees that the director should not be the only individual permitted to determine that disclosure is not required to further the purposes of the laws enforced by the department and has therefore added "or a designated representative" to sections 10025(h) and 10057(h)(1)(B). In the housing context for pre-investigation mediations, to ensure that the matters remain solely in the dispute resolution division, the chief of dispute resolution or her designee would make the determination if disclosure would further the purposes of the laws enforced by the Department.

Comment: This following should be added to this subdivision:
With regard to pre-complaint, voluntary settlement agreements, negotiation for limited confidentiality will be permitted to protect the identities of the parties in dispute. Limited confidentiality shall be defined to allow for disclosure of underlying facts that led to the filing of a complaint that a violation of law has occurred, the settlement sum, and date of resolution. Further, all parties shall be informed of the department's goal in lifting confidentiality in cases resolved through its dispute resolution division: to provide an early, alternative dispute resolution option in discrimination cases, and to serve the public's interest in knowing how mediation can be used to effectively prevent litigation.

Department response: The Department declines to add the first sentence because it subsequently added text to address confidentiality in all contexts – employment and housing, pre-investigation and mandatory dispute resolution. Any further addition of text along the lines suggested by the commenter may interfere with the purposes of the regulations, which are to provide the public with more information and education regarding the laws the Department enforces. The Department also declines to add the sentence beginning with "further" because it is a policy statement that is better suited to regulatory statements of reasons.

Comment: This following should be added to this subdivision:

Finally, the department shall, for a period of no less than 12 months following the change in policy concerning confidentiality in both mandatory and voluntary mediation, engage an independent expert to evaluate the impact of limited confidentiality, as defined herein. The evaluation in mandatory mediations should seek to document: a) settlement sums and classification of dispute as employment, housing, Ralph, Unruh, or human trafficking, and other categories as deemed appropriate by the evaluator; b) number of cases in which multiple violations are alleged in a single complaint to be filed by the department.
The evaluation in pre-complaint, voluntary mediations should document at least these effects: a) change in frequency of the use of the department's alternative dispute resolution program, b) which party accepts or declines mediation (complainant or respondent), b) trend in amount of settlement sums reached through voluntary mediation; c) classification of dispute as employment, housing, Ralph, Unruh, or human trafficking, and other categories as deemed appropriate by the evaluator; d) number of cases in which multiple violations are alleged in a single complaint filed with the department.
The evaluation shall include both findings and recommendations with regard to improvements that can be made to the alternative dispute resolution program offered by the department.

Department response: The Department declines to accept this addition because it is outside of the scope of this rulemaking action and would interfere with the rulemaking action's cost neutrality. However, the Department can institute such a program without codifying it in regulation and will consider the proposal in the context of its ongoing review of its current programs.

Comment: The proposed amendment added the language "and the director determines that disclosure is not required to further the purposes of the law enforced by the department." This statement should only apply to mandatory or post-civil complaint mediation settlements and not for voluntary mediation settlements.

Department response: The Department agrees and ultimately incorporated this idea into both sections.

Comment: First, a potential effect of the proposed regulation is that Respondents will not participate in early, voluntary mediation. Respondent participants in the Department of Fair Employment and Housing ("DFEH") early mediation program tend to highly value a confidential settlement agreement. This is one of the main forms of "consideration" given by Complainants to induce Respondents to offer something of value to Complainants and to reach a settlement. The requirement of non-confidential settlement agreements may have an effect of Respondents declining to "come to the table" for DFEH early mediations.

Second, if Respondents decline to "come to the table," Complainants will lose the opportunity of early mediation, as both parties must agree to voluntary, early mediation under the DRD dispute resolution program. Complainants frequently benefit from early mediation, and many 1) cannot find an attorney, 2) cannot afford an attorney, 3) may have problematic legal claims, or 4) may have claims carrying small damages. Yet, the DFEH DRD program frequently and successfully serves these Complainants and the Respondents involved in the Complaint, achieving early and prompt

resolution of these Complaints and preventing the need for investigation or litigation of these types of claims.

Third, there is strong potential for early, voluntary mediations to significantly decline if pre-investigation mediated agreements "shall" be disclosed, absent Director approval. This will decrease the settlement rate of the DFEH DRD, will potentially lead to the reduction of staff mediators, and will unquestionably burden the Consultants' workloads. If Respondents decline to participate in early mediation due to mandatory disclosure of settlement agreements, far fewer Complaints will be resolved through early mediation, and Consultants will be tasked with completing the investigation of those Complaints, which are now regularly and successfully resolved through mediation with the option of confidential settlement agreements.

Fourth, Complainant and Respondents choose mediation for a fast, confidential process, in lieu of litigation. The number of non-confidential settlement agreements reached through the DFEH DRD voluntary mediation program to date is extremely small. This is because Respondents and Complainants value the confidentiality of the settlement agreement. In short, confidential, pre-investigation mediation is the process our constituents self-select, frequently. If the confidentiality of settlement agreements is no longer available for early mediation, many parties will proceed to litigation, increasing the number of lawsuits arising from DFEH Complaints.

Fifth, if the goal of the proposed regulation is to increase transparency or publicly available settlement information, there are other avenues through which this can be achieved. Complainants may use the DFEH investigation process, the DFEH Legal Division, or lawsuits filed by private counsel to pursue transparent, public results. Our agency serves the public in different ways, and there is no one approach that works across the board given our diverse roles and purposes. The role of mediators is very different from investigators and attorneys, and parties' expectations of the mediation process and its outcomes are very different from advocacy processes. Pre-investigation mediation is not a fact-finding process but a confidential, party-centered, negotiation process. The comprehensive confidentiality of this process allows parties to trust the mediator, which then allows Complaints to be resolved early and quickly, without resort to advocacy-based processes such as investigation or litigation.

Finally, the proposed regulation states that the Director can override the mandate of non-confidential settlement agreements. Parties seek mediation to achieve efficient closure of the dispute and the DRD general practice is to resolve the case in one day. Practically speaking, the need for the Director's involvement will likely prevent completion of mediations in one day, as it is difficult to imagine that the Director could be available to approve the non-confidentiality of the settlement agreement during the mediation, given the important demands on his time in ably leading this Agency. Additionally, the need for Director involvement may breach the existing "firewall" between the DRD and other Divisions, intended to protect mediation confidentiality. The Director's involvement in reviewing settlement agreements to determine whether they shall remain non-confidential or may be held confidential almost certainly invades the confidentially and neutrality of the mediation.

Mediators are bound by ethical duties of neutrality/impartiality, as well as the Evidence Code governing the confidentiality of mediations, and these ethical and legal duties also impact our comments here.

Department response: The Department declines to revise the regulations in response to these policy considerations. First, to the extent that respondents do not want to engage in mediation, then the Department can pursue enforcement and litigation. But, given the cost and time of investigation and litigation, and what it may reveal, it is unclear that respondents would choose to decline mediation in order to engage in this process. Second, whether or not complainants have retained an attorney, the Department will still carry out the enforcement process with the complainant as the real party in interest, effectively providing representation. Third, the regulations do not prohibit complainants and respondents, between themselves, from negotiating confidentiality; these regulations merely give the Department the authority to discuss outcomes and ultimately carry out its duty to deter discrimination and inform the public. Fourth, it is very speculative how potential respondents would react to the regulations. Nevertheless, if the staffing levels of mediators declined, then there might be a corresponding increase in resources available for consultants (investigators). Fifth, the Department's "constituents" are the people of California. While state resources are being spent to solve individual complaints, the ultimate purpose is to serve the people of the state and this is accomplished through affirmative relief and deterrence through transparency. If there is an increase in litigation, that would be accompanied by an increase in penalties, transparency, and ultimately legal precedents – all of which would benefit the people of California. Sixth, there is no dispute that consultants and mediators have different roles; though it is false that consultants are advocacy-based since they conduct impartial investigations. Seventh, with the addition of the "designee" language, the paragraph starting with "finally" has been rendered moot. Finally, the Evidence Code and Model Standards of Conduct for Mediators only provide for confidentiality as to what is said and done in the mediation process; they do not apply to the settlement terms.

Comment: The Equal Employment Opportunity Commission ("EEOC") has a similar voluntary, early mediation program as that offered by the Department of Fair Employment and Housing ("DFEH") through its pre-investigation, early mediation program. The settlement agreements reached as a result of EEOC voluntary mediations are not required to be made public and the parties may and do enter into confidential settlement agreements. Parties to settlement agreements reached through DFEH pre-investigation voluntary mediations should be allowed to negotiate for the confidentiality or non-confidentiality of the agreement, as is the current practice at the DFEH and the EEOC.

Department response: The regulation ultimately allows for the negotiation of confidentiality and a process of approval. In any event, the EEOC's approach to its own work does not wholly determine the Department's approach.

Comment: The proposed restriction on confidentiality provisions in mediated settlement agreements is contrary to the hallmark mediation principle of self-determination. The American Bar Association considers self-determination a fundamental ethical standard that mediators must uphold. ABA Standard I of the Model Standards of Conduct for Mediators is entitled "Self-Determination" and states in pertinent part: "A mediator shall conduct a mediation based on the

principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."
The EEOC has never found it appropriate to compromise this fundamental principle in the interest of transparency. The EEOC has a long-established and successful mediation program – separate from its Conciliation process -- which follows ABA standards by allowing the parties to decide for themselves whether to make their agreement confidential. Insofar as the great majority of employment-related complaints are dual-filed with the DFEH and EEOC, great deference should be given to the EEOC's mission to promote self-determination of the parties in mediation over transparency.

Department response: The Department agrees that the principle of self-determination is vital to mediation; however, it is not at stake here. The regulations only contemplate publicizing the outcome of mediation, not the process or parties' determination about what outcome to reach. This is commensurate with the Evidence Code and Model Standards of Conduct for Mediators. The regulation ultimately allows for the negotiation of confidentiality and a process of approval. In any event, the EEOC's approach to its own work does not wholly determine the Department's approach.

Section 10025(j):

Comment: For section 10025(j), in the last sentence, I recommend taking out "employment," because mediators should be able to assist parties to select affirmative relief in Unruh Civil Rights Act and Ralph Civil Rights Act cases.

Department response: The Department agrees and removed "employment."

Section 10035(a):

Comment: § IV (B) of the HUD MOU requires that DFEH "agrees that complaints may be filed by telephone, in person, or by mail." Therefore, they are not required to be in writing to be processed.

Department response: While section 10038(b) already enables persons to make telephone inquiries and the Department writes down verbal inquiries, to ensure maximum clarity, the Department nevertheless replaced "in writing" with "by telephone, in person, or by mail."

Section 10039(c):

Comment: "In person" should also be added to conform to § IV (B) of the HUD MOU, which stipulates that DFEH "agrees that complaints may be filed by telephone, in person, or by mail." DFEH should allow the filing of complaints by these three means, even when it is not necessary to avoid missing the statute of limitations for filing.

Department response: Because the Department agrees that the method in which an inquiry or complaint is lodged with the Department is immaterial to the issue of obtaining a complainant's

verification of a complaint, the Department deleted "solely on the basis of a telephone interview with a complainant," which is clearer than adding "in person."

Comment: As stipulated in § IV(C) of the HUD MOU, the signature and affirmation may be made at any time during the investigation (See 24 CFR 103.30(a))."

Department response: The Department appreciates the close reading of the regulations and the HUD MOU. However, the MOU is outdated since that federal regulation does not relate to signature and affirmation. More importantly, the Fair Employment and Housing Act contradicts that provision of the MOU in Government Code section 12980(a), so the Department does not have discretion here.

Section 10041(c):

Comment: As mentioned above and in § IV(C) of the HUD MOU, "signature and affirmation may be made at any time during the investigation (See 24 CFR 103.30(a))."

Department response: Please see the response immediately above.

Section 10050(a):

Comment: This section should make it clear that the medical release should not be a blanket medical release, but rather targeted and as narrow in scope as possible, by adding the as following: "This authorization shall be targeted and as narrow in scope as necessary to reasonably evaluate and prosecute the complaint."

Department response: The Department declines to add the proposed language. This subdivision already limits "medical records or information reasonably necessary to evaluate and prosecute the complaint" to that which is "directly relevant" and making the proposed change may be misconstrued as altering the already stringent standard.

Section 10057(d):

Comment: Post-cause dispute resolution should be limited to a reasonable time frame to prevent unnecessary delay in the enforcement of cause findings.

Department response: The Department disagrees with this comment because any time frame would be arbitrary and may oversimplify a process that requires differing amounts of time for differing cases and circumstances.

Comment: The language with respect to "mandatory dispute resolution" is confusing. Subsequent language in this subsection seems to indicate that participation is not mandatory. Is participation mandatory (potentially problematic), or is it mandatory only that DFEH offer the parties an invitation to participate in a formal mediation session?

Department response: The language of this subdivision comes from the statute – Government Code section 12981(a) – and is therefore unalterable by regulation.

Section 10057(f):

Comment: At the end of the first sentence for Sub-Section 10057(f), the text still refers to the "mediation" division. To be consistent with the name change for the division, this should be changed to refer to the "Dispute Resolution Division."

Department response: The Department agrees and changed "mediation division" to "dispute resolution division."

Section 10057(h):

Comment: The second sentence of this subsection creates a presumption that settlement agreements shall be made public unless: (1) the parties request non-disclosure, and (2) the director determines that disclosure is not required to further the purposes of the laws enforced by the department. We are concerned that the proposed regulation may result in the disclosure of settlement agreements in which the parties have requested confidentiality. It is increasingly common for housing discrimination complaints to be filed by tenants who are facing eviction (including evictions for non-payment of rent). Often a complaint is filed based on an incomplete or inaccurate set of facts. Though they may not have violated the law, many housing providers choose to participate in pre-investigation mediation rather than devote the time and resources required to competently defend such a complaint. These cases often result in the complainant agreeing to settle the housing discrimination complaint in exchange for a favorable settlement in the eviction. Assuming the parties request non-disclosure, it would be inequitable to make such settlement agreements public. Making such agreements public may cause housing providers to be perceived as engaging in discriminatory practices when no investigation has been conducted and there has been no finding that the complaint has merit. We request that the second sentence be re-phrased so that the presumption is in favor of non-disclosure when the parties have so requested, unless there is an overriding reason to make the settlement agreement public:
"Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. ~~However, s~~Settlement agreements shall be made public unless the parties request nondisclosure. If the parties request nondisclosure, the settlement agreement shall not be made public unless ~~and~~ the director determines that disclosure is ~~not~~ required to further the purposes of the laws enforced by the department."

Department response: The Department declines to accept this recommendation. Settlement agreements are voluntary and almost always carry a presumption that parties are not admitting wrongdoing. Moreover, the Department does not have discretion here due to its workshare agreement with HUD, although the Department generally supports transparency and deterrence.

Comment: Consider qualifying this provision further, as per § V (8) the HUD 2016 Criteria for Processing:

"Circumstances that may result in partial or complete nondisclosure of a conciliation agreement may include, but are not limited to:
• Sexual harassment claims;
• A complainant's physical or mental condition, or medical diagnoses; or
• The fact that a complainant is a resident in a domestic violence shelter or other protected residence which complainant believes may, if disclosed, be a safety risk."

Department response: The Department agrees that the suggested language is a valuable addition and incorporated it after making slight revisions for clarity and parallel construction.

Section 10057(j):

Comment: We do not object to the affirmative relief requirement, but instead request that additional language be added to the subsection to make clear that the purpose of the affirmative relief is to prevent future discrimination. In other words, the affirmative relief should be aimed at compliance, rather than compensation for the complainant. This is consistent with the stated need for the subsection in the initial statement of reasons. While settlement agreements may include provisions intended to compensate the complainant, such provisions should be the result of agreement between the parties rather than department mandate. We are concerned that without this clarification the subsection may be misconstrued and could lead to mediators acting as advocates for complainants:
"All DFEH-mediated settlement agreements shall include "affirmative relief." Affirmative relief may include training, the development of policies or practices to prevent future discrimination or harassment, reporting requirements, and monitoring compliance with settlement terms. DFEH mediators assist parties to select the affirmative relief that is best suited to the housing complaint at issue. <u>The purpose of the affirmative relief is to strengthen compliance with the law and prevent future discrimination from occurring, rather than to compensate the complainant</u>."

Department response: The Department declines to follow this recommendation. Affirmative relief is simply anything that is not monetary. Enumerating examples of affirmative relief does not relieve mediators of their duty to be neutral, as is mentioned in section 10001(h). Finally, adding the suggested language may confuse readers who may interpret it as a change in policy or law rather than as a clarification as intended.

Comment: This subdivision should be rewritten as follows:
"All DFEH-mediated settlement agreements shall include 'affirmative relief.' Affirmative relief may include individual relief to make the complainant whole such as approving or restoring a housing opportunity, approval of a reasonable accommodation request, and relief for individuals other than a complainant in the public interest to prevent future discrimination or harassment such as training, the development of policies or practices, and affirmative advertising. DFEH mediators assist parties to select the affirmative relief that is best suited to the housing complaint at issue. Agreements shall also include reporting and monitoring provisions to ensure compliance with settlement terms."

Department response: The Department agrees and incorporated the entirety of the proposal with the exception of "for individuals other than a complainant" because that is unnecessarily limiting and could lead to confusion.

Section 10062:

Comment: This provision creates fundamental concerns with respect to substantial equivalence, which is necessary for compliance with and funding from the Department's memorandum of understanding with the federal Department of Housing and Urban Development (http://www.dfeh.ca.gov/legal-records-and-reports/work-share-agreements), and does not appear to be supported by the plain text of the Fair Employment and Housing Act.

Department response: The Department agrees and deleted the section.

Section 10063(a):

Comment: The last clause of this subdivision should read as "the director shall file a civil action in the name of the department on behalf of the aggrieved person as a real party in interest" to clarify that the department is bringing the civil action on behalf of the complainant, as stipulated in § 12981 of the Fair Employment and Housing Act.

Department response: The Department declines to make the addition because it is not necessarily true, as in the case of director's complaints.

Section 10063(b):

Comment: The stated need for this subsection is to make clear that the department must offer dispute resolution before filing a civil action. However, this is not clear in the proposed language. We recommend inserting the word "only" after the phrase "if at all" to make clear that the department cannot file a civil action until dispute resolution has been offered.

Department response: The Department agrees and added the proposed language.

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

Sections 10025(d) and 10057(d)

Comment: What is considered a "reasonable opportunity" to hold a meaningful mandatory mediation to avoid litigation will be interpreted differently by the parties and participants of the mediation. Scheduling a day-long mandatory mediation with a fixed complaint expiration date to accommodate all the different parties and their representatives, including the DFEH attorneys, would not be an easy task. Therefore, instead of "offering a reasonable opportunity" to mediate that would be subject to interpretation, it would be more helpful if an exact number of days, such as at least 14, 21, or 30 calendar days, is proposed instead.

Department response: The Department disagrees. The intent of this provision is to provide flexibility to both the dispute resolution division and parties to schedule mediations in good faith. Adding a time limit would be punitive, arbitrary, and possibly violate the statute, which calls for mediation without imposing temporal restrictions.

Sections 10025(h) and 10057(h)

Comment: All settlement agreements reached by a confidential mediation are also confidential unless parties agreed otherwise.

Department response: The Department disagrees. Evidence Code section 1115 et seq., the California Supreme Court, and the Model Standards of Conduct for Mediators are consistent that the mediation process only, and not the terms of settlement, are inherently confidential.

Sections 10025(d) and (h) and 10057(d) and (h)

Comment: "Conciliation" or "a conciliation agreement" in the proposed Sections 10025(d) & (h) and Sections 10057(d) & (h) are misplaced. They should be changed to "mediation" or "a mediated settlement agreement."

Department response: In both subdivisions lettered (h), the Department agrees that the agreements reached by the dispute resolution division should not be referred to as "conciliation agreements" and changed the language to "settlement agreements." However, the subdivisions lettered (d) only refer to "conciliation" to the extent the statute – Government Code section 12981 – uses the term. There is not any ambiguity that the dispute resolution division "mediates" rather than "conciliates."

Section 10025(h):

Comment: The essence of mediation is confidentiality. The mediation privilege in California is almost absolute. In the typical discrimination case, there are allegations not only against the company but sensitive claims against specific individuals and their supervisors. Whether the claims are true, false, or somewhere in between, they are frequently inflammatory. Moreover, it is simply a fact of life that when an employee or ex-employee files a charge with the DFEH, and quickly receives a financial settlement, when word of that settlement gets out, employers believe, correctly, that it will stimulate other charges. When co-employees hear about the monetary resolution of the charge, they are tempted to follow suit, whether or not there are underlying facts that justify such actions. The bottom line is that if you adopt the proposal and all mediations are subject to disclosure without permission of the parties if an agreement is reached, your mediation program, heretofore useful and effective, will be virtually unused by sophisticated employers. You will therefore force DFEH charge resolution away from DFEH mediators, and into the private mediation process, frequently forcing charging parties to seek legal counsel unnecessarily.

Department response: The Department declines to further revise the regulations in response to these policy considerations. The Evidence Code and Model Standards of Conduct for Mediators only provide for confidentiality as to what is said and done in the mediation process; it does not apply to the settlement terms. To the extent that respondents do not want to engage in mediation, then the Department can pursue enforcement and litigation. But, given the cost and time of investigation and litigation, and what it may reveal, it is unclear that respondents would decline to participate in mediation in favor of going through those processes. Whether or not complainants have retained an attorney, the Department will still carry out the enforcement process with the complainant as the real party in interest, effectively providing representation. And the regulations do not prohibit complainants and respondents, between themselves, from negotiating confidentiality; these regulations merely give the Department the authority to discuss outcomes and ultimately carry out its duty to deter discrimination and inform the public.

Comment: If Section 10025(h) is adopted and the parties must, mandatorily and as a matter of course, disclose the terms of their settlement agreement made through confidential, voluntary mediation, the mediators expect, given their collective experience as mediators for the past seven years and prior, that:
1. Respondents will frequently decline to participate in early mediation because confidentiality is the main form of "consideration" given by Complainants.
2. Many Complainants will lose the opportunity of early mediation, when Respondents choose to decline early mediation. Complainants frequently benefit from early mediation, and many are elated and relieved to achieve an early settlement, free of mediation and litigation costs.
3. If the confidentiality of settlement agreements is no longer a matter for negotiation, many parties will proceed directly to litigation, increasing the number of lawsuits arising from DFEH Complaints.
4. One through 3, above, will almost certainly increase the number of investigations that must be taken to completion by Consultants.
5. The parties are in the best position to assess the importance of confidentiality during voluntary mediations where cause has not yet been determined. Respondents and Complainants both can value confidential agreements. Complainants tend to value confidentiality when their alleged experience of discrimination was stressful or traumatic for them, when there are other sensitive and personal issues involved in the mediation, when a Complainant and Respondent have an ongoing relationship (employer/employee, proprietor/ tenant, customer/ service provider), and when a Complainant is an applicant for or recipient of public benefits or need-based scholarships. Anecdotally, some Respondents do not highly value confidential agreements, and are willing to agree to a non-confidential agreement, which Complainants are free to disclose in exchange for payment of a lower settlement amount. The DFEH abolished a presumption of confidential agreements; it should not be replaced by a presumption of non-confidential agreements. The parties must be allowed to decide on a case-by-case basis.
6. The need for Director or a designated representative's involvement in reviewing non-confidential agreements may breach the existing "firewall" between the
DRD and other Divisions. Such involvement in reviewing settlement agreements almost certainly invades the confidentially and neutrality of the mediation.
Additionally, the presumption of non-confidentiality absent Director or designee approval seems practically cumbersome and difficult to administer: do both parties need to request that the

agreement not be disclosed? What occurs if one party requests non-disclosure but the other party prefers disclosure? These and other questions weigh in favor of allowing each party in each voluntary, pre-cause mediation to determine their need and the strength of their need for the confidentiality or non-confidentiality of the settlement agreement.

Department response: Please see the response on page eight of this final statement of reasons to the first four policy considerations that were introduced during the original comment period. As to the fifth issue, the Department disagrees about who is in the best position to assess the importance of confidentiality. Nevertheless, these regulations do not preclude settlements from being confidential, they simply do not set an expectation or assumption of confidentiality. As to the sixth issue, the regulations do not provide for a content review of the settlement terms where the director would otherwise not be involved; the sole consideration is whether disclosure is in the public interest.

Section 10057(h):

Comment: We previously expressed concern that the proposed language may result in the disclosure of settlement agreements in which the parties have requested confidentiality. We requested that the second sentence of the subsection be re-phrased so that the presumption was in favor of non-disclosure when the parties have so requested, unless there is an overriding reason to make the settlement agreement public.
The revised subsection keeps in place the same problematic presumption in favor of public disclosure of settlement agreements. In addition, new language has been added to the regulation to provide examples of situations in which non-disclosure may be appropriate. All three of the examples relate to protection of a complainant's privacy. While the situations provided for in the examples would certainly justify non-disclosure, the focus on protection of the complainant's privacy, without any examples related to protecting the privacy of respondents, could result in the subsection being interpreted too narrowly. As discussed in our prior comment, many complaints filed with the department are resolved through the mediation process prior to any investigation being conducted and without any finding of wrongdoing. In such situations, it is difficult to imagine how public disclosure of a settlement agreement in which the parties have requested disclosure would further the purposes of laws enforced by the department, even if there was not a compelling privacy interest of the complainant at stake. The regulation as written is not only inequitable, it discourages settlement of complaints. We request that the presumption be re-phrased in favor of non-disclosure of settlement agreements when non-disclosure has been requested by the parties. We also request that the list of examples of situations in which non-disclosure may be appropriate be removed. Alternatively, we request that additional examples be provided which exhibit a broader range of situations in which non-disclosure may be appropriate, including where there has not been a finding of wrongdoing by the respondent.
We recommend use of the following language:
"Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. ~~However, s~~Settlement agreements shall be made public unless the parties request nondisclosure. If the parties request nondisclosure, the settlement agreement shall not be made public unless ~~and~~ the director, or a designated representative, determines that

disclosure is ~~not~~ required to further the purposes of the laws enforced by the department. ~~Circumstances that may result in partial or complete nondisclosure of a conciliation agreement may include, but are not limited to: (1) Claims involving allegations of sexual harassment; (2) A complainant's physical or mental condition, or medical diagnoses; or (3) Claims involving circumstances that, if disclosed, could create a safety risk, including the fact that a complainant is a resident in a domestic violence shelter or other protected residence."~~

Department response: The Department declines to follow this recommendation. Settlement agreements are voluntary and almost always carry a presumption that parties are not admitting wrongdoing. Moreover, the Department does not have discretion here due to its workshare agreement with HUD, though the Department generally supports transparency and deterrence. Also, the Department disagrees that further examples are necessary since the examples given demonstrate the scope of situations for which confidentiality would be appropriate without strictly limiting confidentiality to those situations. Finally, public disclosure would further the effect of the laws the Department enforces; to the extent parties do not wish to engage in mediation, DFEH will retain its authority to investigate and bring litigation.

Section 10057(j):

Comment: We are not aware of any statutory authority supporting the position that the department is empowered to require a respondent to compensate a complainant. Furthermore, providing that compensation to the complainant falls within the mandatory "affirmative relief" component of a mediated settlement agreement is unnecessary. Complainants are already intrinsically motivated to seek compensation for their alleged injuries. If a complainant is dissatisfied with a settlement offer, he or she need not accept it. Thus, the effect of the revised subsection is to give the department the power to reject settlement terms which are satisfactory to both the complainant and the respondent for the mere fact that the department is of the opinion that the settlement does not make the complainant "whole."

The revisions are particularly problematic when considered in light of the fact that many settlement agreements are reached during pre-investigation mediation. This means that the department may require compensation to make a complainant "whole" for alleged discrimination which may not have occurred. Moreover, the revisions are inconsistent with the Council's initial statement of reasons for this subsection, which provides that the purpose of the affirmative relief requirement is to "strengthen compliance with the law and prevent future discrimination." Requiring compensation, monetary or otherwise, to the complainant is a remedial measure rather than a proactive compliance-oriented measure (as called for in the initial statement of reasons). Most concerning about the revisions is that they encourage, if not directly mandate, that department mediators act as advocates for complainants rather than as neutral third parties. This is inconsistent with the department's position that it does not represent either the complainant or respondent in the mediation process. *See* DFEH Mediation FAQs, https://www.dfeh.ca.gov/resources/frequently-asked-questions/mediation-faqs/.

We request that the newly added language related to compensation for the complainant be stricken, and that the subsection instead make clear that the purpose of the affirmative relief requirement is to strengthen compliance, as stated in the initial statement of reasons.

We recommend use of the following language:
"All DFEH-mediated settlement agreements shall include "affirmative relief." Affirmative relief may include ~~individual relief to make the complainant whole such as approving or restoring a housing opportunity, approval of a reasonable accommodation request, and relief in the public interest to prevent future discrimination or harassment such as training,~~ the development of policies or practices~~,~~ and/or affirmative advertising ~~to prevent future discrimination or harassment, reporting requirements, and monitoring compliance with settlement terms~~. DFEH mediators assist parties to select the affirmative relief that is best suited to the housing complaint at issue. Agreements shall also include reporting and monitoring provisions to ensure compliance with settlement terms. The purpose of the affirmative relief is to strengthen compliance with the law and prevent future discrimination from occurring, rather than to compensate the complainant."

Department response: The Department declines to make the suggested revisions. This subdivision neither contemplates "compensation" nor requires any form of affirmative relief. Instead, as is indicated by the use of "may," this subdivision provides a non-exhaustive, non-mandatory list of potential forms of affirmative relief that parties may choose, without any advocacy from neutral mediators. Accordingly, this section does "strengthen compliance with the law and prevent future discrimination" by remedying potential violations of the FEHA and instituting practices to avoid future violations, measures which serve a deterrent role because other potential respondents would not want to have to implement them.

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

Section 10025(h):

Comment: We truly value the pre-investigation mediation opportunity and have found it to be the most efficient as well as effective way of achieving relief for our clients and for the public. We fear we will lose this possibility should the proposed language be accepted.

Department response: The Department appreciates this input and assures the commenter that these regulations would not impact the availability of pre-investigation mediation. To the extent this comment insinuates that parties would no longer agree to voluntarily mediate as a result of these regulations, the Department will still retain authority to pursue enforcement and litigation. Given the cost and time of investigation and litigation, and what it may reveal, it is unclear that respondents would decline to participate in mediation in lieu of these other processes.

Comment: The timing and manner in which non-disclosure is requested and approved would benefit from some additional explanation. In order to maximize the possibility that Respondents will be willing to mediate under these terms, the request for nondisclosure and the determination of whether nondisclosure is required should occur prior to the preinvestigation mediation. The proposed language provides that "in pre-investigation mediation, the parties request nondisclosure…" The language does not make clear when this request is made or granted, and we suggest that non-disclosure determinations take place in advance, with an opportunity to consider the possibility of hybrid confidentiality or non-disclosure agreements.

Department response: The Department declines to follow this suggestion as it would be impractical and likely impossible to ascertain if confidentiality would serve the public interest before mediation.

Section 10057(h):

Comment: We previously expressed concern that the proposed language may result in the public disclosure of settlement agreements in which the parties have requested confidentiality. The revised subsection keeps in place the same problematic presumption in favor of public disclosure of settlement agreements. We continue to request that there be a presumption in favor of non-disclosure when the parties have so requested, unless there is an overriding reason to make the settlement agreement public.

The subsection has also now been restructured to distinguish between settlements reached through pre-investigation mediation (subsection (h)(1)(A)), and settlements reached during mandatory dispute resolution (subsection (h)(1)(B)). It is unclear why this distinction is necessary, as both sections appear to be substantively the same.

In addition to the differentiation between settlements reached through pre-investigation mediation versus mandatory dispute resolution, the subsection was restructured in other ways. The problematic sentence that lists various circumstances which may result in partial or complete non-disclosure of a settlement agreement has been renumbered as a standalone subdivision (2) of subsection (h). It's not entirely clear what the purpose of this sentence is now that it has been renumbered, though there are two possible interpretations (discussed below).

First, the sentence could be interpreted to provide examples of circumstances in which "disclosure is not required to further the purposes of the laws enforced by the department" (the standard set forth in subdivisions (1)(A) and (1)(B)). If this is the intention, then the same concerns expressed by us previously continue to apply. Namely, all of the circumstances relate to protection of complainants' privacy without any regard for the protection of the respondents' privacy. This indicates that complainants' privacy rights are more important than respondents'. We are not aware of any authority for such a position. Accordingly, if the sentence is meant to apply to circumstances in which the parties have requested non-disclosure of a settlement agreement, we request that the sentence be struck. Alternatively, we request that additional examples be provided which exhibit a broader range of situations in which non-disclosure may be appropriate, including where there has not been a finding of wrongdoing by the respondent.

Another possible interpretation of the standalone subdivision (2) is that it provides an independent basis on which the Department could choose to classify a settlement agreement as confidential, regardless of whether the parties have requested non-disclosure. If this is the case, we do not object to the inclusion of subdivision (2) in subsection (h), but does request that additional language be added to make the purpose of subdivision (2) clear. We recommend use of the following language:

"Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. ~~However, s~~Settlement agreements shall be public records available in accordance with the department's Public Records Act policy, including the provisions regarding redaction, unless the parties request nondisclosure. If the parties request nondisclosure, the settlement agreement shall not be made public unless ~~and~~ the director, or a designated

representative, determines that disclosure is ~~not~~ required to further the purposes of the laws enforced by the department. ~~Circumstances that may result in partial or complete nondisclosure of a conciliation agreement may include, but are not limited to: (1) Claims involving allegations of sexual harassment; (2) A complainant's physical or mental condition, or medical diagnoses; or (3) Claims involving circumstances that, if disclosed, could create a safety risk, including the fact that a complainant is a resident in a domestic violence shelter or other protected residence."~~

Department response: The Department declines to make the suggested adjustment for the reasons stated above on page 19. The distinction is made between pre-investigation mediation and mandatory mediation in response to other comments and because the Department has already found merit in the case of mandatory mediations, so the director would likely already be familiar with the matter. In the case of pre-investigation mediation, the matter is usually only within the province of the dispute resolution division.

Section 10057(j):

Comment: Though this subsection has not been amended, we still request that the language related to compensation for the complainant be stricken, and that the subsection instead make clear that the purpose of the affirmative relief requirement is to strengthen compliance, as stated in the initial statement of reasons: "All DFEH-mediated settlement agreements shall include "affirmative relief." Affirmative relief may include ~~individual relief to make the complainant whole such as approving or restoring a housing opportunity, approval of a reasonable accommodation request, and relief in the public interest to prevent future discrimination or harassment such as training,~~ the development of policies or practices~~,~~ and/or affirmative advertising ~~to prevent future discrimination or harassment, reporting requirements, and monitoring compliance with settlement terms~~. DFEH mediators assist parties to select the affirmative relief that is best suited to the housing complaint at issue. Agreements shall also include reporting and monitoring provisions to ensure compliance with settlement terms. The purpose of the affirmative relief is to strengthen compliance with the law and prevent future discrimination from occurring, rather than to compensate the complainant."

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

No one requested a public hearing on the regulations and there was not a subsequent 15-day public comment period because the Department did not make any additional revisions to the regulations after the second 15-day comment period.