

**CIVIL RIGHTS COUNCIL
REGULATIONS REGARDING GOVERNMENT CODE
SECTION 11135 et seq.
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

Subchapter 9. Non-Discrimination in State Programs and Activities

Article 9.5 of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code (“Article 9.5”) addresses discrimination in state-funded and state-administered programs and activities. Within Article 9.5, Government Code section 11135 prohibits discrimination and the denial of full and equal access to programs, services, or activities that are conducted, operated, or administered by the state or any state agency, that are funded directly by the state, or that receive any financial assistance from the state. (Gov. Code § 11135.) This prohibition applies to discrimination or denial of full and equal access because of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. (*Id.*) Article 9.5 also establishes procedures for determining and addressing violations of this prohibition. (Gov. Code §§ 11136, 11137, and 11139.)

The Civil Rights Department (“Department” or “CRD”) (formerly, the Department of Fair Employment and Housing) is responsible for receiving, investigating, conciliating, mediating, and prosecuting complaints of violations of Article 9.5. (Gov. Code §§ 12930(f)(4) and 11136.) Pursuant to Government Code section 12935(a), the Civil Rights Council (“CRC” or “the Council”) (formerly, the Fair Employment and Housing Council) has authority to adopt necessary regulations implementing Article 9.5.

Prior to 2017, the California Health and Human Services Agency had the authority to enforce and adopt regulations under Government Code section 11135. S.B. 1442 (Liu, Chapter 870, Statutes of 2016) transferred the authority to enforce and regulate under Article 9.5 to CRD (then “DFEH”) from the California Health and Human Services Agency. S.B. 1442 reorganized the law into the existing enforcement framework of the CRD, added to the list of protected bases upon which discrimination is prohibited, and eliminated certain provisions, including the requirement that nearly every department promulgate its own set of regulations to enforce Government Code section 11135.

Following the enactment of S.B. 1442, the Council transferred the California Health and Human Services Agency’s relevant regulations to the Council’s part of the California Code of Regulations through the changes without regulatory effect process. (OAL Matter Number: 2016-1128-04.) This rulemaking action now proposes to make substantive changes to those regulations and to further implement, interpret, and/or make specific Article 9.5.

In the process of drafting the proposed modifications explained below, the Council reviewed

other civil rights laws, including the California Fair Employment and Housing Act (“FEHA” and the following federal laws: Title VI of the Civil Rights Act of 1964 (“Title VI”), Section 504 of the Rehabilitation Act of 1973 (“Section 504”), and the Americans with Disabilities Act (“ADA”). Consideration of these statutes was necessary for a number of reasons.

For example, courts have recognized that “in light of the parallel language of [section 11135] and [Title VI], federal law provides important guidance in analyzing [section 11135] claims.” (*Darensburg v. Metropolitan Transportation Com.*, (9th Cir. 2011) 636 F.3d 511, 519.) Courts have held similarly with respect to Section 504 and the ADA. (*See, e.g., Bassilios v. City of Torrance* (C.D. Cal. 2015) 166 F.Supp.3d 1061,1084 [“[I]f a public entity that receives state funding has violated [Section 504] or the ADA, then it has also violated § 11135.”].) Therefore, it was appropriate for the Council to review case law, regulations, and guidance under Title VI, Section 504, and the ADA.

Moreover, section 11139 states that Article 9.5’s prohibitions and sanctions “are in addition to any other prohibitions and sanctions imposed by law” and “shall not be interpreted in a manner that would frustrate its purpose.” (*See also* Koon, Government Code § 11135: A Challenge to Contemporary State Funded Discrimination (2011) 7 Stan. J. Civ. Rts. & Civ. Liberties 239, 251-52 [explaining that section 11135 has been repeatedly amended to ensure a broad construction and to correct narrow judicial interpretations].) That section 11135 was enacted after, and uses language similar to, Title VI and Section 504 (prohibiting federally-funded programs from discriminating based on race, color, or national origin [Title VI] or disability [Section 504]) demonstrates the California Legislature’s intent to ensure that section 11135 is at least as protective as its federal counterparts.

In addition, Article 9.5 makes direct reference to two specific statutory schemes. In the context of disability discrimination, section 11135(b) expressly requires covered programs and activities to meet the protections and prohibitions contained in the federal ADA “except that if the laws of this state prescribe stronger protections and prohibitions,” the state’s laws prevail. The proposed regulations comport with this statutory mandate by being at least as protective as the ADA or consistent with stronger, applicable state law protections, such as those in FEHA, where appropriate. Similarly, section 11135(c) states that the protected characteristics enumerated in section 11135 have the same meaning as those terms are defined in section 12926 of FEHA. Therefore, the Council has utilized the definitions in sections 12926 and 12926.1 and FEHA’s implementing regulations wherever possible.

The Council’s review of analogous state and federal statutes and regulations is also proper in light of state law governing administrative regulations and rulemaking. Government Code section 11349.1(a)(4) states that the Office of Administrative Law shall review proposed regulations for “consistency.” “Consistency” is defined at Government Code section 11349(d) to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” In addition, the California Administrative Procedure Act mandates that the notice of proposed regulations include “[a]n evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.” (Gov. Code § 11346.5(a)(3)(D)). Government Code section 11346.5(a)(3)(B) also requires an analysis “[i]f the proposed action differs substantially from an existing comparable federal regulation or

statute.” Consistencies with related state or federal statutes or cases are noted below.

The Council also looked to federal guidance in the course of drafting the below proposed amendments. While not legally binding, federal guidance is helpful as a point of reference to ensure that commonly used terms are consistently interpreted and that the Council is not acting arbitrarily or capriciously. That is, federal guidance is helpful to show that the Council has adequately considered all relevant factors and has demonstrated a rational connection between those factors, the policy choice made, and the purpose of the enabling statute. OAL authorizes the consideration of non-binding authority, such as reports, articles, and guidance, as long as such sources are cited in the Initial or Final Statement of Reasons. (*See* Gov. Code §§ 11346.2(b)(3), 11346.9(a)(1).) Thus, in citing these types of materials, we comply with OAL protocols.

The specific purpose of each proposed, substantive 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 section or subsection, as applicable, when the proposed change goes beyond mere clarification. Changes are not explained below when they are non-substantial, including correcting grammatical or formatting errors, renumbering or re-lettering provisions, deleting unnecessary citations, and/or clarifying complicated concepts in simpler terms and/or eliminating jargon.

Article 1. General Matters

§ 11140 § 14000, Purpose of This Subchapter

The purpose of this section is to outline the parameters of the regulations and describe the purpose of the statutory scheme being implemented. The section was renumbered, and the edits reflect the revised statutory scheme enacted by S.B. 1442, as set forth in more detail below.

§ 14000(a)

The Council proposes to redraft existing regulatory language to conform the regulations to current statutory language, including changes mandated by S.B. 1442, which took effect January 1, 2017. This is necessary because the purpose of the entire regulatory scheme (Subchapter 9) is to implement Article 9.5. S.B. 1442 reorganized and amended statutes, including Article 9.5. S.B. 1442 also added and revised the enumerated bases covered by Article 9.5; removed the requirement that state agencies adopt implementing regulations; required the CRD (then “DFEH”) to enforce Article 9.5; and authorized the Council to add, amend, and repeal regulations as necessary. In this vein, this subsection includes a direct quotation from Government Code section 11135 that enumerates all of the bases upon which the law prohibits discrimination, including those that the Legislature added in S.B. 1442. These additions are: “physical disability” and “mental disability” (replacing the more general term of “disability”), “ancestry,” “medical condition,” and “marital status.” This subsection also omits outdated references to the “Division,” which has been replaced by “Subchapter”; the Health and Welfare Agency, which no longer exists; and the Fair Employment and Housing Commission, which has been succeeded by the Council.

§ 14000(b)

The Council proposes to update subsection (b), which emphasizes that these regulations are established to accomplish multiple purposes, including to “advance the objectives of Article 9.5”; protect persons against unlawful discrimination and denial of full and equal access on any of the bases enumerated in Article 9.5; ensure that state agencies use consistent practices with regard to Article 9.5; eliminate conflicting interpretations and standards of enforcement if they afford less protection than provided by these regulations; increase efficiency; and ensure that those who are supposed to benefit from Article 9.5 have a clear understanding of their rights and how to enforce them. This subsection is necessary to update the current regulation to bring it into conformity with S.B. 1442 and to retain the substance of the prior regulation that recognized the importance of ensuring the consistency of practices and eliminating conflicting interpretations and standards of enforcement.

§ 14000(c)

The Council proposes to add subsection (c) to clarify that the definitions and prohibitions in other regulations promulgated by the Council to implement the FEHA, or any other statute under its jurisdiction, are incorporated by reference. This language is necessary to ensure that those affected by Article 9.5 understand that a violation of the Council’s other regulations may result in a violation of this subchapter when Article 9.5’s jurisdictional requirements are met, and further, if there is a conflict between other regulations and this subchapter, for purposes of implementing Article 9.5, this subchapter will prevail.

§ 14000(d)

The Council proposes to add subsection (d) to articulate the relationship between Article 9.5 and federal law – namely, that federal law provides a “floor” of protection, while state law provides greater or additional protections. The subsection implements the directive, rooted in Government Code section 12993(a), that Article 9.5 and these regulations must be “construed liberally.” The subsection also implements the mandates set forth in Government Code sections 11135(b) (protections and prohibitions in Government Code section 11135 must meet or exceed those in the ADA) and 11139 (prohibitions and sanctions imposed by Article 9.5 are in addition to any other prohibitions and sanctions imposed by law). (See also *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 930, fn. 8 [“[o]nly when FEHA provisions are similar to those in Title VII do we look to the federal courts’ interpretation of Title VII as an aid in construing the FEHA.”] (quoting *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 74).) This language is necessary to clarify that, in some instances, these regulations interpret Article 9.5 in ways that are more protective of rights than analogous provisions of federal law, to inform stakeholders that compliance with federal laws does not ensure compliance with Article 9.5 and these regulations, and to ensure that the requirements of Article 9.5 and the regulations can be fully enforced.

§ 14000(e)

The Council proposes to add subsection (e) to make it explicit that discrimination under Article 9.5 may take different forms, including intersectional discrimination (which is defined at section 14020(y)), discrimination on more than one basis, harassment, coercion, intimidation, and retaliation. This language is necessary to ensure that the requirements of the section and regulations are interpreted liberally in ways consistent with other contemporary civil rights protections and can be fully enforced.

Deleted Former § 11141, Legal Scope

The Council proposes to delete this section, renumber it to 14004, and elaborate upon it there (*see below*).

§ 14001, History of this Subchapter

The purpose of this section is to describe the derivation of the Council's regulations. Pursuant to the Legislature's enactment of S.B. 1442, the previously enacted regulations were transferred from Title 22 to Title 2 of the California Code of Regulations and renumbered. A further purpose of this section is to explain that the pre-existing regulations remain in force unless they are amended, and the Council's new regulations are not intended to reduce any substantive rights that existed previously. This section is necessary to inform the public about the applicability of both the pre-existing, unchanged regulations, as well as the revised regulations, thereby ensuring effective enforcement of Article 9.5.

Deleted Former § 11142, Private Right of Action

The Council proposes to renumber and update this section, and reorganize the order of the regulations, so the prior section numbered 11142 has been deleted. This is necessary for clarity and to ensure consistency with S.B. 1442's reorganization of Article 9.5 and its enforcement and regulatory mechanisms. The revised section is now at section 14050.

Deleted Former § 11143, Exhaustion of Administrative Remedies

The Council proposes to renumber and update this section, and reorganize the order of the regulations, so the prior section numbered 11143 has been deleted. This is necessary for clarity and to ensure consistency with S.B. 1442's reorganization of Article 9.5 and its enforcement and regulatory mechanisms. The revised section is now at section 14051.

§ 11144 § 14002, Applicability of This Subchapter by Operation of Law

The purpose of this section is to describe the applicability of the subchapter. However, the Council does not propose to make any substantial changes and is simply renumbering from section 11144 to section 14002. The section has also been updated by replacing a reference to "procedures set forth in this Division" to "this subchapter."

§ 11145 § 14003, Relationship to Local Laws

The purpose of this section is to explain the relationship of these regulations to laws adopted by local entities. The Council proposes to renumber and change the title of the section from "Preemption of Local Law" to "Relationship to Local Laws." This revision is necessary because it provides a more accurate description of the interplay between this subchapter and other local laws. "Preemption" is a term used to describe a variety of legal doctrines. Here, the Council intends to clarify merely that where local laws provide less protection than Article 9.5 and this subchapter, the local laws cannot replace, subvert, or render inapplicable the protections of Article 9.5 and this subchapter. The Council further proposes to retain pre-existing language stating that local laws and regulations that afford less protection than Article 9.5 are superseded by Article 9.5 and this subchapter. However, the Council proposes to replace the listing of enumerated protected bases to a more general description of "any protected class or protected class member." This language is necessary because S.B. 1442 added protected bases to Article

9.5 after the pre-existing regulation was promulgated, and it ensures that Article 9.5 and the subchapter can be fully enforced.

§ 14004, Legal Scope

The purpose of this section is to address the reach and applicability of Article 9.5, this subchapter, and other implementing regulations to covered entities. The Council proposes to move Legal Scope (previously section 11141) here and add clarity to pre-existing language. Previously, the regulation merely stated that “the rights and remedies ... are not exclusive and do not affect rights and remedies provided elsewhere by law or contract.”

§ 14004(a)

The Council proposes to clarify that Article 9.5 and these regulations are not exclusive, as provided in former section 11141, but are in addition to other rights and duties imposed by the statute or its implementing regulations. This is necessary to implement Government Code section 11139 and to ensure that stakeholders understand both that compliance with other laws does not necessarily constitute compliance with Article 9.5 and that compliance with Article 9.5 and these regulations does not necessarily constitute compliance with other laws if other laws are more protective of protected classes.

§ 14004(b)

The Council proposes to add subsection (b) to clarify that Article 9.5 must not be interpreted in a way that would frustrate its purposes. This language is necessary to implement Government Code sections 11135(a) and 11139 and to ensure that the protections provided by Article 9.5 can be fully enforced.

§ 14004(c)

The Council proposes to add subsection (c) to provide that Article 9.5 is not interpreted in any way that would negatively impact programs and activities designed to benefit members of protected classes. This language is necessary to implement Government Code sections 11135(a) and 11139 and to ensure that the protections provided by Article 9.5 can be fully enforced. This subsection incorporates former subsection (b) of section 11155 with minor, non-substantial language changes for clarity.

§ 14004(d)

The Council proposes to add subsection (d) to clarify that Article 9.5 and these regulations are not intended to prohibit or require programs outside of the legal scope of Article 9.5. This language is necessary to implement Government Code sections 11135(a) and 11139 and to ensure that the protections provided by Article 9.5 can be fully enforced. This subsection incorporates former subsection (c) of section 11155 with minor, non-substantial language changes for clarity.

§ 11146 § 14005, Recipient - Duration of Obligation: Real Property

The purpose of this section is to establish the duration that a recipient or transferee of state support in the form of real property must comply with Article 9.5 and this subchapter. The Council proposes to renumber and update this section to ensure consistency with S.B. 1442’s reorganization of Article 9.5 and its enforcement and regulatory mechanisms. There are no

substantial changes to subsections (a) through (c), inclusive, of this section.

§ 14005(d)

The Council proposes to add the following sentence to this subsection: “Ultimate beneficiaries may enforce regulatory agreements or covenants, conditions and restrictions imposed pursuant to this section.” This sentence is necessary to fully implement and enforce the existing requirements in subsections (a) through (d) by clarifying that ultimate beneficiaries, as defined in these regulations, can enforce anti-discrimination protections related to real property.

§ 11147 § 14006, Recipient – Duration of Obligation: Personal Property

The purpose of this section is to make specific the duration of the legal obligations pertaining to personal property covered by Article 9.5 and this subchapter. However, the Council does not propose to make any substantial changes and is simply renumbering and moving the text from section 11147 to section 14006.

§ 11148 § 14007, Recipient – Duration of Obligation: Other Cases

The purpose of this section is to make specific the duration of the legal obligation of recipients not covered by section 14006. The Council is proposing to renumber and move the text from section 11148 to section 14007. The only substantial change that the Council proposes is to add a provision clarifying the time period during which the obligations remain in effect. This sentence is necessary to clarify the duration of the anti-discrimination obligations imposed by Article 9.5 in situations that do not involve real or personal property. Pre-existing language made clear that the duration of the obligation continues for the period during which state support is received. But a recipient can stop receiving state support (for example, when funding for a program formally ends), while still using previously-received state support to continue a program or activity. The proposed change clarifies that the anti-discrimination obligation continues throughout the time period that the recipient enjoys the benefit or advantage of the state support it received. This is consistent with the prior two sections.

§ 11149 § 14008, Severability

The purpose of this section is to provide that invalid provisions may be severed from the regulations without affecting the remainder of the regulations. The Council does not propose to make any substantial changes and is simply renumbering and moving section 11149 to section 14008.

Article 2. General Definitions

§ 11150 § 14020, Definitions

The purpose of the entire definitions section is to give meaning to technical or unfamiliar terms used in Article 9.5 and the regulations and to provide guidance when there is no other applicable section of the regulations. The Council proposes to move and update pre-existing definitions that were in various prior sections and consolidate them in a single “Definitions” section, as part of the new numbering scheme designed to enhance the readability and usability of the regulations, and to address changes necessary to implement S.B. 1442’s reorganization of Article 9.5 and its enforcement and regulatory mechanisms. New definitions are also added to provide clarity. Non-substantial changes are proposed to make cross-references and capitalization consistent

throughout the revised regulations.

§ 14020(a) “The Act” or “Article 9.5”

The Council proposes to add a new definition of “the Act” or “Article 9.5” to reference Government Code sections 11135 to 11139.8, inclusive. This is necessary for clarity and to provide a uniform term for a reference used in many places in the proposed regulations.

§ 14020(b) “Adverse action”

The Council proposes to add a new definition of “adverse action” to provide a uniform term for an essential element of a claim under Article 9.5. This is necessary to create a consistent reference to the broad range of actions that can give rise to a claim under Article 9.5 – a range that includes but expands beyond housing and employment contexts. This section also eliminates repetitive definitions. The proposed definition is consistent with the FEHA’s housing discrimination regulations, which define “adverse action” as “action that harms or has a negative effect on an aggrieved person,” including “reducing services, changing the terms, conditions, or privileges” and “harassment.” (Cal. Code Regs., tit. 2, § 12005(b).) The FEHA’s employment regulations also provide some examples of adverse actions. (*See* Cal. Code Regs., tit. 2, §§ 11091(a)(5) [denying CFRA leave], 11049(c) [denying reasonable accommodation, transfer, or pregnancy disability leave], 11029(b) [treating differently, paying less, treating adversely based on stereotyping, subjecting to conduct of a sexual nature, or subjecting to a hostile work environment], 11017.1(g)(3) [discharging, laying off, or declining to promote].)

§ 14020(c) “Age” (Previously §§ 11170(b), 11170(c), and 11170(d))

The Council proposes to renumber and move the subsection that defines “age” and update the definition to provide a uniform term for a reference used in many places in the proposed regulations. The definition was previously at section 11170(b). These changes are necessary to create a consistent reference for the term “age” and to eliminate repetitive definitions. The definition is being updated to clarify that “age” can be perceived or actual, pursuant to Government Code section 11135(d). For ease of reference, the revised definition also consolidates two related terms (“age distinction” and “age-related term”) under “age,” which were previously found at subsections (c) and (d) of section 11170. The term “age distinction” is not being substantively altered. The term “age-related term” is modified only as follows: “‘Age-related term’ means a word or words which describe or ~~necessarily~~ imply a particular age or range of ages....” The new definition better implements the term “perceived” under section 11135(d) because one person could perceive a term to be “age-related,” but another person may not. The word “necessarily” could be misinterpreted to require that an age-related term be *inevitably* perceived as “age-related”; such inevitability could imply a heightened standard of proof not required by law. No other substantial changes were made to that term. (*See also* proposed section 14080, which cross references these terms in the substantive provisions relating to age discrimination.)

§ 14020(d) “Aggrieved person”

The Council proposes to add a new definition of “aggrieved person.” The definition is necessary for clarity, to provide a uniform term for a reference used in many places in the proposed regulations, and to eliminate repetitive definitions. This definition is also necessary to distinguish this term from “person,” which is a broader term. Whereas the term “person,” for purposes of Article 9.5, “means an individual, proprietorship, firm, partnership, joint venture, syndicate,

corporation, association, committee, legal representative, trustee, trustee in bankruptcy, receiver and any other organization or group of persons acting in concert.” (Cal. Code Regs., tit. 2, § 11150), “aggrieved person” refers to someone whose rights were or may be infringed. It is necessary to provide consistency with other laws enforced by the Department, as well as Government Code section 12927(g). Specifically, the Council proposes to use the term “aggrieved person” because it is analogous to the term used in the FEHA. (*See* Gov. Code § 12927(g) [“‘Aggrieved person’ includes any person who claims to have been injured by a discriminatory housing practice or believes that the person will be injured by a discriminatory housing practice that is about to occur.”]; *see also, e.g.*, Gov. Code §§ 12961, 12965(e)(1)(C).)

The ADA also uses the term “aggrieved persons.” (*See* 42 U.S.C. § 12203(c) [“The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons.”].) Thus, using the term “aggrieved persons” ensures that these regulations comply with section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.”

Additionally, in its online publication entitled the “Complaint Process,” CRD describes an “aggrieved person” as one who has been “harmed,” and in its FAQ’s, as one who feels they were a “victim of discrimination.” In a similar vein, the Council describes an “aggrieved person” as one who has been “injured.” Thus, the proposed definition includes individuals who believe they have been injured by a discriminatory practice or believe that they may be injured by a discriminatory practice, because parties falling into both categories can file a claim or a civil action under Article 9.5.

The Council also proposes to clarify that “aggrieved person” includes unpaid interns, volunteers, and persons providing services pursuant to a contract. This is necessary to be consistent with Government Code section 12940(j), which makes it an unlawful practice to engage in harassment against such persons on a protected basis. Adding this language is also necessary to provide clarity as to section 11135’s coverage of the term “person,” which has been a source of confusion. Additionally, Government Code sections 11349 and 11349.1 state that the OAL shall review proposed regulations for “consistency,” to ensure they are “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

§ 14020(e) “Ancestry”

The Council proposes to add a new definition of “ancestry” to provide a uniform term for a reference used in many places in the proposed regulations. This is necessary to describe to which relationships or characteristics the phrase “ancestry” applies as it is used in Article 9.5. Doing so clarifies what actions may constitute discrimination on the basis of ancestry. “Ancestry” is an enumerated basis in section 11135, but it is not defined in the FEHA at Government Code section 12926 or 12926.1. Thus, defining it is necessary to provide clarification and guidance pursuant to Government Code section 11342.2. The proposed definition is consistent with the definition of “ancestry” at census.gov: “Ancestry refers to a person’s ethnic origin or descent, ‘roots,’ or heritage, or the place of birth of the person or the person’s parents or ancestors before their arrival in the United States.”

§ 14020(f) “Assistance animal”

The Council proposes to add a new definition of “assistance animal” to provide a uniform term for a reference used in many places in the proposed regulations. This is necessary for clarity and consistency and to eliminate repetitive definitions. It is also necessary to provide consistency with other regulations implementing other laws enforced by the Department—sections 11065(a) and 12005(d) of the Council’s regulations—and to provide clarity in an area of the law where there is a great deal of confusion and inconsistency in implementation by stakeholders. The new definition is consistent with case law. The new definition is detailed to distinguish among different categories of assistance animals recognized by case law and statute, specifically “service animals” in paragraph (1) and “support animals” in paragraph (2) of this subsection. Such clarification is necessary because some rights and obligations apply to all assistance animals, and some rights and obligations are specific to either “service animals” or “support animals.” In particular, the definitions and examples of service animals are necessary to provide consistency with other statutes that are also enforced by the Department (e.g., Civil Code section 54.1.).

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” While the coverage of miniature horses is based on state law, not federal law, the reference to the federal definition of “miniature horses” in subparagraph (D) of paragraph (1) of this subsection, along with the definition generally, meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* the United States Department of Justice (“DOJ”) American with Disabilities Act (“ADA”) Title II regulations at 28 C.F.R. § 35.136, revised March 15, 2011 [protections for miniature horses as assistance animals].) The proposed assistance animal regulations are consistent with the FEHA fair housing regulations. (Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance Animals”].)

§ 14020(g) “Associated with”

The Council proposes to add a new definition of “associated with” to provide a uniform term for a reference used in many places in the proposed regulations. This definition is necessary for clarity and consistency, to eliminate repetitive definitions, and to implement Government Code section 11135(d), which explicitly includes in protected bases people who are “*associated with a person who has, or is perceived to have, any of those characteristics*” (emphasis added).

Because this term is subject to confusion, the Council proposes several examples for clarity. The non-exhaustive list of examples of how individuals may be associated with persons who are perceived to be members of a protected class include examples that commonly arise in discrimination cases. This definition is further necessary to define a term to provide clarification and guidance pursuant to Government Code section 11342.2. The Council’s proposed definition is consistent with court interpretations. (*See, e.g., Castro-Ramirez v. Dependable Highway Express Inc.* (2016) 2 Cal.App.5th 1028 [explaining that the father of a child with a disability was “associated with” a person with a disability for purposes of the FEHA, and finding a triable

issue of fact as to whether his employer discriminated against him on the basis of that association].)

§ 14020(h) “Auxiliary aids and services”

The Council proposes to add a new definition of “auxiliary aids and services.” The changes are necessary to accurately describe a significant number of examples of the types of auxiliary aids and services that may be necessary to provide effective communications for people with disabilities. It is also necessary to provide consistency with other regulations, such as section 11065(n)(3) of the Council’s regulations, and to provide clarity in an area of the law where there is a great deal of confusion and inconsistency in implementation by stakeholders. Paragraphs (1) through (5), inclusive, of this subsection provide non-exhaustive examples of types of auxiliary aids and services to provide more clarity and guidance for the regulated community.

Additionally, the Council proposes to define “qualified reader” in subparagraph (A) of paragraph (2) of this subsection. It is necessary to explain and distinguish between qualified readers, often used by blind individuals or those with vision disabilities, and other types of auxiliary aids and services used by those individuals. This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by Government Code section 11135 “shall be subject to the stronger protections and prohibitions.” The revised definition meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* 42 U.S.C. § 12103(1) [definition of “auxiliary aids and services”] and DOJ ADA Title II regulations at 28 C.F.R. § 35.104, revised October 11, 2016 [definitions of “auxiliary aids and services” and “qualified readers”]).

§ 14020(i) “Benefit” (Previously § 11150)

The Council proposes to update the definition of “benefit” currently contained in former section 11150 to clarify the scope of the term. The term is used in section 11135, which explicitly provides protection from being “*unlawfully denied full and equal access to the benefits of*” a program or activity (emphasis added). It is necessary both to define a “benefit,” which is a term used throughout the regulations, and to clarify that the term applies not only to entities receiving state support, but to the full range of state programs that provide benefits and are subject to Article 9.5. The Council retained the existing regulatory definition but clarified and updated the language to ensure that benefits can include “maintaining a condition, or preventing anticipated deterioration.” For example, government-funded weatherization benefits are intended in part to maintain and prevent deterioration in housing, and health benefits, such as vaccines, are designed to prevent deterioration in health, not improve immediate health. The updated definition also clarifies that the “benefits” covered by section 11135 include not only those that are provided to an individual with a disability, but also those that are “offered” but may or may not be accepted. (*See* 28 C.F.R. § 35.130(e)(1) [“Nothing in this part shall be construed to require an individual with a disability to accept [a] ... benefit provided under the ADA or this part which such individual chooses not to accept.”]).

§ 14020(j) Color (Previously § 11161(b))

The Council proposes to renumber and move the subsection that defines “color” and update the definition to provide a uniform term for a reference used in many places in the proposed regulations. Currently, “color” and “ethnic group identification” are defined synonymously in

section 11161(b). In Government Code section 11135(a), the terms are enumerated separately. Therefore, the Council proposes to provide separate definitions for each basis. This revision is necessary to ensure that the term “color” has a definition consistent with the meaning that has been commonly used by courts and federal agencies.

§ 14020(k) “Contract” (Previously § 11150)

The Council proposes to amend the definition of “contract” contained in former section 11150. The amendments are necessary to ensure that the requirements of the Article 9.5 and its implementing regulations can be fully enforced. Consistent with the California Civil Code and case law, the modifications clarify that the amount or type of consideration is not relevant to whether there is a contract and that a contract can be for single or multiple acts.

§ 14020(l) “Contractor” (Previously § 11150)

The Council proposes to amend the definition of “contractor” contained in former section 11150 to clarify that a contractor includes not only a person or local agency but any recipient of state support under a contract or subcontract. This is necessary to conform the regulations to the scope of Article 9.5 by acknowledging that there are recipients other than local agencies.

§ 14020(m) “Covered Entity”

The Council proposes to provide a definition of the umbrella term “Covered Entity” that is used throughout the regulations. This definition is necessary to clarify the individuals and entities subject to section 11135 and its implementing regulations. The proposed language in subparagraphs (A) through (C), inclusive, of paragraph (6) is consistent with Title VI at 42 U.S.C. § 2000d-4a(3).

The Council’s proposed definition of “covered entity” is consistent with corresponding federal statutes. Section 504 regulations clarify that the statute applies to “each recipient” of Federal funding and to each “program or activity” receiving such assistance. (28 C.F.R. § 42.502.) The implementing regulations further define “recipient” to mean “any State or unit of local government, any instrumentality of a State or unit of local government, any public or private agency, institution, organization, or other public or private entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.” (28 C.F.R. § 42.540(e).) Similarly, the regulations implementing Title VI define “recipient” to mean “any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary.” (28 C.F.R. 42.102(f).) Further, section 202 of the ADA, which prohibits public entities from discriminating against, or denying services or benefits to, an individual on the basis of disability, defines “public entity” to mean “any state or local government,” “any department, agency, special purpose district, or other instrumentality of a State or States or local government,” and “the National Railroad Passenger Corporation, and any commuter authority.” (42 U.S.C. §§ 12131(1), 12132.)

§ 14020(n) “DFEH” or “the Department” (Previously § 11150)

The Council proposes to update the definition of “DFEH” by adding “or the Department” to provide an alternative term to refer to the Department of Fair Employment and Housing, which is first mentioned in section 12901 of the Government Code. This is a non-substantial revision necessary to reflect how the Department of Fair Employment and Housing is often referred to in practice— “DFEH” or “Department.”

Effective July 1, 2022, the Department’s name was changed to the Civil Rights Department.

§ 14020(o) “Direct threat”

The Council proposes to add a definition of “direct threat” to clarify a term which is used in the regulations, and has been used in case law, in connection with protection for people with disabilities. The definition is necessary because the term is not defined in Article 9.5. This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The definition meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.139, revised March 15, 2011 [direct threat exception].)

§ 14020(p) “Disability” (Previously § 11187(a), (b), and (c))

The Council proposes to renumber, move, and combine the subsections that defined “disabled person,” “physical or mental impairment,” and “disability” previously found in subsections (a), (b), and (c) of section 11187 and update the definitions. The amendments address statutory changes in Article 9.5 and other state and federal statutes and regulations since the prior regulation was adopted. The proposed definition provides a comprehensive definition of “disability” and its component parts to be consistent with Article 9.5, the ADA, Section 504, and related state statutes such as the FEHA and the Unruh Civil Rights Act. The proposed definition is comprehensive and incorporates and updates the prior definitions, including the provisions relating to a record of a disability and being regarded as a person with a disability, while acknowledging statutory changes and currently preferred terminology. Each of the subsections in the definitions elaborate further on the component characteristics of the definitions. The definition also incorporates the requirements of Government Code section 11135(a)-(d) and is consistent with Government Code sections 12955.3, 12926(j), 12926(m), 12926(n), and 12926.1.

The Council proposes to add new definitions of “assistive technology,” and its subsets, “assistive technology device” and “assistive technology service,” to provide uniform terms for references used in many places in the proposed regulations. The new definitions are necessary to clarify and make specific the ways in which assistive technology can be used to enable people with disabilities to fully and equally participate in programs and services, as required by Article 9.5. The definition and its subparts meet or exceed the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability”].) This is necessary to comply with Government Code section 11135(b), which requires the protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by

section 11135 “shall be subject to the stronger protections and prohibitions.”

Moreover, the terms “assistive technology device” and “assistive technology service” are used in Section 504 at 29 U.S.C. § 705(3), which provides that each term shall have “the meaning given such term in section 3002 of this Title [Assistive Technology for Individuals with Disabilities].” Therefore, the Council has used the terms as defined in that section, 29 U.S.C., chapter 31, “Assistive Technology for Individuals with Disabilities.” (*See* 29 U.S.C. §§ 3002(4) and (5).) The express purposes of Chapter 31 are to increase coordination among federal and state agencies on assistive technology and to increase awareness and facilitate the change of laws and regulations to facilitate the availability of assistive technology. (29 U.S.C. §§ 3001(b)(1)(E) and (F).) The Council determined this was an appropriate analogous source for clear definitions in the proposed regulations. The Council also determined that this is an appropriate definition to ensure consistency with Section 504.

The definitions of “ordinary eyeglasses or contact lenses” and “low-vision devices” come directly from the ADA at 42 U.S.C. § 12102(4)(E)(iii). (*See also* 28 C.F.R. § 35.108(d)(1)(viii).) The term “assistive technology” is utilized in the ADA’s definition of a disability at 42 U.S.C. § 12102(4)(E)(i)(II). These definitions are also consistent with the FEHA at Government Code section 12926.1, particularly subdivision (c).

§ 14020(p)(1)

This paragraph clarifies that the definitions provide protections that are independent from those in the ADA and may afford additional protections but in no event shall be construed to provide fewer protections than the ADA. This is necessary to incorporate the requirements of Government Code section 11135(a)-(d) and is consistent with Government Code sections 12955.3, 12926(j), 12926(m), and 12926(n), and 12926.1. The definition and its subparts meet or exceed the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability”].) This is necessary to comply with Government Code section 11135(b), which requires the protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.”

§ 14020(p)(2)

The Council proposes to add that “[a]ll definitions shall be interpreted in accordance with the construction mandates of section 12926.1 of the Government Code.” Government Code section 11135(b) provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” Therefore, the proposed language referencing Government Code section 12926.1 is necessary to ensure that people with disabilities are afforded all possible protections under state law. (*See* Gov. Code § 12926.1(a) [“The law of this state in the area of disabilities provides protections independent from those in the federal [ADA]. Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional

protections.”].) The proposed language is also necessary to ensure consistency with Government Code sections 12926.1 and 12926(n), as required by section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(3)

The Council proposes to define “mental disability.” This paragraph is necessary to provide a uniform definition for a term referenced throughout the proposed regulations. This paragraph is also necessary for the regulations to be consistent with Government Code sections 12926(j), 12926(n), and 12926.1, as required by section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. Additionally, Government Code section 11135(b) provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition and its subparts meet the protections and prohibitions of the ADA (*see* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability”]) or exceed them where the FEHA is stronger. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(4)

The Council proposes to define “physical disability.” This paragraph is necessary to provide a uniform definition for a term referenced throughout the proposed regulations. This paragraph is also necessary to be consistent with Government Code sections 12926(m), 12926(n), and 12926.1, as required by section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. Additionally, Government Code section 11135(b) provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The definition and its subparts meet the protections and prohibitions of the ADA, as required by section 11135(b). (*see* DOJ ADA Title II regulations at 28 C.F.R. § 35.108(b), revised October 11, 2016 [definition of “disability,” including the definition of physical or mental impairment]) or exceed them where the FEHA is stronger. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(5)

The Council proposes to define “[h]aving a record of such impairment.” The definition is necessary to be consistent with Government Code sections 12926(j)(3) and 12926(m)(3)), as required by section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in Government Code section 12926. The

definition is also necessary to meet or exceed the protections and prohibitions of the ADA, as required by section 11135(b). (See DOJ ADA Title II regulations at 28 C.F.R. § 35.108(e), revised October 11, 2016 [definition of disability, including subsection (e), having a record of impairment].) Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(6)

The Council proposes to define “[p]erceived as having an impairment.” This paragraph renumbers and updates the definition of “is regarded as having an impairment” in former section 11187(b)(5). The updates are necessary to comply with section 11135(d), which provides that “the protected bases used in this section include a *perception* that a person has any of those characteristics or that the person is associated with a person who has, or is *perceived* to have, any of those characteristics” (emphasis added). The updated definition is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The definition is necessary to be consistent with Government Code sections 12926(j)(4) and (5) in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926. (See also Cal. Code Regs., tit. 2, § 11065(d)(5).) Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(7)

The Council proposes to clarify the extent of “disability” covered by Article 9.5. The definition is necessary to be consistent with Government Code sections 12926(n) and 12926.1 in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926. This clarification is also necessary to comply with Government Code section 11135(b), which requires the protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The examples of disabilities enumerated in this proposed regulation are consistent with the regulations implementing section 202 of the ADA (in particular 28 C.F.R. §§ 35.108(b)(1) and (d)(2)(iii)) and the regulations implementing the FEHA (in particular Cal. Code Regs., tit. 2, § 11065(d)(1)-(2)). Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(8)

The Council proposes to add that “[i]ndividuals are protected from discrimination and denial of full and equal access due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived or regarded as disabling or potentially disabling

(even if it has no present disabling effect), including when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity, whether or not the impairment actually limits or is perceived to limit a major life activity.” The definition is necessary to be consistent with Government Code section 12926(j)(3) and (m)(3) in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926.

This paragraph is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This proposed amendment meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of disability, including coverage of “regarded as having an impairment”].) Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(9)

The Council proposes to add that “[p]hysical and mental disabilities include chronic or episodic conditions, such as, HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.” These examples are illustrative, not exclusive, as denoted by the definition of “includes” to mean “includes but not limited to.” (*See* section 14020(x).)

This paragraph is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The addition is consistent with Government Code sections 12926.1 and 12926(n), which define “disability” more broadly than does federal law and are therefore more protective. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability,” including subsection (b) (lists of impairments that may constitute disabilities) and subsection (d)(iv) (conditions that are episodic or in remission are covered if they would be disabling if active)].)

The definition is also necessary in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(10)

The Council proposes to add that the “definitions of ‘physical disability’ and ‘mental disability’

require a ‘limitation’ upon a major life activity, but do not require, as does the ADA, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under this subchapter than under the ADA.” This paragraph is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The paragraph is consistent with Government Code sections 12926.1(c) and 12926(n), which define “disability” more broadly than does federal law and are therefore more protective. The definition is also necessary in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(11)

The Council proposes to add that “‘major life activities’ shall be broadly construed and include physical, mental, and social activities; caring for one’s self; performing manual tasks, walking, seeing, hearing, speaking, breathing, eating, sleeping, standing, lifting, bending, learning, reading, concentrating, thinking, communicating, and working. Working is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employment.” This paragraph renumbers and updates the definition of “major life activities” in former section 11187(b)(3). The definition is also necessary in order to comply with section 11135(c), which mandates that the definitions of the protected bases listed in subdivision (a) of that section have the same meaning as the terms in section 12926.

This paragraph is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The paragraph is consistent with Government Code sections 12926(j)(1)(C) and 12926(m)(1)(B), which define “disability” more broadly than does federal law and are therefore more protective. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability,” including section (c) (“major life activities”)]). Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(12)

The Council proposes to add that “a major life activity also includes the operation of a major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, cardiovascular, genitourinary, hemic, neurological, lymphatic, brain, respiratory (including speech organs), circulatory, endocrine, and reproductive functions.” This paragraph is necessary to further clarify and make specific the scope of the term “a major life activity.” This paragraph is also necessary to comply with Government Code section 11135(b), which provides

that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This definition meets or exceeds the protections and prohibitions of section 202 of the ADA. (See DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of “disability,” including subsection (c)(1) (“major life activities”)]). Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(13) and (14)

The Council proposes to add paragraph (13) to this subsection, stating that “[a] disability limits a major life activity if it makes the achievement of the major life activity difficult.” The Council also proposes to add paragraph (14) to this subsection, stating that “[an] impairment that limits one major life activity need not limit other major life activities in order to be considered a disability.” (See 28 C.F.R. § 35.108(d)(iii).) These paragraphs are necessary to further clarify the scope of the term “limits a major life activity.” Both paragraphs are necessary because Government Code section 11135(c) mandates that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. Paragraph (13) is consistent with Government Code 12926 subdivisions (j)(1)(B) (stating that “[a] mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult”) and (m)(1)(B)(ii) (stating that “[a] physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult”). Paragraph (14) is also consistent with Government Code section 12926, which repeatedly states that a disease, disorder, condition, or other impairment can constitute a disability if it limits “a [singular] major life activity” (emphasis added). (See Gov. Code §§ 12926(j)(1), (m)(1)(B).) These paragraphs also are necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” Subdivisions (j) and (m) of Government Code section 12926 define “disability” more broadly than does federal law and are therefore more protective. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(15)

The Council proposes to add that the “determination of whether an impairment limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the ADA” and to provide a non-exhaustive list of mitigating measures. This paragraph is necessary to further clarify the scope of the term “limits a major life activity” and provide examples of mitigating measures used by people with disabilities. The paragraph is consistent with Government Code sections 12926(j)(1)(A) and 12926(m)(1)(B)(i), including provision for assistive devices, which define “disability” more broadly than does federal law and are therefore more protective. Paragraph (15) also is consistent with Government Code section 12926.1,

particularly subsection 12926.1(c). The definition is also necessary to comply with section 11135(c), which mandates that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926.

The Council proposes to add new definitions of “assistive technology device” ((p)(15)(B)(i)) and “assistive technology service” ((p)(15)(B)(ii)) to provide uniform terms for a reference used in the proposed regulations. The new definitions are necessary to clarify and make specific how assistive technology can be used to enable people with disabilities to fully and equally participate in programs and services, as required by Article 9.5. These definitions are also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The definitions meet or exceed the protections and prohibitions of section 202 of the ADA. (*See* 42 U.S.C. § 12102(4)(E)(i) [the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures and listing various measures] and 28 C.F.R. § 35.108(d)(1)(viii), revised October 11, 2016.) The definitions of “ordinary eyeglasses or contact lenses” and “low-vision devices” come directly from the ADA at 42 U.S.C § 12102(4)(E)(iii). (*See also* 28 CFR § 35.108(d)(1)(viii).)

Moreover, the terms “assistive technology device” and “assistive technology service” are also used in Section 504 at 29 U.S.C. § 705(3). Section 705(3) provides that each term shall have “the meaning given such term in section 3002 of this Title.” Therefore, the Council has used the terms as defined in section 3002, 29 U.S.C chapter 31, “Assistive Technology for Individuals with Disabilities.” (*See* 29 U.S.C. §§ 3002(4) and (5).) The express purposes of Chapter 31 are to increase coordination among federal and state agencies on assistive technology, and to increase awareness and facilitate the change of laws and regulations to facilitate the availability of assistive technology. (§ 3001(b)(1)(E) and (F).) The Council determined this was an appropriate analogous source for the definitions in the proposed regulations since a definition is necessary for clarity. The Council also has determined that this is an appropriate definition to ensure consistency with Section 504.

Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(16)

The Council proposes to add that the “ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment limits a major life activity” and to define “ordinary eyeglasses or contact lenses” and “low-vision devices.” The terms “ordinary eyeglasses or contact lenses” and “low-vision devices” are defined in the ADA at 42 U.S.C. § 12102(4)(E)(iii). This paragraph is necessary to further clarify the scope of the term “limits a major life activity.” This paragraph is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA

unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.”

§ 14020(p)(17)

The Council proposes to add that “[d]isability’ does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs. ‘Sexual behavior disorders’ means pedophilia, exhibitionism, and voyeurism.” This paragraph is necessary to identify some limited statutory exceptions to the definition of “disability.” In particular, it is necessary to implement the specific exceptions in Government Code sections 12926(j)(5) and 12926(m)(6), because section 11135(c) mandates that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. The exception regarding current use of illegal substances is addressed further in subsection 14020(p)(18), immediately below, which clarifies that substance abuse is exempted from the definition *only* if it results from the *current, unlawful* use of a controlled substance. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(18)

The Council proposes to include four classes of individuals who are not engaged in “current unlawful use of controlled substance or drugs.” This paragraph is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This paragraph meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* DOJ Title II regulations at 28 C.F.R. § 35.131(a)(2), revised March 15, 2011 [prohibiting public entities from discriminating “on the basis of illegal use of drugs” against an individual who is not currently using illegal drugs and who “[h]as successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully,” “[i]s participating in a supervised rehabilitation program,” or “[i]s erroneously regarded as engaging in such use.”].) Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(p)(19)

The Council proposes to add that “[n]otwithstanding other provisions of this subchapter, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of current unlawful use of drugs if the individual is otherwise entitled to such services.” This paragraph is necessary to ensure that Article 9.5 does not in any way operate to justify the denial of health services or drug rehabilitation services to someone who is unlawfully using drugs, if the individual is otherwise entitled to such services. This paragraph is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the

requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This paragraph meets or exceeds the protections and prohibitions in DOJ ADA Title II regulations at 28 C.F.R. § 35.131(b)(1), revised March 15, 2011 (“A public entity shall not deny health services, or services connected with drug rehabilitation, to an individual on the basis of that individual’s current illegal use of drugs, if the individual is otherwise entitled to such services”).

§ 14020(q) “Ethnic Group Identification” (Previously § 11161(b))

The Council proposes to renumber, move, and update the definition of “ethnic group identification” to provide a uniform term for a reference used in many places in the proposed regulations. Presently, “color” and “ethnic group identification” are defined synonymously in section 11161(b). In section 11135(a), the terms are enumerated separately. Therefore, the Council proposes to provide separate definitions for each basis, which is necessary to clarify that the term “ethnic group identification” refers both to actual and self-identified traits related to one’s ethnicity, as reflected by the Legislature’s express use of the term “identification,” as well as the “perception” of one’s ethnic group identification. This subsection is consistent with section 11027.1 of the Council’s regulations on employment discrimination based on national origin. This language also is necessary to clarify that ethnic group identification includes not only color, but also ancestry, national origin, and race. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(r) “Facility” (Previously § 11150)

The Council proposes to renumber and move the definition in subsection 11150 to subsection 14020(r) and to update it by further elaborating the range of facilities that fall within the term. This definition is necessary because the term is referred to throughout the proposed regulations as a short-hand term to describe buildings and related fixtures and equipment. The previous definition has been updated to be consistent with developments in the law and technology that have occurred since the prior definition was written 35 years ago. The existing definition includes personal property. Given the vital functions that technology now plays in the current operations, programs, and services of government and government-funded entities, the Council determined that it was necessary to add specificity to the definition by including “information systems and electronic technology, including mobile and tablet-based technology and newly developed forms of electronic information systems and technology as they become available.” The amendments are necessary to encompass the many types of personal property to which Article 9.5 applies, and to ensure that all such components of facilities are accessible to people with disabilities. It also includes technology such as a screen reader, captioning, and magnification software; Braille; and other personal property items that are now part of “facilities” in the public and government-funded private sectors.

These amendments are also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibition.”

This revision is also necessary to ensure that programs and services are equally available to people with disabilities, who may not have full access to those programs and services except for electronic means. And it is important to meet the ADA obligation to provide effective communication for people with disabilities. “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” (28 C.F.R. § 35.160(a)(1).) “A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” (28 C.F.R. § 35.160(b)(1).) The ADA also requires that “[a]gencies must ensure that all published electronic information is compatible with assistive technology devices commonly used by people with disabilities for information and communication. This applies to persons with disabilities who use assistive technology to read and navigate electronic materials.” (U.S. Dept. of Health and Human Services, “What is section 504 and how does it relate to Section 508?” (Aug. 19, 2015), <https://www.hhs.gov/web/section-508/what-is-section-504/index.html>.)

This subsection is also consistent with Government Code section 7405 (requiring state entities using electronic or information technology, directly or through the use of state funds by other entities, to comply with Section 508 of the Rehabilitation Act and implementing regulations), and section 11546.7 (requiring that state agencies certify that their websites are in compliance with Section 7405 and 11135).

§ 14020(s) “FEHC” or “Council”

The Council proposes to amend “FEHC” by adding “or Council” after it. This is necessary to provide a short-hand term for referring to the Fair Employment and Housing Council and implements Government Code section 12903. This is a non-substantial revision necessary to reflect how the Fair Employment and Housing Council is often referred to in practice: “FEHC” or “Council.”

Effective July 1, 2022, the Council’s name was changed to the Civil Rights Council.

Former § 11150 “Funded directly by the State”

The Council proposes to delete this definition. This deletion is necessary because the definition has been subsumed under the definition of “State support” in section 14020(ww).

§ 14020(t) “Gender”

The Council proposes to add a new definition of “gender.” This definition is necessary to clarify that “sex,” which is one of the enumerated bases in section 11135, includes “gender.” Section 11135(c) provides that terms used in section 11135(a) have the same meaning as found in Government Code section 12926, and the proposed definition of “gender” derives directly from section 12926(r)(2), which states as follows: “‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” The proposed definition is

also consistent with the Council’s definition of “gender” in subsection 11030(c) of the Council’s regulations pertaining to sex discrimination in employment. Further, the proposed addition is necessary to clarify a term that is used throughout the proposed regulations and to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(u) “Genetic information”

The Council proposes to add a new definition of “genetic information.” This regulation is necessary to clarify the definition of a term that is now an enumerated basis in section 11135. Section 11135(c) provides that terms used in section 11135(a) have the same meaning as found in section 12926, and the proposed definition of “genetic information” derives directly from section 12926(g). Further, the proposed addition is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation, particularly because it is a technical term. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(v) “Grant” (Previously § 11150)

The Council proposes to renumber, move, and update this definition of “grant.” This definition is necessary to clarify the meaning of grants, a form of state support. Modifications to the existing definition are necessary to add additional clarity and specificity through relevant examples.

§ 14020(w) “Grantee” (Previously § 11150)

The Council proposes to renumber and move the definition in section 11150 to subsection 14020(w) and update the definition of “grantee.” Minor modifications to the existing definition are necessary to make this term consistent with other changes in the regulations, but no substantial changes are proposed.

§ 14020(x) “Includes” or “including”

The Council proposes to add a new definition of “include” or “including” to provide a shorthand reference for terms of inclusion: “includes, but not limited to.” This definition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations, and it enables the Council to state rules succinctly rather than provide a definition mid-sentence. The proposed definition clarifies that this term is always non-exclusive and that any list of items following it are intended to be illustrative but not exhaustive.

§ 14020(y) “Intersectional Discrimination”

The Council proposes to add the definition of “intersectional discrimination” to define a form of discrimination prohibited by Article 9.5. “Intersectionality” or “intersectional discrimination” generally refers to the recognition that discrimination may occur as the result of the intersection of two or more protected bases, such as race and sex. For example, an African American woman may suffer unlawful discrimination even if Caucasian women and African American men do not. (*See Lam v. Univ. of Hawaii* (9th Cir. 1994) 40 F.3d 1551, 1562 [“[W]here two bases for

discrimination exist, they cannot be neatly reduced to distinct components.”].) The term “intersectionality” is also used by the EEOC in its Enforcement Guidance, which states in part that “discrimination motivated by a stereotype about two or more protected traits would constitute intersectional discrimination,” and provides an example. (*See* EEOC Enforcement Guidance on National Origin Discrimination (11-18-16) at <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination>, replacing section 13 of the U.S. Department of Justice Notice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (June 18, 2002) 67 FR 41455-01 – 41472, 2002 WL 1310207.) The EEOC Guidance cites *Lam, supra*, and *Jefferies v. Thompson* (D. Md. 2003) 264 F.Supp.2d 314, 326. In addition, in *Jefferies v. Harris County Community Action Assn.* (5th Cir. 1980) 615 F.2d 1025, 1032, the Fifth Circuit Court of Appeals explains that “discrimination against black females can exist even in the absence of discrimination against black men or white women.” *Jefferies* was cited with approval by the U.S. Supreme Court in *Olmstead v L.C., ex rel Zimring* (1999) 527 U.S. 581, 598, fn. 10, a case brought under the ADA. The definition is necessary to elaborate upon a term used in subsection 14000(e) and to provide further guidance to the regulated community that intersectional discrimination is prohibited by the Article 9.5.

§ 14020(z) “Local agency” (Previously § 11150)

The Council proposes to renumber and move the definition in subsection 11150 to subsection 14020(z) and amend the definition of “local agency.” Additions to the existing definition are necessary to add additional clarity about the breadth of the term, as well as additional relevant examples.

§ 14020(aa) “Marital status”

The Council proposes to add the definition of “marital status” to define one of the enumerated bases expressly included in Government Code section 11135(a). The added definition is necessary to clarify that a covered entity may not discriminate against anyone on the basis of marital status and that marital status refers not only to being married, but also to not being married. Further, the definition incorporates section 11135(d)’s mandate that the law applies to others’ perception of a person’s marital status, as much as it applies to one’s actual marital status. This addition is consistent with the inclusion of marital status in Government Code sections 12920, 12926(l), 12926(o), and 12927. The proposed definition is virtually identical to section 11053 of the Council’s employment regulations, but updates that regulation by clarifying that “domestic partnership” is a form of marital status to accord with Family Code section 297.5, which affords the same rights to registered domestic partners as to married spouses. In addition, as of January 1, 2021, Government Code section 12945.2 (California Family Rights Act) was amended to expressly apply to domestic partners, as the term is defined in section 297 of the Family Code.

The Council also proposes to add “actual or perceived” to reflect the requirement in 11135(d) that definitions of protected bases include “a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.” Pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(bb) “May” (Previously § 11150)

The Council does not propose to make any substantial changes and is simply renumbering and moving the definition from previous section 11150 to subsection 14020(bb).

§ 14020(cc) “Medical condition”

The Council proposes to add a new definition of “medical condition,” which incorporates the term “genetic characteristics.” This is necessary to provide a uniform definition for a term referenced in Article 9.5 and the proposed regulations, since “medical conditions” were not included in Article 9.5 at the time the prior regulations were adopted. “Medical condition” is now one of the enumerated bases in section 11135. This subsection is also necessary to comply with Government Code section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926; the proposed definition is consistent with Government Code section 12926(i). Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(dd) “National origin”

The Council proposes to add the definition of “national origin” to define one of the enumerated bases expressly included in Government Code section 11135(a). This definition is necessary to make clear that a covered entity may not discriminate against anyone on the basis of national origin and incorporates Government Code section 11135(d)’s mandate that the law applies to a person’s actual or perceived national origin. Without further guidance, the term is subject to misinterpretation. This addition is consistent with the inclusion of “national origin” in Government Code sections 12920, 12926(l), 12926(o), 12926(v), and 12927, and complies with section 11135(c)’s mandate that the definitions of the protected bases listed in section 11135(a) have the same meaning as the terms in section 12926. This definition is consistent with section 11027.1 of the Council’s employment regulations but includes an addition to reflect the recent enactment of section 12926(v), which provides that “[n]ational origin’ discrimination includes, but is not limited to, discrimination on the basis of possessing a driver’s license....” Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(ee) “Other implementing regulations”

The Council proposes to add the definition of “other implementing regulations” to provide a short-hand term for referring to non-discrimination regulations, guidelines, or procedures adopted by other state agencies to implement Article 9.5. This definition is necessary to elaborate upon and clarify a term that is used throughout the proposed regulations and to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation.

§ 14020(ff) “Perceived membership in a protected class”

The Council proposes to add a definition of “perceived membership in a protected class.” This addition is necessary to reflect Government Code section 11135(d) and to provide a consistent definition for a statutory concept that is referenced throughout the proposed regulations. It also

enables the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation.

§ 14020(gg) “Person” (Previously § 11150)

The Council proposes to renumber and move the definition in section 11150 to 14020(gg) and update the existing definition of “person” to include the terms “entity” and “group.” This amendment is necessary to clarify the nature of certain entities and groups that are also covered by the definition.

§ 14020(hh) “Practice” or “Practices”

The Council proposes to add a new definition of “Practice” or “Practices.” This addition is necessary to provide a consistent definition for terms that are referenced throughout the proposed regulations and to clarify the very broad scope of the practices covered by Article 9.5. The regulation also enables the Council to state rules succinctly rather than provide a definition mid-sentence. This proposed definition is consistent with the definition of the term “practice” or “practices” in FEHA fair housing regulations, Cal. Code Regs., tit. 2, § 12005(x).

§ 14020(ii) “Program or activity” (Previously § 11150)

The Council proposes to renumber, update, and move the existing definition of “program or activity” from section 11150 to subsection 14020(ii). Updates to the language of the existing definition are necessary to ensure the comprehensive use of the term and to make the statute more specific, consistent with the statutory intent, and for clarity in connection with other changes in proposed definitions and regulations. The definition has been restructured, but continues to cover “any services, financial aid or benefit,” as in the existing regulation, as well as updated language covering “programs and activities” to ensure coverage consistent with the statute and the revised proposed regulations.

The revised definition is also necessary to clarify that, consistent with its federal counterparts, section 11135 prohibits discrimination throughout entire local government agencies or departments if any part of the agency or department receives state assistance. For instance, Section 504 defines “program or activity” to mean “all of the operations of . . . a department, agency, special purpose district or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.” (29 U.S.C. § 794(b).) Title VI contains the same language. (29 U.S.C. § 2000d-4a.)

This broad application of the term “program or activity” reflects the United States Congress’s intent, as expressly clarified through the Civil Rights Restoration Act of 1987, which overturned *Grove City College v. Bell*, (1984) 465 U.S. 555. *Grove* significantly narrowed prior interpretations of “program or activity.” Specifically, the Court ruled that Title IX of the Education Amendments of 1973, which prohibits sex discrimination in educational programs or activities receiving federal funding, applied only to the specific office of an institution’s operations that received the federal funding. (*Id.* at pp. 572-574.) Because the college received federal funds as a result of federal financial aid to students, the Court found that the “program or activity” was the college’s financial aid program. (*Id.* at pp. 573-574.) Overturning *Grove City*’s holding as to the scope of Title IX’s reach, the Civil Rights Restoration Act of 1987 included virtually identical amendments to broadly define “program or activity” for Title VI, Section 504,

Title IX, and the Age Discrimination Act. According to Section 2 of the Civil Rights Restoration Act of 1987, Congressional action was “necessary to restore the prior consistent and longstanding executive branch interpretation and broad, *institution-wide* application of those laws as previously administered” (emphasis added). (*See also* Dept. of Justice Civil Rights Division, Title VI Legal Manual, sec. V (hereinafter “DOJ Title VI Manual, sec. V”), p. 23 [“With regard to public institutions or private institutions that serve a public purpose, the ‘program or activity’ that Title VI covers encompasses the entire institution and not just the part of the institution that receives federal financial assistance. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct.” (citations omitted).].)

Notably, both Title VI and Section 504 also contain broad definitions of the “recipients” which are covered by their requirements. The implementing regulations for Title VI define “recipient” as “any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary. (28 C.F.R. § 42.102(f); *see also* 28 C.F.R. § 42.540(e) [defining “recipient” similarly for purposes of Section 504, but excluding “political subdivisions” or instrumentalities thereof].)

This amendment is also consistent with with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions under section 202 of the ADA. (*See* 42 U.S.C. § 12132 and 28 C.F.R. § 35.102, revised March 15, 2011, which provides that Title II of ADA applies to “all services, programs, and activities provided or made available by public entities.”)

§ 14020(ji) “Protected class” and “protected basis”

The Council proposes to add new definitions of “protected class” and “protected basis.” This addition is necessary to provide short-hand terms that are used interchangeably throughout the proposed regulations to describe those who are protected per the express terms of Article 9.5 and to enable the Council to state rules succinctly rather than provide a definition mid-sentence. This is also necessary to implement section 11135(c) which mandates that the protected bases shall have the same meaning as the terms in Government Code section 12926. This also implements section 11135(d) which states that “the protected bases used in this section include a perception that a person has any of those characteristics, or that a person is associated with a person who has, or is perceived to have, any of those characteristics.” Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(kk) “Qualified individual with a disability” (Previously § 11187(d))

The Council proposes to renumber the subsection that defines “qualified disabled person” and

update the definition, which was previously found at subsection 11187(d), to include updated and more appropriate terminology. The changes are necessary to accurately define the full range of individuals entitled to certain protections under Article 9.5. This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” Subsection (kk)(1) meets or exceeds the protections and prohibitions of section 202 of the ADA. (See 42 U.S.C. § 12131(2) and DOJ ADA regulations at 28 C.F.R. § 35.104, revised October 11, 2016 [definition of qualified individual with a disability].) It is also consistent with Section 504 of the Rehabilitation Act.

The Council also proposes to add as subsection (kk)(2) that “[w]ith respect to employment, a qualified individual with a disability is an applicant or employee who, with or without reasonable accommodations, can perform the essential functions of the job in question.” This is necessary to explain the intersection of being a “qualified individual with a disability” as it relates to employment law and is a version of subsection 11065(o) of the Council’s employment regulations which is slightly abbreviated because of the different context, but the two subsections are entirely consistent. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260-262.) Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(II) “Qualified interpreter” (Previously § 11161(c))

The Council proposes to renumber and update the definition of “qualified interpreter,” previously found at section 11161(c), to provide more clarity. Provision of a qualified interpreter insures effective language access. The Council is proposing this regulation to interpret and make specific a statutory term, which the Council is authorized to do under the Administrative Procedure Act, Government Code section 11342.600. The changes are necessary to provide clarity in an area of the law where there is a great deal of confusion and inconsistency in implementation by stakeholders.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions. The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ’s Title II ADA regulations at 28 C.F.R. §§ 35.104, revised October 11, 2016 (definition of qualified interpreter) and 28 C.F.R. § 35.160, revised March 15, 2011 (obligations to ensure effective communication).

Further, the proposed definition borrows heavily from and is consistent with the language access afforded by section 7296(a) of the Dymally-Alatorre Bilingual Services Act (Chapter 17.5 (commencing with section 7290) of Division 7 of Title 1 of the Government Code). The proposed definition is also consistent with regulations and guidance provided by the U.S. Department of Justice’s “ADA Title II Assistance Manual,” which addresses the requirements of

section 202 of the ADA. *See* section II-7.1200, regarding the requirements for qualified interpreters, <https://www.ada.gov/taman2.html>. The definition is also consistent with Section 504. Also useful in formulating this proposed definition is Title VI Guidance published by the Civil Rights Division of the U.S. Department of Justice in regard to individuals who are Limited English Proficient (“LEP”), including the following: “Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs,” (August 2011), including Question/Answer L (types of language assistance) and Question N (skills for interpreters and translators) at p. 8-10, <https://www.lep.gov/faq/faqs-federally-conducted-and-assisted-programs/common-language-access-questions-technical>; and U.S. Dept. of Justice, “Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs,” (May 2011) at pp. 5-6 (describing interpreters and translators), https://www.lep.gov/sites/lep/files/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf.)

§ 14020(mm) “Race”

The Council proposes to add a definition of “race,” one of the protected bases enumerated in Government Code section 11135 and which refers to “supposed or presumed physical, cultural, or genetic characteristics, or the perception of an individual’s race, without regard to whether those characteristics are immutable.” The Council is proposing this regulation to interpret and make specific a statutory term, which the Council is authorized to do under the Administrative Procedure Act, Government Code section 11342.600. “Race” is a term utilized throughout the statute and it is essential that the term be defined to fully implement the statute.

To ensure that Article 9.5 affords its intended protection against race discrimination, it is important to state that the term “race” is to be broadly construed. In line with the term’s broad construction, the proposed definition underscores that it is unlawful to discriminate based on “supposed or presumed...characteristics” or “perceptions” related to a person’s race. Focusing on perception is important because as one commentator explains, “[i]t is the perceptions of the alleged discriminators that determine the likelihood of experiencing discrimination....” (Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race* (2017) 38 Cardozo L. Rev. 1817, 1876.)

The change is necessary because without further guidance, the term is subject to misinterpretation. It also is necessary to highlight that race may overlap with other classes protected by Article 9.5, as the Supreme Court recognized in *St. Francis College v. Al-Khazarji* (1987) 481 U.S. 604. In that opinion, the Court interpreted 42 U.S.C. § 1981’s prohibition against racial discrimination to include discrimination on the basis of ethnicity or ancestry and held that a man who was born Arab could sue under Section 1981. (*Id.* at p. 613.) Since then, a number of courts have treated discrimination based on ethnicity as race discrimination under Title VII, and in *Village of Freeport v. Barrella* (2d Cir. 2016) 814 F.3d 594, the Court of Appeals for the Second Circuit expressly held that being “Hispanic” or “Latino” constitutes a race for purposes of Title VII. Similarly, being Jewish has been held to constitute race discrimination under 42 U.S.C. § 1982. (*Shaare Tefila Congregation v. Cobb* (1987) 481 U.S. 615, 617.)

The Council included “hair texture” and “protective hairstyles” in the definition of “race.” This is necessary because Government Code section 12926(w) states that “[r]ace” is inclusive of

traits historically associated with race, including, but not limited to, hair texture and protective hairstyles” and Government Code section 12926(x) states that “[p]rotective hairstyles’ includes, but is not limited to, such hairstyles as braids, locks, and twists.”

§ 14020(nn) “Real Property (Previously § 11150)

The Council proposes to renumber and update the existing definition of “real property.” One change is necessary to clarify that both unimproved and improved real property is covered by the definition, to provide additional guidance to stakeholders.

§ 14020(oo) “Recipient” (Previously § 11150)

The Council proposes to renumber and update the existing definition of “recipient” to mean “any covered entity or person, other than the state or a state agency, whether operating directly or indirectly through another recipient, including any local agency, contractor, subcontractor, agent, successor, assignee, or transferee of a recipient who receives state support.” The changes are necessary to state the entities and persons who may be covered by Article 9.5. The Council has removed the exemptions for recipients with fewer than 5 employees or who received less than certain dollar amounts of State support because there is no statutory basis for such exemptions. The Council also deleted a reference in the previous regulation exempting state agencies because state agencies are now expressly exempted in the first sentence of subsection 14020(oo).

§ 14020(pp) “Reasonable Accommodations” or “Reasonable Modifications”

The Council proposes to add a new definition of “Reasonable Accommodations” or “Reasonable Modifications” to give meaning to a term used in the regulations, including in section 14327, regarding accommodations or modifications for people with disabilities, defining them as adjustments necessary to afford an individual with a disability a full and equal opportunity to use or enjoy benefits, privileges, or services, programs, or activities, and providing examples. This replaces the former section 11166, “Reasonable Accommodation,” which referred to religious accommodations and has been deleted and replaced with section 14182, “Reasonable Accommodation of Religious Practice.” This change is necessary to provide a uniform term for a reference used in the proposed regulations, to ensure a broad interpretation consistent with the goals of the statute, and to eliminate repetitive definitions. It is also necessary to provide clarity and consistency in an area of the law where there is a great deal of confusion and inconsistency in implementation by stakeholders.

The proposed definition is consistent with Government Code section 12926(p), which provides that reasonable accommodations include making facilities readily accessible, modifying schedules, modifying materials, and other accommodations for people with disabilities. This is necessary to comply with section 11135(c), which mandates that the protected bases shall have the same meaning as the terms in Government Code section 12926. The definition is also consistent with Government Code section 12927(c)(1), which provides that discrimination includes the refusal to permit reasonable modifications of premises or reasonable accommodations in rules, policies, or practices; and with the FEHA housing regulations at California Code of Regulations, title 2, sections 12176-12181.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall

meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ’s Title II ADA regulations at 28 C.F.R. § 35.130(b)(7), revised October 11, 2016 (public entity shall make reasonable modifications in policies, practices and procedures when necessary to avoid discrimination on the basis of disabilities) and 34 C.F.R. § 104.12(b), effective November, 13, 2000 (reasonable accommodations may include making facilities readily accessible and modifying policies and procedures). Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(qq) “Religion” (Previously § 11165)

The Council proposes to revise the definition of “religion” and renumber section 11165. This is necessary to update and provide a more inclusive definition of “religion” and to make it clear that the terms “religion,” “religious creed,” “religious observance,” “religious belief,” and “creed” are all covered under the term “religion,” as they are in Government Code section 12926(q). This definition is consistent with longstanding EEOC Title VII guidance (*see* EEOC Compliance Manual (2008), section 12, “Religious Discrimination”).

The proposed definition also defines the related terms “religious dress practices” and “religious grooming practices,” which are described in Government Code section 12926(q). The inclusion of these terms is necessary to provide additional clarity and to comply with Government Code section 11135(c) which requires the protected bases to have the same meaning as the terms in Government Code section 12926. The definition is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

Former § 11150 “Secretary”

The Council proposes to delete this definition because the reference to the Secretary of the Health and Welfare Agency is no longer relevant due to the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms.

Former § 11150 “Services to be provided to the public”

The Council proposes to delete this definition, as it has been subsumed under the definition of “Program or activity” in subsection 14020(ii).

§ 14020(rr) “Sex”

The Council proposes to add the definition of “sex.” This is necessary to elaborate one of the enumerated bases in Government Code section 11135. Section 11135(c) provides that terms used in subdivision (a) of that section have the same meaning as in Government Code section 12926, and the proposed definition of “sex” is consistent with subdivision (r) of that section. It is also consistent with the Council’s definition of “sex” in subsections (a) to (f), inclusive, of section 11130 of the Council’s employment regulations. Further, the proposed addition is necessary to clarify a term that is used throughout the subchapter and to enable the Council to state rules

succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(rr)(1) “Gender identity”

The Council proposes to add a new definition of “gender identity.” This definition is necessary to clarify that “sex,” which is one of the enumerated bases in Government Code section 11135, includes “gender identity.” Section 11135(c) provides that terms used in subdivision (a) of that section have the same meaning as found in Government Code section 12926, and the proposed definition of “gender identity” derives directly from paragraph (2) of subdivision (r) of that section, which states as follows: “‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” The proposed definition is also consistent with the Council’s definition of “gender identity” in section 11130(b) of the Council’s regulations pertaining to sex discrimination in employment. Further, the proposed addition is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(rr)(2) “Gender expression”

The Council proposes to add a new definition of “gender expression.” This definition is necessary to clarify that “sex,” which is one of the enumerated bases in Government Code section 11135, includes “gender expression.” Section 11135(c) provides that terms used in subdivision (a) of that section have the same meaning as found in Government Code section 12926, and the proposed definition of “gender expression” derives directly from paragraph (2) of subdivision (r) of that section. The proposed definition is also consistent with the Council’s definition of “gender expression” in subsection (a) of section 11130 of the Council’s regulations pertaining to sex discrimination in employment. Further, the proposed addition is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(rr)(3) “Transgender”

The Council proposes to add a new definition of “transgender” to clarify that “sex,” which is one of the enumerated bases in Government Code section 11135(a), includes protections for people who are transgender. Government Code section 11135(c) provides that the protected bases enumerated in Government Code section 11135(a) must have the same meaning as in Government Code section 12926, and the term “transgender” is consistent with section 12926(r)(2). Moreover, this proposed regulation is consistent with the existing definition of “transgender” found in section 11130(e) of the Council’s employment regulations, which

interprets section 12926(r)(2). The proposed regulation also is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(ss) “Sexual orientation”

The Council proposes to add a new definition of “sexual orientation.” This is necessary because “sexual orientation” is now one of the enumerated bases in section 11135. Government Code section 11135(c) provides that terms used in subdivision (a) of that section have the same meaning as found in Government Code section 12926, and the proposed definition of “sexual orientation” is consistent with (s) of that section. Further, the proposed addition is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. When adopting the regulations regarding sexual harassment prevention trainings, the Council received significant public comment from stakeholders regarding the definitions of “gender identity,” “gender expression,” and “sexual orientation.” In response to this public comment, the Council is proposing this regulation to interpret and make specific a statutory term, which the Council is authorized to do under Government Code section 11342.600. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(tt) “Shall”

The Council is not proposing any changes to this subsection other than renumbering.

Former § 11150 “Should”

The Council proposes to delete the definition for the word “should” because its dictionary definition is sufficient.

§ 14020(uu) “State”

The Council proposes to add a new definition of “State” to provide a short-hand term for referring to the State of California and any entities of the State. This is necessary because the term is used throughout the regulations and using a short-hand term enables the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation.

§ 14020(vv) “State agency” (Previously § 11150)

The Council proposes to renumber the section that defines “State agency” and modify the existing definition of “State agency” to provide a short-hand term for referring to the types of state agencies that are covered by Article 9.5. The changes are necessary to clarify that additional agencies and individuals fall within the scope of the term, including specifically officials and the California State University under Government Code sections 11000 and 11135(a). The updated regulation includes “special purpose districts” in light of Government Code section 56036, which states that “[d]istrict’ or “special district” are synonymous and mean an agency of the state....” The Council removed “which has the statutory or constitutional authority to provide State support to any person” because it is unnecessary verbiage, given that the statute contains no such

limitation and specifically applies to “any program or activity that is conducted, operated, or administered by the state or by any state agency.” (Gov. Code § 11135(a)). The term is used throughout the regulations and using a short-hand term enables the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation.

Former § 11150 “State financial assistance”

The Council proposes to delete this definition. This is necessary because it has been subsumed under the definition of “State support” in subsection (ww) of section 14020.

§ 14020(ww) “State support” (Previously § 11150)

The Council proposes to renumber, update, and move the existing definition of “State support” from previous section 11150 to subsection (ww) to provide a short-hand term for referring to the types of state support that are covered by Article 9.5. The changes are necessary to clarify that a broad range of contributions fall within the term and are covered by Article 9.5. This includes those terms previously falling within the former definitions of “financial assistance” or “funded directly by the State,” such as grants, entitlements, loans, cooperative agreements, contracts, funds, services of state personnel, real or personal property or interest therein or proceeds therefrom under certain circumstances, and any other arrangement by which the covered entities make available aid to recipients. The changes are necessary for clarity and to fully carry out the purposes of Article 9.5.

§ 14020(xx) “State Supported Program” (Previously § 11150)

The Council does not propose to make any substantial changes and is simply renumbering and moving the section that defined “State supported program,” derived from former section 11150, to subsection (xx).

§ 14020(yy) “Stereotype”

The Council proposes to add a new definition of “stereotype.” This addition is necessary to clarify that discrimination against an individual based upon a stereotype about any protected class is unlawful. The language of this subsection is consistent with the Council’s definition of sex stereotypes in subsection 11030(d) of its employment regulations. Courts have recognized that in a variety of contexts, including employment, access to public accommodations, jury selection, education, and immigration-related actions, stereotyping based on a protected basis that results in an adverse action is unlawful. (*See, e.g., Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1185, n. 11, 1191-1192 [employment]; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34-35 [Unruh Act]; *People v. Williams* (2013) 56 Cal.4th 630 [jury selection]; *Neal v. Bd. of Trustees of Calif. State Universities* (9th Cir. 1999) 198 F.3d 763, 768, n. 4 [education]; *Sessions v. Morales-Santana* (2017) 137 S.Ct. 1678, 1692 [immigration].) This definition replaces the much narrower definition of “Statistical Stereotype” in former section 11183.

§ 14020(zz) “Transitioning”

The Council proposes to add a new definition of “Transitioning.” This is necessary to clarify that under Article 9.5, a person who is in the process of transitioning to begin living as the gender with which they identify is protected from discrimination to the same extent as everyone else. Government Code section 11135(c) requires the protected bases enumerated in subdivision (a) of

section 11135 to have the same meaning as in Government Code section 12926, and the term “transitioning” derives from paragraph (2) of subdivision (r) of that section. Accordingly, this proposed regulation is consistent with the existing definition of “transitioning” found in subsection 11130(f) of its employment regulations, which interprets Government Code section 12926(r)(2). The proposed regulation also is necessary to enable the Council to state rules succinctly rather than provide a definition mid-sentence. Without further guidance, the term is subject to misinterpretation. Furthermore, pursuant to Government Code sections 11346.5(a)(3)(D) and 11349(d), the Council has determined that this proposed regulation is consistent with similar provisions in the FEHA and its implementing regulations.

§ 14020(aaa) “Ultimate beneficiary” (Previously § 11150)

The Council proposes to renumber the section that defines “ultimate beneficiary” and updates that definition. This is necessary to update a uniform definition for a term referenced throughout the proposed regulations and to clarify the full range of individuals who are protected by Article 9.5 but who do not qualify as a “recipient,” as defined at section 14020(oo). These modifications to the existing definition are thus necessary to add additional clarity and specificity to ensure full coverage under Article 9.5.

§ 14020(bbb) “Video remote interpreting (“VRI”)

The Council proposes to add the definition of “Video Remote Interpreting” (“VRI”) as “an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video.” This is necessary to describe in plain terms a technical term used in the regulations as an appropriate auxiliary aid or service for providing effective communications with people with disabilities. This is necessary for clarity and consistency and to eliminate repetitive definitions. It is also necessary to provide clarity in an area of the law where there is a great deal of confusion and inconsistency in implementation by stakeholders.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ’s Title II ADA regulations at 28 C.F.R. § 35.160(d), revised March 15, 2011 (requirements for video remote interpreting service).

Former § 11151. Applicability of This Division.

The Council proposes to renumber and update this section, and reorganize the order of the regulations, so the prior section 11151 has been deleted. This is necessary for clarity. The revised section is now at section 14002.

Article 3. Prohibited Practices Relating to All Groups Protected by Article 9.5

§ 11153 § 14025, General Prohibitions

The Council proposes to renumber and update this section. The purpose of this section is to state, in general terms, Article 9.5's prohibitions. This is necessary to update the existing regulation to include all protected classes under Government Code section 11135(a) and to use updated terminology reflecting statutory changes created by S.B. 1442. This section is necessary to clarify that Article 9.5 and its implementing regulations include all protected bases, including those added since the existing regulation was enacted, and to provide consistency throughout the proposed regulations.

§ 11154 § 14026, Discriminatory Practices and Unlawful Denial of Full and Equal Access
Applicable to All Persons

The purpose of this section is to identify with specificity the nature of Article 9.5's prohibited practices. The Council proposes to update, renumber, and move this section from former section 11154 to section 14026.

§ 14026(a)(1)-(9)(B) & (a)(10)

The Council proposes to modify these subsections of former section 11154 by reorganizing the section and updating terminology for consistency with other proposed revisions in the regulations and with similar federal regulations. All prior substantive provisions are retained with some modification of language. These proposed subsections use different grammar and verbiage than the former subsection for consistency throughout the proposed regulations. For example, each subsection now begins with a gerund instead of an infinitive, and uses wording such as "program or activity," a more comprehensive defined term, instead of "aid, benefits or services." Similarly, the term "protected class" replaces lists of protected classes and updates the lists by using a new proposed defined term, which includes a number of protected bases that were not previously covered by Article 9.5. That also encompasses the fact that section 11135(d) expressly provides that "protected bases" include a perception that a person is in a protected class and a person's association with a person who has, or is perceived to have, any of the characteristics of a protected basis. The phrase "purpose or effect," as that phrase existed in former subsections 11154(i) and (j), has been moved to subsection (a) so as to apply to all paragraphs of subsection (a), which is necessary to fully implement Article 9.5 and to make explicit that both practices with a disparate effect and practices based on discriminatory intent are prohibited, as set out in proposed section 14027. The proposed subsections meet or exceed the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ ADA regulations, 28 C.F.R. § 35.130, revised October 11, 2016 (prohibitions against discrimination) and Section 504, 34 C.F.R. § 104.4, effective November 13, 2000 (discrimination prohibited). This is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state "prescribe stronger protections and prohibitions," in which case the protections afforded by section 11135 "shall be subject to the stronger protections and prohibitions." Nevertheless, the proposed paragraphs (1) to (9)(B), inclusive, of subsection (a) are substantially unchanged from former subsections (a)-(i), inclusive, and (j) of former section 11154. The changes are also necessary to use updated terminology reflecting statutory changes created by S.B. 1442 (Chapter 870 of the Statutes of 2016).

In proposed paragraph (10) of subsection (a), "closures" of facilities was added to recognize that

selective closures under some circumstances may violate Article 9.5 if they meet the criteria in subsection (a). This is necessary because discriminatory closures of facilities may effectively deny full and equal access to protected classes the same way selecting sites or denying permits may.

§ 14026(a)(9)(C) and (D)

The Council proposes to add the term “segregation” to subsection (a)(9)(C), providing that it is unlawful for a covered entity to utilize criteria or methods of administration that “create, increase, reinforce, or perpetuate discrimination *or segregation* based on membership in a protected class.” Similarly, the Council proposes to add subsection (a)(9)(D), making it unlawful generally to “create, increase, reinforce, or perpetuate discrimination *or segregation*” based on membership in a protected class. The term “segregation” is proposed to be added to subsection (a)(9)(C) and used in a new subsection (a)(9)(D), to clarify that segregation is a type of discrimination and is therefore prohibited. It is necessary to add the term “segregation” to the list of prohibited practices to ensure more complete protection of protected classes consistent with the intent and broad language of Government Code section 11135. This also furthers the purposes of proposed section 14332 (substantially unchanged from existing regulations), which requires that programs and activities be administered in the most integrated setting. It is also consistent with the FEHA in Government Code section 12927(c)(1) (discrimination includes the provision of segregated or separate housing accommodations).

This proposed language also is consistent with longstanding California Supreme Court decisions addressing the connection between racial segregation and the denial of equal treatment, especially in school settings, starting with *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876 (holding that a district that had gerrymandered one of its high school attendance zones to perpetuate a largely segregated student body had engaged in intentional racial discrimination that was unconstitutional) and most recently *Collins v. Thurmond* (2019) 41 Cal.App.5th 879 (*Collins*). As the court in *Collins* observed, “For purposes of stating a claim, it is reasonable to conclude that students of a district subject to de facto racial segregation due to racially discriminatory disciplinary practices are receiving an education that is fundamentally below the standards provided elsewhere throughout the state where the legal proscriptions on such discriminatory practices are being enforced.” (*Id.* at p. 899).

This subsection is necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in 42 U.S.C. § 12101(a)(2) (“segrega[tion]” is a “form[] of discrimination against individuals with disabilities”), and in the DOJ ADA regulations, 28 C.F.R. § 35.130(d), revised October 11, 2016 (“a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities”).

§ 14026(a)(11)

The Council proposes to add that it is unlawful for a covered entity to interfere “with admittance

to or enjoyment of public facilities or the rights of an individual with a disability under any program or activity.” The addition of “interference” to the prohibited practices is necessary to describe all forms of activities in which discrimination is prohibited under Article 9.5 and to ensure more complete protection of protected classes consistent with the intent and broad language of Article 9.5. Activities of covered entities that interfere with the rights of individuals deny them their rights just as effectively as would failing to provide the rights in the first place. This addition is also necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ Title II ADA regulations, 28 C.F.R. 35.134(b) (a public entity may not interfere in the exercise or enjoyment of rights protected under the ADA).

§ 14026(b)

The Council proposes to add that “[t]his subsection applies to any covered entity engaging in permitting activity, or site or facility selection, notwithstanding that other covered entities have issued, allowed or made permits or selections relating to the same program, activity, site or facility.” This is necessary to describe all forms of activities in which discrimination is prohibited under Article 9.5 and to ensure more complete protection of protected classes consistent with the intent and broad language of Article 9.5. Prohibiting discrimination in permitting activity is a necessary corollary to the requirement that a public entity cannot discriminate in the site or facility selection because a public agency that denies a permit for discriminatory reasons has the same effect as a public entity choosing a site based on discriminatory reasons. Further, one discriminatory act is not justification for a second discriminatory act. Each agency must exercise its own appropriate judgment. This language is consistent with Government Code section 12955(l) (discrimination in land use practices prohibited, including denials of use permits) and the FEHA land use regulations at California Code of Regulations, title 2, sections 12161 *et seq.*

This addition is also necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ Title II ADA regulations, 28 C.F.R. § 35.130(b)(4), revised October 11, 2016 (a public entity may not make discriminatory decisions in determining the cite or location of a facility).

Former § 11155.

The Council proposes to renumber and update this section, and reorganize the order of the regulations, so the prior section 11155 has been deleted. This is necessary for clarity. The revised subsections are now at subsections 14004(a), (c), and (d).

§ 14027, Standards for Determining Discrimination and Unlawful Denial of Full and Equal Access

The purpose of this section is to articulate the standards for determining when practices are discriminatory or constitute an unlawful denial of full and equal access to programs, services, or activities.

§ 14027(a)

The Council proposes to add this subsection describing the standards for determining whether a practice is discriminatory or denies full and equal access pursuant to Government Code section 11135(a). This is necessary to provide greater clarity and guidance in determining whether a practice is discriminatory or denies full and equal access on a protected basis, in violation of Article 9.5, and to ensure that Article 9.5 is liberally construed for accomplishment its purposes as required by Government Code section 12993. The subsection also implements the mandates set forth in Government Code sections 11135(b) (protections and prohibitions in Article 9.5 must meet or exceed those in the ADA) and 11139 (prohibitions and sanctions imposed by Article 9.5 are in addition to any other prohibitions and sanctions imposed by law), such that that federal law establishes a “floor,” not a ceiling, for protection of rights under Article 9.5. Subsection (a) is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where Article 9.5 provides greater protection than federal law.

§ 14027(b)

The Council proposes to add this subsection to elucidate the three main types of discrimination that have long been recognized under both state and federal law: facial discrimination, intentional discrimination, and disparate impact discrimination. Facial discrimination refers to express discrimination, which is *per se* unlawful. (*See, e.g., Parents Involved in Community Schools v. Seattle School District No. 1 et al.* (2007) 551 U.S. 701, 720.) The only exception to liability under Government Code section 11135 is when a program has been established to benefit members of a protected class.

Intentional discrimination is established when discrimination on a protected basis is a motivating factor and may be proved by direct or circumstantial evidence. (*See, e.g., Bostock v. Clayton County, Georgia* (U.S. Supreme Court, June 15, 2020) 140 S.Ct. 1731, 2020 WL 3146686 [holding that, in Title VII cases, the “because of” causation standard for discrimination does not mean sole cause or primary cause, and the fact that there can be multiple “because of” reasons does not preclude a finding of discrimination based on any one of those reasons].) This is also consistent with Title VII of the Civil Rights Act, at 42 U.S.C. § 2000e–2(m) (an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice). (*See also Donovan v Poway Unified School District* (2008) 167 Cal.App.4th 567, 588, 591, 608 [motivating factor sufficient for liability under Education Code section 220 and Title IX of the Civil Rights Act, which are interpreted consistently with Government Code section 11135]; *Community Service Inc. v. Wind Gap Mun. Authority* (3rd Cir. 2005) 421 F.3d 170 (to prevail on a disparate treatment claim under the Fair Housing Act, generally a plaintiff must demonstrate that some discriminatory purpose was a “motivating factor” behind the challenged action]; *Alpha Energy Savers, Inc. v. Hansen*, (9th Cir.

2004) 381 F.3d 917, 923, 928-930 [standard of proof in a First Amendment case is substantial or motivating factor].)

Disparate impact discrimination, also known as “adverse impact” or “discriminatory effect,” is established when a facially neutral practice has a disproportionate impact on a protected class, perpetuates discrimination or segregation, or has the effect of violating any other prohibition in Article 9.5 or these regulations. (See, e.g., *Griggs v. Duke Power Co.* (1971) 401 U.S. 424.) This subsection also makes it clear that disparate impact discrimination may be rebutted by evidence of a legally sufficient justification, which is further defined in section 14029. Subsection (b) is necessary to ensure compliance with the law, to prevent misconstruction of provisions in the statute, and to provide direction to the public where Article 9.5 provides greater protection than federal law.

§ 14028, Types of Evidence and Proof in Intentional Discrimination Cases

The purpose of this section is to describe the types of evidence and proof required in intentional discrimination cases.

§ 14028(a)

The Council proposes to add this subsection to clarify that different types of evidence may be relied on to prove intentional discrimination, including admissions, expressions of bias, or other direct evidence. However, such overt evidence is not required in order to prove intentional discrimination. The subsection is necessary in order to accurately render existing case law interpreting state and federal antidiscrimination principles (see below), to ensure compliance with the law and to prevent misconstruction of statutes.

§ 14028(b)

The Council proposes to add this subsection to clarify that intentional discrimination also may be proved by circumstantial evidence and to provide a non-exhaustive list of the types of circumstantial evidence that may be probative of unlawful discrimination. The subsection is necessary in order to accurately render existing case law interpreting state and federal antidiscrimination principles, to ensure compliance with the law and to prevent misconstruction of provisions in the statute. A variety of sources of information are described in subsection 14028(b)(1); statistical data is described in subsection 14028(b)(2); evidence that also would be probative of disparate impact discrimination is described in subsection 14028(b)(3); and subsection 14028(b)(4) clarifies that a showing of disparate treatment between similarly situated individuals or groups is not required to prove intentional discrimination. With regard to the latter, the Council clarifies that an aggrieved person need not show the existence of a similarly situated person to prove intentional discrimination.

The Council’s description of relevant direct and circumstantial evidence derives from both state and federal cases and federal guidance. Cases that provide the foundation for subsections 14028(a) and (b) include *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [holding that when there is no direct evidence of intentional discrimination, if a plaintiff makes a *prima facie* showing, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse action; however, if the plaintiff proves the asserted reason is pretextual, the plaintiff will prevail]; *Village of Arlington Heights v. Metro Housing Devel. Corp.* (1977) 429

U.S. 252 [to prove that an act was racially discriminatory, a plaintiff must prove that a discriminatory purpose was a motivating factor, after which the burden shifts to the defendant to prove its decision would have been the same even if the impermissible purpose had not been considered]; and *International Brotherhood of Teamster v. United States* (1977) 431 U.S. 324 [statistics may be used in disparate treatment cases to prove an employer engaged in a pattern and practice of discrimination.].) Notable state court cases include *Mixon v. Fair Employment and Housing Comm.* (1987) 192 Cal.App.3d 1306 [following *McDonnell-Douglas*'s burden shifting rules, an employee alleging race discrimination does not have to prove racial animus, but they must prove a "causal connection" between the protected class and adverse action]; *Heard v. Lockheed Missiles & Space Co.* (1990) 44 Cal.App.4th 1735 [to prove intentional discrimination, a plaintiff need not show that similarly-situated employees outside the protected class received the employment term sought by the plaintiff]; *Guz v. Bechtel Corp.* (2000) 24 Cal.4th 317 (*McDonnell-Douglas* case reflects the principle that direct evidence of discrimination is rare and that discrimination can be proved by circumstantial evidence, even though in this case, the plaintiff was unable to meet his burden of proof); and *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142 [group homes for recovering alcoholics and drug users did not have to identify a similarly situated entity that was treated more favorably in order to establish a prima facie case that a city ordinance violated the ADA, the Fair Housing Act, and the FEHA].)

§ 14028(c)

The Council proposes to describe the shifting burdens of proof in cases alleging intentional discrimination based on circumstantial evidence. The subsection is necessary to accurately render existing case law interpreting state and federal antidiscrimination principles, in order to ensure compliance with the law and to prevent misconstruction of provisions in the statute. The shifting burdens of proof described in this subsection are well established in case law adjudicated by both federal and state courts, including those cases cited in reference to subsections (a) and (b) above. This subsection is necessary because it informs the public that the same burden-shifting scheme applies under Article 9.5.

§ 14029, Types of Evidence and Proof in Disparate Impact Discrimination Cases

The purpose of this section is to describe the types of evidence and proof required in disparate impact cases.

§ 14029(a)

The Council proposes to add this subsection regarding the range of and types of evidence that may be relevant in establishing or rebutting the existence of disparate impact discrimination. The subsection is necessary to clarify that evidence of disparate impact discrimination may include statistical or anecdotal evidence. While courts make the final determination of admissibility of specific items of evidence, guidance by the Council on this issue is necessary due to the complexity of these cases and the differences between federal and state law on the scope of disparate impact claims. This subsection is consistent with the discriminatory effect regulations under FEHA housing law, which address types of potentially relevant evidence. (Cal. Code Regs., tit. 2, section 12061(d).) The paragraphs within this subsection are necessary to provide examples of probative evidence that are common in the Council's experience: namely, evidence showing that a group whose members are outside a protected class receive better benefits than

persons in a protected class or that the same benefits are harder to obtain for a group whose members are in protected class; that benefits were less effective or more restricted once the program became available to members of a protected class; that a program creates, increases, reinforces, or perpetuates segregation; that a condition for receiving benefits disproportionately excludes individuals on a protected basis; or that the objectives of a program or activity are negatively impacted on the basis of a protected class.

§ 14029(b)

The Council proposes to add this subsection to describe the shifting burdens of proof in cases alleging disparate impact discrimination based on circumstantial evidence. The shifting burdens of proof described in this subsection are well established in case law adjudicated by both federal and state courts, including those cases cited in reference to this subsection. This subsection is necessary because it informs the public that the same general burden-shifting scheme applies to disparate impact cases under Article 9.5. However, unlike in disparate treatment cases, in which the respondent may rebut an allegation of intentional discrimination by producing evidence of a “legitimate nondiscriminatory reason” for its actions, under a disparate impact theory, a respondent may rebut disparate impact discrimination by producing evidence of a legally sufficient justification. (*See, e.g.*, Government Code section 12955.8; *Olmstead, supra*; *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507; *City and County of San Francisco v. FEHC* (1987) 191 Cal.App.3d 976, 989-990; *Johnson Controls Inc. v FEHC* (1990) 218 Cal.App.3d 517, 541). If respondent satisfies its burden of proof, a complainant, plaintiff, or petitioner may prevail by producing evidence that the purpose of the challenged action or practice can be equally served by one that has less discriminatory effect. (*See e.g., Griggs, supra*).

Further, the proposed regulations require a causal connection between a “program or activity” and a disparate impact. Section 14029(b)(1) of the proposed regulations addresses burdens of proof in disparate impact cases, stating:

The complainant, plaintiff, or petitioner must show that the practice they are challenging has a disparate impact. This means that, in a legal proceeding, the complainant, plaintiff, or petitioner has the burden of proving that an action, practice or practices caused or predictably will cause a disparate impact.

This language tracks, almost verbatim, the disparate impact standard articulated in FEHA’s already-approved fair housing regulations at 2 CCR § 12061(a).

Similarly, the Council’s proposed standard for disparate impact under section 11135 is consistent with the U.S. Department of Housing and Urban Development’s interpretation of the Fair Housing Act. In 2013, HUD issued regulations that require the plaintiff or charging party to first prove as part of the prima facie showing that a challenged practice “caused or predictably will cause a discriminatory effect.” The Council utilized this rule in crafting the section 11135 regulations. While HUD subsequently raised the standard for proving disparate impact in a 2020 rule, HUD reversed course again in 2021 and proposed to reinstate the 2013 rule. (*See Reinstatement of HUD's Discriminatory Effects Standard* (June 25, 2021) 86 FR 33590-01, 2021 WL 2590054.)

Moreover, the Council’s language is consistent with the U.S. Supreme Court’s 2015 *Inclusive Communities* decision affirming disparate impact liability under the Fair Housing Act. There, the Court explained that “[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [between the disparate impact and the defendant’s policy or practice] cannot make out a prima facie case of disparate impact.” (*Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.* (2015) 576 U.S. 519, 543.)

§ 14029(c)

The Council proposes to add this subsection to identify the respondent’s burden of proof in rebutting a claim of disparate impact, referred to as a “legally sufficient justification.” This subsection is necessary to provide clarity and guidance as to how a respondent may rebut a showing of disparate impact in a case brought under Article 9.5. *See Griggs, supra; Olmstead, supra; City and County of San Francisco, supra.*

§ 14030, Other Proof Provisions

The purpose of this section is to describe other considerations related to proof in cases alleging discrimination.

§ 14030(a)

The Council proposes to add this subsection to clarify that a “legally sufficient justification” is not a defense to intentional discrimination. The subsection is necessary to avoid possible confusion between an *intentional discrimination claim* and a *disparate impact claim* by clarifying that a legally sufficient justification defense to a discriminatory effect claim under proposed section 14029(b)(2) and (c) will not constitute a defense to an intentional discrimination claim under section 14028. The two types of discrimination have different proof requirements. There is no legally sufficient justification defense in intentional discrimination claims.

§ 14030(b)

The Council proposes to add that the “same information may be probative of more than one form of discrimination.” This is necessary to clarify that the same information may be probative of more than one form of discrimination and to ensure that evidence that shows more than one type of discrimination is appropriately considered. For example, a plaintiff who alleges the denial of a contract with the State due to both age and disability may proffer a statement by a supervisor that “at 70, there’s no way you have the mental or physical capacity to provide this service,” as evidence of both age and disability discrimination.

§ 14030(c)

The Council proposes to add that the “evidence and methods of proof described in this Article shall be construed as illustrative and not as limitations on the enforcement of Article 9.5, this subchapter, or other implementing regulations.” This is necessary to ensure that the Council’s illustrative descriptions of the kinds of evidence and methods of proving discrimination are not deemed to be the exclusive means available to parties. It is impossible to identify every possible type of evidence and method of proof that courts may consider or that that may be justified based on specific facts of particular cases. Thus, the subsection is necessary to make explicit that the

Council’s examples are illustrative and do not preclude courts from considering other types of evidence or proof that they determine meet evidentiary requirements.

Article 4. Remedial Actions

§ 14050, Administrative Complaints and Judicial Private Right of Action (Previously § 11142)

The Council proposes to renumber and update this section, and reorganize the order of the regulations, so former section 11142 has been deleted. The purpose of this section is to describe the authorization for filing administrative complaints and bringing private litigation under Article 9.5. The proposed changes implement the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms. The revised section 14051 now has three subsections, combining the former private right of action subsection with new subsections.

§ 14050(a)

The Council proposes to add that “[a]ny aggrieved person or state agency may file an administrative complaint with the Department regarding any alleged violation of Article 9.5, this subchapter or other implementing regulations.” This is necessary to implement the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms, including Government Code section 12930(f)(4), which expressly authorizes the Department to “receive, investigate, conciliate, mediate, and prosecute” complaints alleging violations of Article 9.5.

§ 14050(b)

The Council proposes to add, renumber, and modify the former section 11142 regarding a private right of action section to implement the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms. The subsection makes it explicit that Article 9.5 may be enforced by a civil action in federal or state court for equitable relief and includes some specific types of equitable relief. This is necessary to fully implement section 11139, which permits enforcement of Article 9.5 by a civil action for equitable relief, and section 11137, which specifies that another remedy for a violation is the curtailment of state funding. The former restriction of enforcement only through California Code of Civil Procedure section 1094.5 is deleted, as no such restriction exists under the current statutory scheme. This section is necessary to fully implement Government Code section 11139 by allowing private enforcement by a civil action in federal or state court for declaratory, injunctive, and mandamus relief. It is also necessary to provide that such actions shall be independent of any other rights and remedies, pursuant to Government Code sections 11136, 1137, and 11139.

§ 14050(c)

The Council proposes to add this new subsection clarifying the standards for recovery of fees in litigation under Article 9.5. This is necessary to implement the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms, and to ensure complete enforcement of the Article 9.5. The provision is consistent with other civil rights statutes under the jurisdiction of the Department and the Council. *See* Government Code 12965(b).

This subsection is also necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the

requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection also meets or exceeds the existing protections and prohibitions of the ADA at 42 U.S.C. § 12205 (attorney’s fees).

§ 14051, Exhaustion of Administrative Remedies (Previously § 11143)

The purpose of this section is to clarify, pursuant to revisions to the statutes, that there is no requirement to exhaust administrative remedies before bringing a civil action under section 11135. The Council proposes to renumber and update this section, delineate four subsections, and reorganize the order of the regulations, as former section 11143 has been deleted.

§ 14051(a)

The Council proposes to update the former section 11143 to implement the Legislature’s 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms, to update necessary cross references, and to update the regulations to reflect statutory changes made when the Legislature enacted AB 677 (Ch. 708, Statutes of 2001). The Council specifically proposes in this subsection to make explicit that exhaustion of administrative remedies is not a pre-requisite to bringing a cause of action under Article 9.5 and further make specific the types of exhaustion that are not required. This is necessary because, in AB 677, the California Legislature amended section 11135 to expressly eliminate any pre-existing exhaustion requirement by adding the following language: “This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies.”). As the court noted in *Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567, 594 “[t]his amendment was necessary to clarify a victim of discrimination ‘need not pursue administrative or any other remedies prior to, or instead of, bringing an action for equitable relief, nor would any victim be required to elect one remedy.’” [*citing* Assem., 3d reading analysis of Assem. Bill No. 677 (2001–2002 Reg. Sess.) as amended Apr. 25, 2001, p. 3.] Therefore, it was necessary to revise this section in order to address these statutory changes. Furthermore, the Legislature’s 2016 reorganization of Article 9.5 removed individual agency enforcement and hearing obligations, which renders an exhaustion requirement impractical. Subsection (a) makes these changes explicit.

§ 14051(b)

The Council proposes to clarify that if an administrative hearing has been conducted, a subsequent civil action shall be by trial de novo, and to further clarify that any judicial or Departmental reviews are not limited to a review of the administrative record. This is necessary to ensure consistency with subsection (a) (which no longer requires exhaustion of administrative remedies) and with subsection (b) of section 14050 (which allows for a variety of civil enforcement options, including civil complaints and writs of mandate.) This is also necessary to update the regulations to reflect statutory changes made when the Legislature enacted AB 677 (Ch. 708, Statutes of 2001).

§ 14051(c)

The Council proposes to clarify that in some instances, alleged acts may constitute a violation of both Article 9.5 and the employment provisions of the FEHA. This subsection is necessary to clarify that exhaustion of administrative remedies is necessary for the employment claims as

required by existing language in the FEHA, but not for claims under Article 9.5, when both issues are raised in the same action or administrative complaint with the Department.

§ 14051(d)

The Council proposes to explain that claims under Article 9.5 are tolled when a claim is first pursued through a state agency's procedure. This subsection is necessary because there are voluntary administrative or grievance procedures in some state agencies that may be available to aggrieved persons under Article 9.5, and because in some circumstance the Department may choose to refer a complaint to the appropriate state agency for investigation pursuant to subsection (b) of section 14052. The Council does not want to discourage use of those procedures, and therefore it is necessary to make explicit that the time for filing a complaint with the Department is tolled for the pendency of those investigations.

§ 14052, Mandatory Remedial Action (Previously § 11157)

The purpose of this substantially revised section is to provide an updated description of remedial actions that are mandatory under the statute. The statutory scheme requires the Department to investigate allegations of violations, rather than requiring individual state agencies to conduct investigations. However, upon a finding of a violation, state agencies are still responsible for taking remedial actions. Thus, the Council proposes to renumber and update prior section 11157 to implement the statutory change.

§ 14052(a)

The Council proposes to revise the obligations of state agencies and covered entities to make it explicit in subsection (a) that state agencies must notify covered entities of violations that are believed to exist and submit a complaint to CRD detailing the alleged violation. This is necessary to implement the Legislature's 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms, and to ensure complete enforcement of Article 9.5. The revised section 11136 provides that whenever a state agency has reasonable cause to believe there has been a violation of Article 9.5 or of any of the other statutes incorporated into Article 9.5 under Government Code section 11136, the state agency must notify the covered entity of such violations and submit a complaint to the Department. The proposed subsection implements this statutory change, with clarifying language and terminology for full consistency with these regulations (for example, use of the defined term "covered entity" to describe those covered by the regulations).

§ 14052(b)

The Council proposes to clarify that the Department retains discretion to refer complaints to state agencies when the Department deems it appropriate to do so. The subsection is necessary to clarify that such a referral does not preclude an aggrieved person from proceeding to file a judicial complaint under Government Code section 11139, as further explained above in proposed sections 14050 and 14051(a).

§ 14052(c)

The Council proposes to clarify that state agencies must, upon a determination that a recipient has violated Article 9.5 or any of the other statutes incorporated into Article 9.5 under Government Code section 11136, take action to address the violation. In particular, Government

Code section 11137 requires state agencies to “take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.” The subsection further lists a number of options and methods for curtailing funding available to the state agency in those circumstances. The list of options, while not exclusive, is necessary to provide guidance to state agencies concerning the range of options available to them to redress the violations. The subsection is also necessary to clarify that such remedial measures are in addition to, not in lieu of, other remedies that may be available under other laws, as set out in Government Code section 11139.

§ 14052(d)

This subsection was formerly subsection (b) of section 11157. The Council proposes to list statutory violations which trigger the requirement for recipients to take remedial action. This is necessary to clarify that remedial action is required whenever a recipient violates a civil rights statute under the jurisdiction of the Department and Council. The regulation further recognizes that in some circumstances, the state, a state agency, or a court may be the entity that orders remedial action.

§ 14053, Permissive Remedial Action (Previously § 11158)

The purpose of this section is to renumber and update section 11158 regarding the remedial actions that state agencies are permitted to take under Article 9.5 in order to overcome discriminatory effects that violate a variety of state laws.

§ 14053(a)

The Council proposes to update this subsection to clarify the expanded scope of Article 9.5 following its 2016 reorganization by the Legislature and to update cross-references to include the list of state anti-discrimination statutes enumerated in the updated Government Code section 11136. In addition, the Council proposes to update the description of the permissive remedial actions, which is necessary to clarify that remedial action can involve a program, an activity, or both. The subsection continues to provide that remedial action can be required with respect to former participants and potential participants, not only current participants. The changes in the subsection are necessary to implement the statutory changes.

§ 14053(b)

The Council proposes to add subsection (b) to update cross-references to the state anti-discrimination statutes enumerated in section 11136 and to describe permissive remedial actions that the state or responsible state agency can take to address violations of the laws to implement the goals of Article 9.5. This subsection is necessary to clarify the expanded scope of Article 9.5 and to make it more specific by providing examples of the types of remedial action the state or responsible state agency may take, as they deem appropriate, to address violations of any of the enumerated laws.

§ 14053(c)

The Council proposes to add subsection (c) to clarify that state agencies need not wait until the conclusion of an investigation to take remedial actions as they deem appropriate to address the effects of alleged violations but can take such actions while an investigation is pending. This is necessary to ensure that agencies can act to prevent further harm from occurring during the pendency of investigations. Under the statute, the Department or the courts retain authority to

determine the adequacy of any investigation and appropriate relief.

§ 14053(d)

This subsection was formerly subsection (b) of section 11158. The Council proposes to add language clarifying that violations of Article 9.5 include discrimination and denial of full and equal access, which is necessary to reflect the broad scope of the updated Article 9.5. The subsection continues to provide that a state agency may allow a recipient to take voluntary steps, as well as mandated actions, to remedy any conditions that might limit opportunities for individuals in protected classes. This is necessary to ensure that agencies can act to accomplish the goals of section 11135.

Article 5. Harassment, Coercion, Intimidation, and Retaliation

§ 14070, Harassment Prohibited (Previously § 11184)

The purpose of this substantially revised section is to provide a comprehensive description of prohibited harassment on any basis protected by Article 9.5. This includes harassment on the basis of sex, which was previously but inadequately addressed in section 11184, “Sex Pressure Prohibited,” which the Council proposes to delete. Subsections (a)-(f), inclusive, in this section are consistent with Government Code sections 12923, 12940(j), 12955(f), and 12955.7, and with sections 11019(b) and 11034(f) of the Council’s employment regulations addressing harassment in the workplace. Furthermore, preventing harassment is a necessary component of preventing discrimination under Article 9.5. (*See Hector F. v. El Centro Elementary School Dist.* (2014) 227 Cal¹ App.4th 331, 341 [there is a “public interest in ensuring public schools are free from discrimination, harassment and bullying as articulated in Government Code section 11135, and [the] Education Code . . .”].)

§ 14070(a)

The Council proposes to add that harassment on a protected basis is prohibited under Article 9.5. This section is necessary to state the basic anti-harassment rule, ensure compliance with the law, and prevent misconstruction of provisions in the statute.

§ 14070(b)

The Council proposes to add this subsection to describe two forms of harassment that constitute unlawful conduct known as “quid pro quo” and “hostile environment” harassment and to make them more specific by providing examples of types of conduct that constitute harassment. The subsection is consistent with general precepts of the law on harassment as set out in Government Code sections 12923, 12940(j), 12955(f), and 12955.7, and is consistent with sections 11019(b) and 11034(f) of the Council’s employment regulations, both of which describe “quid pro quo” and “hostile environment” harassment. The subsection also is consistent with the Council’s housing regulations, California Code of Regulations, title 2, section 12120. The proposed section is based on California law, but also provides rights and remedies that are equal to or greater than those provided in federal law, specifically 24 C.F.R. 100.600, “Quid pro quo and hostile environment harassment,” and with federal fair housing law. (*See Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act Final Rule (HUD Final Rule Harassment)* (Sept. 14, 2016) 81 FR 63054-01, 63066 – 63073.) The subsections are necessary to clarify the nature of the two types of harassment, to

provide guidance as to the elements and circumstances that will give rise to liability under each type, and to clarify that the same conduct may violate one or more of these provisions. The Council proposes to add a non-exhaustive list of examples of types of conduct that may constitute harassment. By establishing standards for evaluating claims of quid pro quo and hostile environment harassment and examples, the rule provides guidance to covered entities so that they can ensure that their programs, activities, and services are free of unlawful harassment. It also provides clarity to persons and their representatives who have potential claims of harassment regarding how to assess potential claims of illegal harassment under Article 9.5.

§ 14070(c)

The Council proposes to clarify that a single incident of harassment may be sufficient to constitute harassment. This subsection is consistent with the FEHA and the Council's employment and housing regulations. Recently, the Legislature added Government Code section 12923, effective January 1, 2019, to declare expressly that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (Gov. Code § 12923(b); *see also* FEHA employment regulations, Cal. Code Regs., tit. 2, § 11034(f)(2)(A) ["[a] single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment..."]; FEHA housing regulations, Cal. Code Regs., tit. 2, § 12120(d) ["[a] single incident because an individual is a member of a protected class may constitute a discriminatory housing practice"]); *Beliveau v. Caras* (C.D. Cal. 1995) 873 F. Supp. 1393, 1398 [a single incident of offensive touching may be sufficient to establish hostile environment claim].) This subsection is necessary to ensure that protections from harassment under Article 9.5 are at least as protective as the FEHA and that individuals are able to receive the full benefits of Article 9.5, and to protect individuals in protecting classes from invidious discriminatory harassment.

§ 14070(d)

The Council proposes to add this subsection to clarify that the fact that an alleged perpetrator is a member of the same protected class as the aggrieved person is not sufficient by itself to be a defense. This subsection is necessary to ensure compliance with the law and to prevent misconstruction of the statute.

§ 14070(e)

The Council proposes to add subsection (e) to clarify that a "covered entity is liable for harassment of an ultimate beneficiary by a third party if the covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." There need not be a direct relationship between the covered entity and the third party (the proposed language is not limited to employees, agents, or others where there may be vicarious liability), but the conduct of the third party must occur in connection with the program, services, or benefits being provided. For example, a covered party does not have a general duty to address harassment of individuals in the community but does have an obligation to address harassment by third parties of individuals during their participation in the programs or services provided by the covered entity (i.e., harassment by third parties of individuals waiting in line in a government office or engaging in a government funded activity). This subsection is necessary to make explicit that

covered entities can be held responsible for harassment by third parties. It is consistent with Government Code section 12940(j)(1). In the words of California Supreme Court Justice Ming Chin, “[i]n 2003, the Legislature amended the Fair Employment and Housing Act ... to state that employers are potentially liable when third party nonemployees (e.g., the employer’s customers or clients) sexually harass their employees.” (*Carter v. California Department of Veterans Affairs* (2008) 38 Cal.4th 914, 918.) This principle, the court found, clarified existing law and did not represent a change in the law. The subsection also is consistent with the Council’s employment regulations (Cal. Code Regs., tit. 2, § 11034(f)(1)(c)).

The subsection is also consistent with Council’s housing regulations (Cal. Code Regs., tit. 2, § 12010(a)(1)(C) and with federal fair housing regulations. (See 24 C.F.R. § 100.7(a)(1)(iii) and HUD’s Final Rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act (HUD Final Rule Harassment) (Sept. 14, 2016) 81 Fed. Reg. 63054-01, 63064, 63066 – 63072, 63074; Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make A Federal Case Out of It?* (2011) 61 Case W. Res. L. Rev. 865.) Similar to the employment context, housing owners and managers are liable for conduct of third parties if they knew or should have known of the harassing conduction and fail to act. For example, an owner can be liable if the owner fails to take corrective action when a tenant sexually harasses another tenant after the harassment was reported to the owner. (See, e.g., *Fahnbulleh v. GFZ Realty, LLC* (D. Md. 2011) 795 F. Supp. 2d 360, 364; *Reeves v. Carrollsburg Condominium Unit Owners Ass’n*, (D.D.C. Dec. 18, 1997) 1997 WL 1877201; *Wetzel v. Glen St. Andrew Living Community LLC*, (7th Cir. 2018) 901 F. 3d 856, 862-863); see also *Davis v. Monroe County Board of Education* (1999) 526 U.S. 629, 645 [Supreme Court held that a school district could be held liable under Title IX for failing to respond when one of the students under its authority had engaged in known acts of student-on-student sexual harassment, since the school district “exercised substantial control over both the harasser and the premises on which the misconduct took place.”].) The power to take action against third parties derives from the legal authority or responsibility that the person may have in response to the circumstances, based on a case-by-case analysis.

§ 14070(f)

The Council proposes to add that the prohibition against harassment covers conduct based on an individual’s membership in a protected class, an individual’s perceived membership in a protected class, being associated with someone in a protected class or perceived to be in a protected class, or the aiding or encouraging of a person in the exercise of rights protected by Article 9.5. This subsection is necessary to ensure compliance with Article 9.5, including implementing Government Code section 11135(d). which expressly provides that “protected bases...include a perception that a person has any of those characteristics, or that the person is associated with a person who has, or is perceived to have, any of those characteristics,” and to prevent misconstruction of provisions in Article 9.5. It is also consistent with FEHA housing regulations at California Code of Regulations, title 2, section 12120(e) (persons protected from harassment include those having aided or encouraged any person in the exercise of rights protected under the FEHA).

§ 14071, Retaliation Generally

The purpose of this section is to explain the nature of unlawful retaliation that violates Article 9.5.

§ 14071(a)

The Council proposes to add that under Article 9.5, it is unlawful for a covered entity to take adverse action against a person because the person has engaged in protected activity challenging practices which the person reasonably believed were unlawful, or was perceived to be participating in protected activity, and to set forth criteria for establishing retaliation. Retaliation is a form of intentional discrimination. (*Jackson v. Birmingham Board of Education* (2005) 544 U.S. 167 [retaliation against a teacher who complained about sex discrimination in provision of athletic resources was a form of intentional sex discrimination actionable under Title IX].) The proposed subsection is consistent with the FEHA. (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 473-474 [retaliation provision in FEHA aids enforcement of FEHA]; see Gov. Code § 12940(h) and Cal. Code Regs., tit. 2, § 12130 [retaliation].) It is also consistent with regulations interpreting Title 6 of the Civil Rights Act of 1964, at 28 C.F.R. § 42.107(e), revised July 5, 1973 (retaliation prohibited under Section 601 of the Civil Rights Act of 1964). It is also necessary for consistency and to clarify that “motivating factor” is the appropriate standard for causation for retaliation. This is consistent with *Bostock v. Clayton County, Georgia* (2020) 140 S. Ct. 1731 (in Title VII cases, the “because of” causation standard for discrimination does not mean sole cause or primary cause, and the fact that there can be multiple “because of” reasons does not preclude a finding of discrimination based on any one of those reasons). This is also consistent with Title VII, 42 U.S.C. § 2000e–2(m) (an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice).

This proposed amendment is necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section 1 to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed section also meets or exceeds the existing protections and prohibitions of the ADA at 42 U.S.C. § 12203(a) (retaliation prohibited).

Subsection (a)(2) clarifies that the adverse action need not be related to the nature of the protected activity. If the adverse action occurs in order to retaliate against an individual for engaging in protected activity, the adverse action can occur in an unrelated forum. For example, if an individual files a complaint with CRD under Government Code section 11135 because of discriminatory conduct by a covered entity in denying her food subsidy benefits, it could be retaliation for the covered entity to call her employer to complain about her, even if the CRD complaint was unrelated to her employment.

Subsection (a)(3) provides that retaliation may be established by direct evidence or circumstantial evidence, including the temporal proximity between the protected activity and the adverse action. For example, cases often examine the sequence of events and temporal proximity (how close in time the adverse action and protected activity occur) in order to determine if

adverse action is retaliatory. If the adverse action occurs before the protected activity, or years afterwards, it is evidence to suggest that the adverse action was not retaliatory. However, if the adverse action occurs shortly after the protected activity, that is evidence from which the inference can be drawn that the adverse action is retaliatory. This is consistent with the fair housing regulations under FEHA. (Cal. Code Regs., tit. 2, § 12130(e); see *DFEH v. Atlantic North Apartments, et al.* (1983) FEHC Precedential Dec. No. 83-12 (Apr. 7, 1983) 1983 WL 36461 at p. 3 [“The requisite inference of causality may be established by evidence which indicates that the timing of the adverse action in relation to the owner’s notification of the protected activity is such that we can infer retaliatory motivation...”] [internal citations omitted].)

§ 14071(b)

The Council proposes to describe the shifting burdens of proof in retaliation cases. A retaliation case is initiated by an aggrieved party or the Department, who first has the burden of establishing a prima facie showing of a causal connection between an adverse action and protected activity under Article 9.5. The burden then shifts to the respondent to establish a legitimate, non-retaliatory reason for the adverse action. In order to prevail, the initiator must prove the asserted non-retaliatory reason was pretextual or false. (See, e.g., *Emeldi v. University of Oregon* (9th Cir. 2012) 673 F.3d 1218; *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028.) This subsection is necessary to distill case law on proof in retaliation cases.

§ 14071(c)

The Council proposes to describe which persons may be able to initiate retaliation claims for having been subjected to adverse action due to activity protected under Article 9.5. Consistent with employment and housing discrimination law, the regulation is necessary to clarify that a person does not have to be a member of a protected class or prove underlying discrimination to prevail on a retaliation claim under Article 9.5, so long as they engaged in protected activity. (See, e.g., *Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423; *Thompson v. North American Stainless, LP* (2011) 562 U.S. 170, 177.) This is consistent with subdivision (h) of Government Code section 12940, which extends protection to “any person” who opposes practices prohibited by FEHA, the Council’s employment regulations on retaliation (Cal. Code Regs., tit. 2, § 11021), and the Council’s housing regulations on types of prohibited harassment (Cal. Code Regs., tit. 2, § 12130(b)). It is also necessary to clarify, in subsection (c)(3)(A), that complaining about conduct that is reasonably believed to be discriminatory is protected activity, even if the underlying conduct is ultimately determined not to be unlawful. (See, e.g., *Yanowitz v. L’Oreal USA, Inc.*, *supra*, 36 Cal.4th 1028 at p. 1043 [conduct may constitute protected activity for purposes of anti-retaliation provisions of the FEHA even when the complained of conduct is not ultimately found to violate the FEHA]; *Miller v. Dept. of Corrections*, *supra*, 36 Cal.4th 446 at pp. 473-474.) It is also necessary to clarify that individuals are protected from retaliation under Article 9.5 when the employer perceives them to be engaged in protected activity, which is consistent with Government Code sections 12926(o) and 11135(d) and California Code of Regulations, title 2, section 11021. This subsection is necessary to ensure compliance with the law, which recognizes an expansive view of an “aggrieved person” for purposes of bringing a retaliation claim, and to prevent misconstruction of provisions in the statute.

§ 14071(d)

The Council proposes to describe in this subsection, for illustrative purposes, a variety of actions that may constitute protected activity for which it is unlawful for a covered entity to retaliate against a person. This is necessary to make Article 9.5 more specific on this point.

The Council proposes to include eight specified activities, which are consistent with Government Code sections 12940(h), 12940(l)(4), 12955(f) and 12955.7 and the associated employment and/or housing regulations:

1. Making complaints, testifying, assisting, or participating in a proceeding under Article 9.5 and other state laws enforced by the Department (Cal. Code Regs., tit. 2, §§ 11021(a), 12130(c));
2. Opposing practices prohibited by the aforementioned laws, even if no complaint is filed or the complaint is found not to have merit (Cal. Code Regs., tit. 2, §§ 11021(a)(1)(A), 12130(c));
3. Assisting others in seeking advice from the state, state agency, CRD or the Council, or authority of a recipient, even if no complaint is filed or is found to have merit (Cal. Code Regs., tit. 2, §§ 11021(a)(1)(B), 12130(c));
4. Participating in activity perceived to be opposition to discrimination, whether or not the participant intended to be doing so (Cal. Code Regs., tit. 2, § 11021(a)(1)(D));
5. Contacting or participating in a proceeding of a human rights or civil rights agency regarding discrimination (Cal. Code Regs., tit. 2, §§ 11021(a)(1)(E), 12130(c));
6. Assisting or participating in proceedings of the state, state agency or recipient which is perceived as participation in a proceeding alleging violation of Article 9.5 (Cal. Code Regs., tit. 2, §§ 11021(a)(2)(B), 12130(c));
7. Seeking information under the California Public Records Act (although not specifically mentioned in existing FEHA regulations, it can be an action related to access to statutory remedial process or remedies (Cal. Code Regs., tit. 2, § 12130(c)). It was also necessary to include the example of seeking information under the California Public Records Act because such requests are used to obtain data from public entities that may demonstrate discriminatory practices, and therefore could potentially result in retaliation. (*See Michaelis v. City of Los Angeles* (2007) 2nd Dist. Court of Appeal (reversed on other grounds), unpublished LEXIS 9788 [a request to a city under the CPRA constituted protected activity for purposes of bringing an Anti-SLAPP (Strategic Lawsuits Against Public Policy) motion under Code of Civil Procedure section 425.16(e)]); and
8. Requesting a reasonable accommodation (Gov. Code § 12940(l)(4), Cal. Code Regs., tit. 2, § 12130(c)).

§ 14071(e)

The Council proposes to add that retaliation is considered a discriminatory practice and is therefore subject to remedial actions described above. As the Supreme Court has long held, retaliation for advocacy on behalf of a protected class is a form of intentional discrimination.

(*Jackson v. Birmingham Board of Education* (2005) 544 U.S. 167; see also *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229.) The subsection is necessary to ensure compliance with the law and to prevent misconstruction of the statute.

§ 14072, Coercion, Intimidation, Threats, or Interference with Rights Prohibited

The purpose of this section is to clarify that it is unlawful under Article 9.5 to engage in coercion or any other conduct that compels the doing of any act forbidden by Article 9.5. This section is necessary to ensure consistency between Government Code section 11135 and Government Code sections 12940(i), 12955(g), and 12955.7, which prohibit coercion on any basis enumerated in Government Code section 12926.

Article 6. Specific Practices Prohibit—d - Age

Former § 11159, Specific Discriminatory Practices

The Council proposes to delete former section 11159, since the regulations are now renumbered and restructured. This section is no longer necessary and covered in depth in several other sections.

Former § 11161, Definitions.

The Council proposes to renumber and update former section 11161, and reorganize the order of the regulations, so former section 11161 has been deleted. The definitions in this section have been moved to either section 14020 or 14100. This is necessary for clarity and to keep all definitions in a small number of sections. The former definitions are now found in the following sections:

- “Alternative communications services” are included under the term “Alternative communication services,” now defined at section 14100(b).
- “Color or ethnic group identification” has been modified. “Color” is now defined at section 14020(j) and “Ethnic group identification” is now defined at section 14020(q).
- “Interpreter” is now defined as a “Qualified Interpreter” at section 14020(ll).
- “Multilingual employee” is now defined at section 14100(c).
- “Non-English-speaking person” is no longer a defined term, but is incorporated into the term “Limited English proficient persons” (“LEP”), now defined at section 14100(d).
- “Primary language” is now defined at section 14100(e).

Former § 11162, Discrimination Prohibited.

The Council proposes to renumber and update former section 11162 and reorganize the order of the regulations, so former section 11162 has been deleted. Discrimination on the basis of ethnic group identification is now addressed in Article 7. Discrimination on the basis of color and race is now addressed in Article 8. This is necessary for clarity and to keep all related sections together.

Former § 11165, Religion Defined

The Council proposes to renumber and update former section 11165 and reorganize the order of the regulations, so the former section 11165 has been deleted. Discrimination on the basis of religion is now addressed in Article 10. “Religion” is now defined at subsection 14020(qq). This is necessary for clarity and to keep all related sections together.

Former § 11166, Reasonable Accommodation.

The Council proposes to renumber and update former section 11166 and reorganize the order of the regulations, so the former section 11166 has been deleted. “Reasonable accommodations” of religious beliefs is now addressed in Article 10. This is necessary for clarity and to keep all related sections together.

Former § 11167, Exemption of Religious Organizations

The Council proposes to renumber and update former section 11167 and reorganize the order of the regulations, so the former section 11167 has been deleted. Exemptions relating to religious organizations are now addressed in Article 10. This is necessary for clarity and to keep all related sections together.

Former § 11168, Discrimination Prohibited

The Council proposes to delete this section. This is necessary because it is duplicative of section 14181. Broadly, discrimination on the basis of the religious beliefs of ultimate beneficiaries is now addressed in Article 10. This is necessary for clarity and to keep all related sections together.

§ 11170 § 14080, Definitions

The purpose of this definitions section is to give meaning to technical or unfamiliar terms used in Article 9.5 and the regulations and to provide guidance when there is no other applicable section of the regulations. The Council proposes to renumber and update former section 11170 and reorganize the order of the regulations. Existing definitions have been moved to section 14020 and revised as noted in section 14020. This is necessary for clarity and to keep all definitions in a small number of sections. The former definitions are now found in the following sections:

- “Action” has been deleted as a defined term. Instead, there are the more precise definitions of “Adverse action” at section 14020(b) and “Practice” or “Practices” at section 14020(hh).
- “Age” is now defined at section 14020(c).
- “Age Distinction” is now part of the definition of “Age” at section 14020(c).
- “Age related term” is now part of the definition of “Age” at section 14020(c).

§ 14081, Practices Prohibited on the Basis of Age.

The purpose of this section is to identify and make specific some of the practices prohibited on the basis of age, since such a section was missing in the prior regulations. The Council proposes to add a new section 14081 that describes three types of discrimination based on (1) an individual’s actual or perceived age, (2) an individual’s association with persons of a particular age, and (3) an individual’s membership in an organization identified with persons of a certain age. The list is not intended to be fully inclusive but provides examples to make Article 9.5 more specific. Membership in an organization is a form of association with others in a protected class, and thus this subsection is necessary to make section 11135 more specific and ensure full and broad compliance with Article 9.5. This section is necessary to describe basic discriminatory practices that are prohibited by Article 9.5 on the basis of age or perceived age, or on the basis of association with persons of a particular age, as required by subdivisions (a) and (d) of

Government Code section 11135.

§ 11171 § 14082, Statutory Exceptions to the Rules Against Age Discrimination

The purpose of this existing section is to describe certain statutory exceptions to the prohibitions on age discrimination. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11171 to section 14082.

§ 11172 § 14083, Definition of “Normal Operation” and “Statutory Objective”

The purpose of this existing section is to define the terms “normal operation” and “statutory objective.” However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11172 to section 14083.

§ 11173 § 14084, Exceptions to the Rules Against Age Discrimination: Normal Operation or Statutory Objective of Any Program or Activity

The purpose of this existing section is to set out exceptions to the rules governing age discrimination concerning “normal operation” and “statutory objective.” However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11173 to section 14084.

Deleted Former § 11174, Exceptions to the Rules Against Discrimination: Reasonable Factors Other Than Age

The Council proposes to delete this section, which had permitted recipients to take action based on a factor other than age, even if it had a disproportionate effect on persons of a particular age, if the factor bore a “direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.” This is necessary because section 11174 was rendered null and void by the Legislature’s repeal of former Government Code section 12941.1 in 2002, which had provided fewer protections for victims of age discrimination in employment than on the other covered bases. In its place, the Legislature enacted Government Code section 12941 (amended by AB 1599, Stats. 2002, c. 525). In AB 1599 the Legislature added age to the list of protected classes in Government Code section 12940 and clarified that age is protected to the same extent as the other protected classes and is subject to the same affirmative defenses as the other protected bases. It also is necessary to delete former section 11174 in order to maintain consistency with section 11076(a) of the Council’s recently approved employment regulations regarding age, which will take effect July 1, 2020.

§ 11175 § 14085, Burden of Proof

The purpose of this existing section is to clarify that the burden of proving an age distinction is lawful is on the covered entity. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11175 to section 14085.

§ 11176 § 14086, State Agency Review of Policies and Procedures

The purpose of the section is to continue to set forth the existing obligations of state agencies to review policies and procedures relating to age discrimination. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11176 to section 14086.

§ 11177 § 14087, Recipient Review of Age Distinctions

The purpose of this section is to continue to set forth the existing obligations that recipients may be required to submit in a report to the responsible state agency explaining and justifying the use of age distinctions. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11177 to section 14087.

§ 11178 14088, State Agency Review of Recipient Age Distinctions

The purpose of this section is to continue to set forth the existing obligations that each state agency is to submit a report to the Department that analyzes the results of the review referred to above. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11178 to section 14088.

Article 7. Specific Practices Prohibit—d - Ancestry, Ethnic Group Identification, and National Origin (Previously § 11161(a), (d), and (f))

§ 14100, Definitions

The purpose of this section is to give meaning to technical terms referenced in the regulations and to provide guidance when there is no other applicable section of the regulations.

§ 14100(a) (Previously § 11161(b))

The Council proposes to cross-reference the definitions of “ancestry,” “ethnic group identification,” and “national origin” to subsections 14020(e), (q), and (dd) for clarity. These definitions are necessary in order to provide a more inclusive definition of the protected bases enumerated in Article 9.5.

§ 14100(b) (Previously § 11161(a))

The Council proposes to renumber and update the pre-existing subsection 11161(a) defining “Alternative Communication Services.”

The Council proposes to add to the existing definition the following examples of alternative communication services: “the provision of written materials in a format other than standard font written print, such as Braille, large font print, sign language visual formats, and electronic formats, auxiliary aids and services....” This is necessary to ensure coverage for people with disabilities who may not be able to read or speak or write in the English language because of their disabilities, and identifies common auxiliary aids and services that are part of providing effective communication pursuant to the ADA. This is consistent with DOJ Guidance under Title VI of the Civil Rights Act, "Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals" (April 2011), Question/Answer 11: https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf.

This proposed amendment is necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This language meets or exceeds the prohibitions and protections in DOJ ADA Title II regulations at 28 C.F.R. § 35.160, revised March 15, 2011 (a public entity shall take appropriate steps to ensure effective communications

for people with disabilities; see also 28 C.F.R. § 35.161 [a public entity must have in place text telephones (TTYs) or other effective telecommunications, and should respond to telephone calls from relay systems, to communicate with individuals who are deaf or hard of hearing and/or who use auxiliary aids and services, including relay systems]; U.S. Department of Justice, Civil Rights Division, “Effective Communication” (Jan. 31, 2014) <https://www.ada.gov/effective-comm.htm>).

The Council is proposing this regulation to interpret and make specific a statutory term, which the Council is authorized to do under Government Code section 11342.600.

The Council also proposes to add to the existing definition “notice to the limited English proficient person of the availability of free alternative communication services, including interpreter and translation services and where to file complaints if appropriate services are not provided.” This is consistent with Section 602 of Title VI, which forbids recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. (See also Executive Order 13166 (Aug. 11, 2000) (65 FR 50121); U.S. Dept. of Justice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Purposes” (June 18, 2002) 67 FR 41455-01, 2002 WL 1310207; U.S. Dept. of Justice, “Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs,” <https://www.lep.gov/faq/faqs-federally-conducted-and-assisted-programs/common-language-access-questions-technical>).

§ 14100(e) (Previously § 11161(d))

The Council proposes to renumber and update the pre-existing subsection 11161(d) defining “Multilingual employee” by revising the existing definition to clarify that a “multilingual employee” refers to a person employed by a covered entity, rather than a recipient, who, in addition to their regular duties, is proficient both in English and the target language, such that the employee can serve as an interpreter. In so doing, the Council proposes to delete the reference to having “minimal reading and writing skills.” The Council retains the language in the preexisting regulation stating that a multilingual employee does not have to be proficient in reading or writing skills in a second language unless such skills are a job-related necessity and adds for clarification the additional exception where reading or writing skills in a second language are necessary for orally interpreting a written document. The subsection is necessary in order to enhance clarity and ensure that interpretations for non-English speaking individuals are effective.

§ 14100(d) (Previously § 11161(e))

The Council proposes to add a definition of “Limited English proficient persons (“LEP”) to broaden and clarify the pre-existing term “Non-English-speaking persons” that was defined in subsection (e) of section 11161. This is necessary to ensure full coverage under Article 9.5 in light of changes since the regulation was first drafted. This former definition has been updated in subsection (d) of section 14100 to be consistent with the definition of LEP used by the U.S. Department of Justice in its enforcement of Title VI of the Civil Rights Act, one of the federal analogues to Article 9.5. (See U.S. Dept. of Justice, “Guidance to Federal Financial Assistance

Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (June 18, 2002) 67 FR 41455-01, 2002 WL 1310207. The proposed definition describes LEP persons as those who are non-English speaking, for whom English is not their primary language, or who have limited ability to read, write, speak, or understand English. Because some recipients of state funding also receive federal funding, including public educational institutions, it is necessary to maintain consistency in the definitions of LEP.

§ 14100(e) (Previously § 11161(f))

The Council proposes to move subsection (f) of section 11161 to Article 7 of these regulations defining “Primary language.” The new definition is identical to the preexisting definition in subsection (f) of section 11161, except that the Council finds it necessary to clarify that a person’s primary language includes “tactile sign language,” as well as “sign language.” “Sign language” usually refers to American Sign Language, which is a means of communication for individuals who are hearing impaired and is comprised of visually understood codes and signals but is broad enough to include other versions of sign language, for example sign language used by someone from another country. “Tactile sign language” is the means of communication used by those who are both hearing and vision impaired and relies on touching. This is necessary to ensure that the form of communication available to individuals who are both visually and hearing impaired is understood to be a primary language.

§ 14100(f)

The Council proposes to add a new definition for the term “translator.” This is necessary in order to clarify the difference between interpreters and translators. The Council is proposing this regulation to interpret and make specific a statutory term, which the Council is authorized to do under Government Code section 11342.600. Interpreting requires spoken fluency in English and the target language, while translating is the act of replacing written text, sign, or recorded image in the source language with written text, sign, or recorded image in another language. This subsection is necessary because “translator” is a term used in the definition of qualified interpreter (14020(*ll*)), and clarity is needed to distinguish between translators and interpreters. Moreover, in order for people to be free from discrimination and have full access, translations of documents, which are often are confidential, medical, and/or technical, must be accurate. To this end, the Council believes it is necessary to provide direction regarding what constitutes “competency of translations,” including direction as to appropriate training on issues such as ethics and confidentiality. This guidance is consistent with materials published by the U.S. Department of Justice in connection with its enforcement of Title VI. (*See* U.S. Dept. of Justice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (June 18, 2002) 67 FR 41455-01, pp. 41455-41472; U.S. Dept. of Justice, “Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs” (August 2011), <https://www.lep.gov/faq/faqs-federally-conducted-and-assisted-programs/common-language-access-questions-technical>; and “Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals” (April 2011): https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf).

§ 14101, Prohibited Practices on the Bases of Ancestry, Ethnic Group Identification, and National Origin

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the bases of ancestry, ethnic group identification and national origin, all of which are enumerated in Government Code section 11135(a). This section is necessary to provide guidance to the public that these three protected bases share definitional foundations and may intersect with each other and other protected bases. This section is intended to cover both intentional and disparate impact discrimination based on ancestry, ethnic group identification, and national origin.

§ 14101(a)

The Council proposes to add this new subsection to clarify that discrimination against a person and denial of full and equal access because of a person's "ancestry, ethnic group identification, or national origin, including the person's primary language," are unlawful. In former section 11162, color and ethnic group identity had been covered together, and the former section had failed to specify that it is unlawful to discriminate against a person within the particular protected class. The Council proposes to cover the protected bases of ancestry, ethnic group identity, and national origin in this Article, and to cover color and race in Article 8. This subsection is necessary in order to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person's actual and perceived ancestry, ethnic group identification, or national origin, and that included in these categorizations are language and accent discrimination. This is consistent with EEOC Guidance on this issue. (See EEOC Enforcement Guidance on National Origin Discrimination (11/18/16), available at <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination>, superseding a prior version of section 13 of the EEOC Compliance Manual.) This subsection also is necessary because ancestry, ethnic group identification, and national origin are commonly referenced together, to provide guidance to the public, to achieve compliance with the law, and to ensure that the law is not unknowingly violated.

§ 14101(b)

The Council proposes to add this new subsection to clarify that it is unlawful to discriminate against or deny full and equal access to a person because of the person's association with someone else's ancestry, ethnic group identification, or national origin. This subsection is necessary to ensure compliance with Government Code section 11135(d), which prohibits discrimination on the basis of an individual's association with a person in a protected class, including ancestry, ethnic group identification, and national origin.

§ 14101(c)

The Council proposes to add this new subsection to clarify that it is unlawful to discriminate against a person because of the person's membership in an organization that promotes the interests of a protected basis, or because the person's name or that of their spouse is believed to reflect a particular ancestry, ethnic group association, or national origin. This subsection is necessary to provide guidance to the public that discrimination because of one's connections to another person or something as basic as a name, may be unlawful, even if the individual with the connection is not a member of a protected class. Membership in an organization is a form of association with others in a protected class, and thus this subsection is necessary to make

Government Code section 11135(d) more specific and ensure full and broad compliance with Article 9.5.

§ 14101(d)

The Council proposes to add this subsection to clarify that it is unlawful for a covered entity to fail to take reasonable steps to ensure meaningful access to programs and activities by LEP persons. This is necessary to make specific the intent of the statute to fully protect individuals in protected classes, such as race, color, ancestry, national origin, and ethnic group identification, who often are limited English proficient (LEP). This is consistent with federal Department of Justice guidance on how to provide meaningful access to LEP individuals that requires a four-part “individualized assessment.” (See U.S. Dept. of Justice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (June 18, 2002) 67 FR 41455-01, 2002 WL 1310207.) Moreover, the Council proposes to include a fifth factor — “the significance of the communication to an individual’s ability to access or be served by the program or activity.” This is necessary to fully analyze and personalize determinations of whether a covered entity provided meaningful access. For example, scheduling an interview with an LEP person to determine their eligibility for a program or activity is typically a less significant communication than the interview itself. Therefore, the steps required to ensure the person’s meaningful access may be different, and less formal, when scheduling the interview than when conducting the interview.

Article 8. Specific Practices Prohibited - Color and Race

§ 14125, Definitions

The purpose of this section is to provide guidance on where “color” and “race” are defined. The Council proposes to cross-reference the definitions of “color” and “race” in subsections (j) and (mm) of section 14020. This is necessary to keep all definitions in one place (section 14020) and provide relevant context for the rest of the article.

§ 14126, Prohibited Practices on the Basis of Color and Race

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the bases of color and race. Previously, discrimination on the basis of color and ethnic group identity were combined. As reflected in the Council’s proposed definitions of these terms in section 14020, the Council has proposed to combine color and race in its discussion of prohibited bases and to treat them together. The section is necessary to clarify that color and race sometimes are used interchangeably or in connection with one other and that they share definitional foundations. This section is intended to cover both intentional and disparate impact discrimination based on color and race.

§ 14126(a)

The Council proposes to add this subsection to clarify that discrimination against a person and the denial of full and equal access because of a person’s actual or perceived color or race are unlawful. In former section 11162, color and ethnic group identity had been covered together, and the subsection had failed to include that it is unlawful to discriminate against a person within the particular protected class. The Council proposes to cover the protected bases of color and

race in Article 8, and to cover ancestry, ethnic group identity, and national origin in Article 7. This is consistent with the Title VI since EEOC similarly covers race and color together in section 15 of its Compliance Manual. This subsection is necessary in order to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person's perceived race or color. This subsection also is necessary because race and color are commonly referenced together, to provide guidance to the public, to achieve compliance with the law, and to ensure that the law is not unknowingly violated.

§ 14126(b)

The Council proposes to add this subsection to clarify that it is unlawful to discriminate against or deny full and equal access to a person because of the person's association with someone else's color or race. This subsection is necessary to comply with Government Code section 11135(d), which prohibits discrimination on the basis of an individual's association with a person in a protected class, including color and race, and to provide guidance to the public to ensure that the law is not unknowingly violated.

§ 14126(c)

The Council proposes to add this subsection to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person's membership in an organization that promotes the interests of a protected basis, or because the person's name or that of their spouse is believed to reflect a particular color or race. This subsection is necessary to provide guidance to the public that discrimination due to one's connections to another person or something as basic as a name, may be unlawful, even if the person with the connection is not a member of a protected class. Membership in an organization is a form of association with others in a protected class, and thus this subsection is necessary to make Government Code section 11135(d) more specific and ensure full and broad compliance with Article 9.5.

Article 9. Specific Practices Prohibit—d - Marital Status (Previously § 11180)

§ 14153, Prohibited Practices

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the basis of marital status, which is an expressly enumerated, protected basis in Article 9.5, and is defined in section 14020(aa) of these regulations. The proposed revised section addresses marital status as a separate protected basis because marital status is so identified in Government Code section 11135(a). This section updates former section 11180 ("Parental, Family or Marital Status"), which has been moved to 14302 under "sex discrimination" to address parental, family, or marital status discrimination based on sex. This section is intended to cover both intentional and disparate impact discrimination based on marital status.

§ 14153(a)

The Council proposes to add this new subsection to clarify that both discrimination against a person and the denial of full and equal access because of a person's marital status are unlawful. The Council also proposes to add this section in order to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the

person's perceived marital status. Previously, marital status had been referenced in preexisting sections 11180 and 11181, but only in connection with sex discrimination. This subsection is necessary in order to conform to Article 9.5 by clarifying that to establish discrimination or denial of full and equal access based on marital status, one is not required to prove that a policy or practice had the "purpose or effect of differentiating on the basis of sex," as is set forth in preexisting section 11180.

§ 14153(b)

The Council proposes to add that it is prohibited to "discriminate against or deny full and equal access to a person on the basis of such person's association with persons of a particular marital status." This subsection is necessary to ensure compliance with Government Code section 11135(d), which prohibits discrimination on the basis of an individual's association with a person in a protected class, including marital status, and to provide guidance to the public to ensure that the law is not unknowingly violated.

§ 14153(c)

The Council proposes to add this new subsection to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person's membership in an organization that promotes the interests of individuals in protected classes. This subsection is necessary to ensure compliance with the law, particularly subdivision (d) of Government Code 11135, and to ensure that the law is not unknowingly violated. Membership in an organization is a form of association with others in a protected class, and thus this subsection is necessary to make Government Code section 11135(d) more specific and ensure full and broad compliance with Article 9.5.

§ 14153(d)

The Council proposes to renumber and update former section 11181 and reorganize the order of the regulations. In prohibiting inquiries based on marital status except under certain circumstances, former section 11181 referenced marital status as a subset of sex discrimination and prohibited discriminatory conduct on the part of a recipient. This subsection is necessary in order to clarify that marital status is now an independent protected basis under Article 9.5 and to prohibit discrimination by "covered entities," as that term is defined in subsection (m) of section 14020, and includes recipients. This subsection also is necessary in order to reaffirm the recognition that inquiries about family status may be a way to determine or perceive one's marital status. Thus, it is prohibited for a covered entity to "inquire about a person's family or marital status," except that "such person may be required to provide information relevant and necessary for determining whether such person satisfies validly imposed criteria for the aid or benefit, or participation in the program or activity in question, including any other former names by which such person has been known."

Former § 11180, Parental, Family or Marital Status.

The Council proposes to renumber former section 11180 and reorganize the order of the regulations. In so doing, the former section 11180 has been renumbered and moved to section 14302 in Article 11. No substantial changes were made to former section 11180.

Article 10. Specific Practices Prohibited - Religion

§ 14180, Definitions (Previously § 11165)

The purpose of this section is to provide the definition of “religion” that cross-references to the definition of religion in subsection (qq) of section 14020. The subsection is necessary to provide clarity and a definition that informs the following regulations regarding prohibited practices, the duty to provide reasonable accommodation in religion, and exemptions. As explained in connection with subsection (qq) of section 14020, the definition is necessary in order to provide a more inclusive definition of religion, and to make it clear that terms “religion,” “religious creed,” “religious observance,” “religious belief,” and “creed” are all covered.

§ 14181, Prohibited Practices on the Basis of Religion (Previously § 11168)

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the basis of “religion,” which is an expressly enumerated, protected basis in Article 9.5, and is defined in section 14020(qq) of these regulations. This section brings the regulations into compliance with Government Code section 11135(d) regarding perceptions of religion and association with a person based on religion. Section 14181 replaces, updates, and expands former section 11168, which has been deleted. This section is intended to cover both intentional and disparate impact discrimination based on religion.

§ 14181(a)

The Council proposes to add this new subsection to clarify that discrimination against a person and the denial of full and equal access because of a person’s religion or perceived religion are unlawful. Previously, the prohibited practice identified in former section 11168 was for a recipient of state support to discriminate against an ultimate beneficiary. This subsection is necessary in order to clarify that all covered entities, and not just recipients, are prohibited from engaging in unlawful discrimination. The subsection also is necessary to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access on the basis of either a person’s actual or perceived religion.

§ 14181(b)

The Council proposes to add this new subsection to clarify that it is unlawful to discriminate against or deny full and equal access to a person because of the person’s association with persons of a particular religion. The subsection is necessary in order to be consistent with Government Code section 11135(d), which prohibits discrimination on the basis of a person’s association with others on a protected basis, including religion.

§ 14181(c)

The Council proposes to add this new subsection to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person’s membership in an organization that promotes the interests of persons with a particular religion. The subsection is necessary in order to fully implement Government Code section 11135(d), which prohibits discrimination on the basis of a person’s association with others from a protected class. Membership in a religious organization or religious advocacy organization is a form of association with others in a protected class and is an essential part of religious practice in many religions, and thus this subsection is necessary to ensure full and broad compliance with

Government Code section 11135(d). This section is consistent with subsection (b) of section 11022 of the Council's employment regulations, which protects persons on the basis of their association with individuals in protected classes.

§ 14182, Reasonable Accommodation of Religious Practices (Previously § 11166)

The purpose of this existing section is to address the duty of covered entities to provide reasonable accommodation to people's religious beliefs. The Council proposes to renumber pre-existing section 11166 to move the provision to section 14182 of Article 10 of these regulations and revise the section to enhance the readability of the regulations. The revision clarifies that it is unlawful for a covered entity to fail to make reasonable accommodation to the religious belief of an ultimate beneficiary unless it would cause undue hardship on the covered entity. This is necessary to clarify that all covered entities, not just recipients of state support, are required to make reasonable accommodations for religious beliefs.

§ 14183, Exemption of Religious Organizations (Previously § 11167)

The purpose of this existing section is to identify exemptions from Article 9.5. The Council proposes to retain and move pre-existing section 11167 to section 14183 in Article 10 of these regulations to enhance the readability of the regulations, and to update cross references. This revision is necessary to conform and to more accurately reflect the legal obligations that Article 9.5 imposes on covered entities. The Council is not proposing any substantial changes.

Article 11. Specific Practices Prohibited - Sex and Sexual Orientation

§ 14300, Prohibited Practices on the Basis of Sex or Sexual Orientation

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the basis of "sex" or "sexual orientation," which are expressly enumerated, protected bases in Article 9.5 and are defined in subsections (rr) and (ss) of section 14020 of the proposed regulations. This section is necessary to bring the regulations into compliance with Government Code section 11135(d) regarding perceptions of sex and sexual orientation and association with a person based on sex and sexual orientation. This section is intended to cover both intentional and disparate impact discrimination based on sex and sexual orientation.

§ 14300(a)

The Council proposes to add this new subsection to clarify that both discrimination against a person and the denial of full and equal access because of a person's sex or sexual orientation are unlawful. The Council also proposes to add this section in order to clarify that prohibited practices under Article 9.5 include both discrimination and denial of full and equal access because of the person's perceived sex or sexual orientation. Previously, there have been no regulations addressing sexual orientation, which was added to Government Code section 11135, effective January 1, 2007. The pre-existing regulations addressing sex discrimination under Article 9.5 did not include any provision describing prohibited practices, and as noted above, sexual orientation was not covered at all. This subsection is necessary in order to conform the regulations to the current legal obligations under Article 9.5 because sexual orientation is now a protected class under Article 9.5. This section is consistent with subsection (b) of section 11022 of the Council's employment regulations, which protects persons on the basis of their association

with individuals in protected classes.

§ 14300(b)

The Council proposes to add this subsection to clarify that it is unlawful to discriminate against or deny full and equal access to a person because of the person's association with persons of a particular sex or sexual orientation. This subsection is necessary to ensure compliance with Government Code section 11135(d), which prohibits discrimination on the basis of an individual's association with a person in a protected class, including sex and sexual orientation.

§ 14300(c)

The Council proposes to add this subsection to clarify that prohibited practices under Article 9.5 include both discrimination or denial of full and equal access because of the person's membership in an organization that promotes the interests of persons with a particular sex or sexual orientation. The subsection is necessary in order to fully implement Government Code section 11135(d), which prohibits discrimination on the basis of a person's association with others from a protected class. Membership in an organization that is identified with, or seeks to promote the interests of persons, of a particular sex or sexual orientation, is a form of association with others in a protected class, and thus this subsection is necessary to make Government Code section 11135(d) more specific and ensure full and broad compliance with Article 9.5. This section is consistent with subsection (b) of section 11022 of the Council's employment regulations, which protects persons on the basis of their association with individuals in protected classes.

Deleted Former § 11181, Personal Information

The Council proposes to delete this section, renumber it as subsection 14153(d) under Article 9 ("Specific Practices Prohibited—Marital Status"), and retain the substance of the former section 11181, as noted above.

§ 11182-§ 14301, Pregnancy, Childbirth, or Termination of Pregnancy

The purpose of this section is to state that pregnancy, childbirth, recovery from childbirth, or termination of a pregnancy must be treated as every other temporary disability. The substance of this section was included in preexisting section 11182, and the Council proposes to renumber and move it to section 14301 of these regulations in order to enhance the readability of the regulations. In addition, the Council proposes to delete the terms "rule" and "policy," which is necessary because those terms are now incorporated in the definition of "practice" in subsection (hh) of section 14020. The Council also proposes to revise the preexisting section to use the term "prohibited practice" instead of "discriminatory practice," which is necessary in recognition of Article 9.5's mandate to provide full and equal access and to clarify that the practices of all "covered entities" as defined in subsection (m) of section 14020, not just recipients of state funding referenced in the pre-existing regulation, must comply with Article 9.5.

§ 14302, Parental, Family, or Marital Status

The purpose of this section is to state that practices concerning parental, family or marital status that have the purpose or effect of discriminating on the basis of sex are unlawful. The substance of this section was included in preexisting section 11180, and the Council proposes to renumber and move it to section 14302 to enhance the readability of the regulations and in recognition of

the fact that practices concerning one’s actual or perceived parental, family, or marital status will violate Article 9.5 if they have the purpose or effect of differentiating on the basis of sex. In addition, the Council proposes to revise the pre-existing section to use the term “prohibited practice” instead of “discriminatory practice,” which is necessary in recognition of Article 9.5’s mandate to provide full and equal access, and to clarify that the practices of all “covered entities” as defined in subsection (m) of section 14020, not just recipients of state funding referenced in the preexisting regulation, must comply with Article 9.5.

Former § 11183, Statistical Stereotypes

The Council proposes to delete former section 11183. The regulation as drafted was an inaccurate and incomplete statement of unlawful sex discrimination. It has been replaced by the new and updated sections in Article 11.

Former § 11184, Sex Pressure Prohibited

The Council proposes to delete former section 11184. The regulations as drafted provided an incomplete description of sexual harassment. It has been replaced by Article 5, “Harassment, Coercion, Intimidation and Retaliation,” and particularly proposed section 14070, “Harassment Prohibited.”

§ 14303, Inquiries Regarding and Recording of Gender and Name

The purpose of this section is to address the propriety of inquiries by a covered entity that directly or indirectly identify a person on the basis of sex or sexual orientation.

§ 14303(a)

The Council proposes to add that “[i]nquiries by a covered entity that directly or indirectly identify a person on the basis of sex, including gender, gender identity, or gender expression, or sexual orientation, are unlawful unless the covered entity establishes a permissible defense, including whether such a practice is required by state or federal law or an order of a state or federal court. For recordkeeping purposes, a covered entity may request a person to provide this information solely on a voluntary basis.” This is necessary because documenting the number of individuals of a particular sex is an important method for monitoring practices to ensure compliance with the law, just as it is for an employer to engage in recordkeeping under subsection 11034(h)(1), so long as providing such information is voluntary. This also is necessary to clarify the scope of the prohibition against making inquiries that identify a person by sex and to remind the public that “sex,” as defined in section 14020(rr), includes gender, gender identity, and gender expression. The Council also proposes to clarify that such inquiries are subject to defenses, including whether an inquiry or recording is required by a state or federal law. This subsection is similar to subsection (d) of section 14153, regarding inquiries about marital status, in that it generally prohibits inquiries but also provides for invocation of a permissible defense. This is also consistent with the Council’s employment regulation, subsection (h) of section 11034, which prohibits an employer or other covered entity from making inquiries that directly or indirectly identify a person on the basis of sex, including gender, gender identity, or gender expression, unless the employer establishes a permissible defense.

§ 14303(b)

The Council proposes to add that “[i]f an ultimate beneficiary requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, a covered entity who fails to abide by the person's stated preference may be liable under Article 9.5, except as noted in subdivision (c) of this section.” This is necessary to clarify that a covered entity that fails to abide by the stated identity preference of an ultimate beneficiary may be liable under Article 9.5, unless using the person’s legal name or gender indicated on a government-issued identity document is necessary in order to meet a legally mandated obligation. This is also necessary for consistency with section 11034(h)(3) of the Council’s employment regulations, which requires employers to abide by the employee’s stated identifying preference unless it is necessary to meet a legally mandated obligation.

§ 14303(c)

The Council proposes to add that a “covered entity is permitted to use a person’s gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation, but otherwise must identify the person in accordance with their gender identity and preferred name.” This is necessary to reiterate the limited circumstances when a person’s preferred gender identity and name may not be used. This is also necessary for consistency with section 11034(h)(4) of the Council’s employment regulations, which permits employers to use an employee’s gender and legal name as it appears on a government-issued identification document, but only if it is legally mandated.

§ 14303(d)

The Council proposes to add that “[i]t is unlawful for a covered entity to discriminate against or deny full and equal access to an individual who is transitioning, has transitioned, or is perceived to be transitioning.” This is necessary to prevent discrimination against individuals who are protected under California law and to comply with the broad and inclusive coverage of sex under section 11135. For example, in subsections 11030(b) and (e) of its employment regulations, the Council describes the protected basis of “gender identity” to include transgender individuals, and in subsection 11030(f), the Council defines the term “transitioning.” The term “transitioning” in subsection 14020(zz) is consistent with the definition in subsection 11030(f) of the Council’s employment regulations, which describes it as the process by which transgender individuals go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. Subsection 14303(d) is consistent with subsection 11034(i)(4) of the Council’s employment regulation as well, which clarifies that “[i]t is unlawful to discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning.”

§ 14303(e)

The Council proposes to add that “[i]t is unlawful for a covered entity to refuse any individual access to facilities that correspond to that individual’s gender identity or gender expression, regardless of the individual’s sex assigned at birth, unless the covered entity establishes a permissible defense. Covered entities may not require individuals to undergo, provide proof of any medical treatment or procedure, provide any identity document, or to use facilities designated for use by a particular gender.” This is necessary to prevent discrimination against individuals who are protected under California law and to comply with the broad and inclusive coverage of sex under section 11135. Subsection 14303(e) is consistent with the Council’s employment regulation, subsection 11034(e)(2), which requires employers to provide equal

access to facilities without regard to the sex of the employee and to allow employees to use facilities that correspond to the person’s gender identity or expression, regardless of the employee’s assigned sex at birth. Like its employment counterpart, subsection 11034(e)(2)(D), subsection 14303(e) does not require individuals to undergo or provide proof of any medical treatment or procedure, provide any identity document, or to use facilities designated for use by a particular gender. This section is also consistent with Education Code section 221.5(f), which requires school districts to permit students to use facilities consistent with their gender identify, regardless of the gender listed on pupil records, as well as Health and Safety Code section 118600, which requires all single user toilet facilities in business establishments, public accommodations, and government agencies to be gender neutral.

§ 14303(f)

The Council proposes to add that “[n]othing in this section shall preclude a covered entity from making a reasonable and confidential inquiry of an ultimate beneficiary for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.” This is necessary to prevent discrimination against individuals who are protected under California law and to comply with the broad and inclusive coverage of sex under section 11135. Subsection 14303(f) tracks the Council’s employment regulation, subsection 11034(e)(2)(E), which permits employers to do the same. This section is also consistent with Education Code section 221.5(f), which requires school districts to permit students to use facilities consistent with their gender identify, regardless of the gender listed on pupil records, as well as Health and Safety Code section 118600, which requires all single user toilet facilities in business establishments, public accommodations, and government agencies to be gender neutral.

Article 12. Specific Practices Prohibited - Disability, Medical Condition, and Genetic Information

§ 11187-§ 14325, Definitions

The purpose of this section is to give meaning to technical terms referenced in the regulations and to provide guidance when there is no other applicable section of the regulations. The Council proposes to renumber and update former section 11187 by providing cross-references to the more accurate, specific, and current definitions of “disability,” “genetic information,” and “medical condition” in section 14020. This is necessary for clarity, to keep all definitions in a small number of sections, and because the terms are used in Articles other than the new proposed Article 12.

§ 14326, Prohibited Practices on the Basis of Disability

The purpose of this section is to specify the types of practices by a covered entity that constitute unlawful discrimination or denial of full and equal access on the basis of disability, which is an expressly enumerated, protected basis in Government Code section 11135(a) and (b). This section is intended to cover both intentional and disparate impact discrimination based on disability.

§ 14326(a)

The Council proposes to add this new subsection to clarify that prohibited practices under Article 9.5 include both discrimination or denial of full and equal access and to clarify that it is unlawful

to discriminate or deny full and equal access due to a person's actual or perceived disability, pursuant to Government Code section 11135(d). This subsection is necessary to comply with Government Code section 11135(a), which prohibits discrimination on the basis of disability, and Government Code section 11135(d), which provides that a perception that an individual has a disability is also a protected basis.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state "prescribe stronger protections and prohibitions," in which case the protections afforded by section 11135 "shall be subject to the stronger protections and prohibitions." The definition meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.108, revised October 11, 2016 [definition of disability, including subsection (f), "regarded as having" an impairment].)

§ 14326(b)

The Council proposes to add this new subsection to clarify that it is unlawful to discriminate against or deny full and equal access to a person because of the person's association with persons who have a disability, pursuant to Government Code section 11135(d). This subsection is necessary to comply with Government Code section 11135(d), which provides that "[t]he protected bases used in this section include a perception that . . . the person is associated with a person who has, or is perceived to have [a disability]."

§ 14326(c)

The Council proposes to add this new subsection to clarify that prohibited practices under Article 9.5 include both discrimination or denial of full and equal access because of the person's membership in an organization that promotes the interests of persons with disabilities, pursuant to Government Code section 11135(d). The subsection is necessary in order to fully implement Government Code section 11135(d), which prohibits discrimination on the basis of a person's association with others from a protected class such as disability. Membership in an organization that is identified with, or seeks to promote the interests of, persons with disabilities, is a form of association with others in a protected class, and thus this subsection is necessary to make Government Code section 11135(d) more specific and ensure full and broad compliance with Article 9.5.

§ 14327, Reasonable Accommodations

The purpose of this section is to describe covered entities' duty to reasonably accommodate an individual with a disability and engage in an interactive process before a request can be refused. The Council proposes to add that "[i]t unlawful for a covered entity to fail or refuse to provide a reasonable accommodation as needed to afford an individual with a disability a full and equal opportunity to use or enjoy programs, activities or services. Upon receiving a request for a reasonable accommodation, covered entities shall engage in a good faith interactive process to determine an effective reasonable accommodation." The provision is necessary to ensure that individuals with disabilities are able to fully and equally access programs and services.

"Reasonable accommodations" in this Article means substantially the same thing as "reasonable

modifications” under section 202 of the ADA, as set out in proposed section 14020(pp) above. The section is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12176-12185.) The definition meets or exceeds the protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.130(b)(7), revised October 11, 2016 [public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disabilities].) This is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.”

§ 14328, Medical Condition

The purpose of this section is to describe the prohibition on covered entities to discriminate based on medical condition. The Council proposes to add “[i]t is a prohibited practice for a covered entity to discriminate against or deny full and equal access to a person on the basis of the person’s actual or perceived medical condition, as defined in section 14020(cc).” Because “medical condition” is an expressly enumerated protected basis under Government Code section 11135(a) and is defined in section 14020(cc) of these regulations, the section is necessary to implement Government Code section 11135(a) regarding medical conditions.

§ 14329, Genetic Information

The purpose of this section is to describe the prohibition on covered entities to discriminate based on genetic information. The Council proposes to add, “It is a prohibited practice for a covered entity to discriminate against a person on the basis of the person’s genetic information, as defined in section 14020(u).” Because “genetic information” is an expressly enumerated protected basis under Government Code section 11135(a) and is defined in section 14020(u) of these regulations, the section is necessary to implement Government Code section 11135(a) regarding genetic information.

§ 14330, Confidentiality

The purpose of this section is to address the issue of confidentiality as it pertains to a person’s request for reasonable accommodations for a disability, medical condition, or genetic information. This is necessary to ensure that the privacy rights of individuals with disabilities relating to their medical condition and diagnoses are protected to the fullest extent possible, consistent with other California laws and the California Constitution. (*See, e.g.,* Cal. Const., Art. I, § 1, and Confidentiality of Medical Information Act, Civ. Code §§ 56 *et seq.*) This is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, § 12176(e).)

§ 14330(a)

The Council proposes to add subsection (a) to clarify that all information concerning a request for reasonable accommodation must be kept confidential unless the individual with a disability waives confidentiality or disclosure is required by law. This section is necessary in order to emphasize that state and federal laws require medical information to be kept confidential, including the Confidentiality of Medical Information Act, and Civil Code sections 56 *et seq.*, and that no Article 9.5 requirement may override that confidentiality. This is consistent with the

FEHA fair housing regulations. (See Cal. Code Regs., tit. 2, § 12176(e).)

§ 14330(b)

The Council proposes to add subsection (b) in order to clarify that it is permissible for a covered entity to request a limited disclosure of medical information in order to review a request for accommodation or to implement an accommodation. However, the information can only be disclosed to a covered entity's staff who are "directly involved" in the accommodation process and must be maintained in a confidential manner. Privacy is of such importance that it is necessary to provide direction to the public, covered entities, and interested parties as to acts that implicate Article 9.5 and may also have other legal consequences. This is necessary to ensure that the privacy rights of individuals with disabilities relating to their medical condition and diagnoses are protected to the fullest extent possible, consistent with other California laws and the California Constitution. (See, e.g., Cal. Const., Art. I, § 1; Confidentiality of Medical Information Act, Civ. Code §§ 56 *et seq.*) This is consistent with the FEHA fair housing regulations. (See Cal. Code Regs., tit. 2, § 12176(e).)

Former § 11188, Self-Evaluation

The Council proposes to renumber this section and reorganize the order of the regulations, so the prior section has been deleted. This is necessary for clarity. The substantive text of the revised section is now at section 14334. No substantial changes were made to this section.

§ 14331, Assistance Animals.

The purpose of this proposed section is to implement Article 9.5's prohibition on discrimination against people with disabilities in regard to all types of assistance animals used by individuals with disabilities. "Assistance animal" is an umbrella term, which encompasses all the various categories of assistance animals, including the two main categories, service animals and support animals. Many regulations apply to all assistance animals and specific provisions relate to specific types of assistance animals.

§ 14331(a)

The Council added a cross-reference here to the definition of "assistance animal" in subsection 14020(f). The cross-referenced definitions include the comprehensive term "assistance animal" and the subcategories of "service animals" and "support animals." This is necessary for clarity and to keep all definitions in one section. The proposed assistance animal definitions are consistent with the FEHA fair housing regulations. (See Cal. Code Regs., tit. 2, §§ 12005(d) [definition of "assistance animals"] and 12185 ["Assistance Animals"].)

§ 14331(b)

The Council proposes to add subsection (b) to make explicit that individuals with disabilities are permitted to be accompanied by service animals in all locations and facilities operated or controlled by covered entities. "Service Animals" are a subset of assistance animals which are trained to carry out tasks and provide specific assistance to individuals with disabilities. The term "service animals" is used to describe the variety of animals who provide this type of assistance, including guide dogs, signal dogs, service dogs, miniature horses under specified circumstances, and service animals in training, as those terms are defined in subsection 14020(f)(1). Different rights attach to service animals than to the other main type of assistance animals (support

animals). In particular, the California Disabled Persons Act (DPA), California Civil Code section 54 *et seq.*, sets out specific rights of individuals with disabilities with respect to service animals. This subsection also provides clarity to the public as to what questions may be asked to determine if an animal is a service animal. This subsection is necessary to ensure consistency with Civil Code sections 54 *et seq.*, particularly section 54.2 (individuals with disability have the right to be accompanied by guide dogs, signal dogs, and service dogs in all public places enumerated in section 54.1).

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations on service animals at 28 C.F.R. §§ 35.104, revised October 11, 2016 [definition of “service animal”] and 35.136 [rights to service animals in public places, limits on questions that can be asked]; DOJ Guidelines, “Frequently Asked Questions about Service Animals and the ADA,” U.S. Department of Justice, Civil Rights Division, (July 20, 2015), https://www.ada.gov/regs2010/service_animal_qa.html (“DOJ ADA FAQ”); DOJ’s update “Service Animals” publication, U.S. Department of Justice, Civil Rights Division, (issued July 12, 2011 and updated February 24, 2020), https://www.ada.gov/service_animals_2010.htm (“DOJ Service Animals Guidance”). This is necessary to comply with Government Code section 11135(b), which requires protections for people with disabilities under subdivision (a) of that section to meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(c)

The Council proposes to add subsection (c) to make explicit that individuals with disabilities are entitled to request a reasonable accommodation to be accompanied by support animals in all locations and facilities operated or controlled by covered entities. “Reasonable accommodations” in this Article means substantially the same thing as “reasonable modifications” under section 202 of the ADA, as set out in proposed section 14020(pp) above. This includes “support animals” as that term is defined in subsection 14020(f)(2) of the proposed regulations. Support animals are not trained to perform tasks. Instead, they provide emotional, cognitive, or other similar support to individuals with disabilities. This subsection also references section 14327 of the proposed regulations, which provides clarity as to the reasonable accommodation process for persons with disabilities.

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.130(b)(7), revised October 11, 2016 [a public entity shall make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability].) This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance

animals”].)

§ 14331(d)(1)

The Council proposes to add that an individual with an assistance animal may also be covered by laws other than Article 9.5. This is necessary to provide additional guidance to the public about overlapping legal obligations to avoid confusion and make clear that Article 9.5. is in addition to, not lieu of, other civil rights laws. This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(2)

The Council proposes to add that an “individual with an assistance animal shall not be required to pay any pet fee or other additional fee, including additional security deposit or liability insurance, in connection with the assistance animal.” This subsection is necessary to ensure consistency with Civil Code sections 54.2 *et seq.* (individuals with a disability have a right to be accompanied by a service animal without being required to pay an extra charge or security deposit).

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations, 28 C.F.R. § 35.136(h), revised March 15, 2011 [a public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets]; DOJ ADA FAQ, *supra* at Question/Answer 12 [hotels cannot charge an extra cleaning fee for cleaning hair or dander shed by a service animal]; and DOJ ADA Service Animals Guidance, *supra* [if a business normally requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals].) This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(3)

The Council proposes to add that an “individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear.” This subsection is necessary to ensure that both the rights and obligations of individuals with disabilities who use assistance animals and the rights of public entities are both addressed. It is also necessary for consistency with Civil Code section 54.2 *et seq.* (individuals with a disability may be liable for any damage done to the premises or facilities by a service dog).

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations, 28 C.F.R. § 35.136(h), revised March 15, 2011 [if a public entity normally charges individuals for the damage they cause, an individual with a

disability may be changed for damaged caused by a service animal]; DOJ ADA FAQ, *supra* at Question/Answer 12 [hotels can charge for damage done by a service animal]; and DOJ ADA Service Animals Guidance, *supra* [if a business normally charges guests for damage that they cause, a customer with a disability may also be charged for damage caused by the service animal].) This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(4)

The Council proposes to add the rules regarding more than one assistance animal. This subsection is necessary to clarify that Article 9.5 does not place restrictions on the number of assistance animals and to ensure that people with disabilities have full and equal access to programs, services, and facilities covered by Article 9.5. This is necessary to ensure that each request for a reasonable accommodation must be considered on an individual basis following a good faith interactive process, pursuant to proposed section 14327.

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.136(a), revised March 15, 2011 [generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal]; DOJ ADA FAQ, *supra* at Question/Answer 13 [people can generally bring more than one service animal into a public place, since animals may perform different tasks].) This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(5)

The Council proposes to add that “[n]o breed, size, and weight limitations may be applied to an assistance animal (other than specific restrictions relating to miniature horses as service animals under the Americans with Disabilities Act).” This is necessary to ensure full inclusion of people with disabilities under Article 9.5, since animals may only be excluded if they pose a direct threat, not because of other factors that do not necessarily constitute a threat.

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA FAQ, *supra* at Questions/Answers 22-24 [restrictions on breeds of dogs violate the ADA, animals may not be excluded because of fears or generalizations about how an animal or breed might behave].) This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the

state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(6)

The Council proposes to add that “[r]easonable conditions may be imposed on the use of an assistance animal” and describe the parameters of those restrictions. This is necessary to balance the rights of people with disabilities and the rights of others and to establish that reasonable conditions can be imposed on all assistance animals (service animals and support animals), so long as those conditions do not interfere with the normal performance of the animal’s duties and the conditions are uniformly applied to all animals. This subsection is necessary to make it explicit both that covered entities may not single out individuals with disabilities for disparate treatment and that generally applicable, reasonable rules regarding control of animals are also applicable to individuals with disabilities, unless modified by a request for a reasonable accommodation. The rules also make it explicit that control over the animal can be exercised by the individual with a disability or by persons assisting the individual, in order to comply with the reasonable conditions (for example, another person could assist the individual with a disability by walking the dog and/or disposing of animal waste). The proposed subsection provides examples for further guidance to the public about the application of this subsection. *See*, Civil Code section 54.1(b)(6)(B); DOJ ADA Service Animals Guidance, *supra*; and DOJ ADA FAQ, *supra*.

This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. §§ 35.136(b) and (d), revised March 15, 2011 [animals can be excluded if they cannot be controlled, leashes may not be required in all circumstance]; DOJ ADA FAQ, *supra* at Questions/Answers 27-28 [animals must be under control, or staff may request that animal be removed from the premises].) This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].) The examples in this and other subsections of (d) are necessary to provide greater clarity for stakeholders in an area that can lend itself to misunderstandings.

§ 14331(d)(7)

The Council proposes to add that “[a]nimal vests, identification cards, or certificates are not in and of themselves documentation of either disability or the need for a reasonable accommodation.” This is necessary to ensure full inclusion of people with disabilities under Article 9.5.

This subsection is necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger

protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.136(f), revised March 15, 2011 [public entity shall not require documents that an animal has been certified, trained, or licensed]; DOJ ADA FAQ, *supra* at Question/Answer 8 [ADA does not require service animals to wear a vest, ID tag, or specific harness].) This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(8)

The Council proposes to add that if “an individual with a disability is denied permission to have an assistance animal, the individual is still entitled to all the rights and privileges that otherwise would have been accorded the individual, so long as the individual no longer has the animal.” This is necessary to ensure full inclusion of people with disabilities under Article 9.5.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.136(c), revised March 15, 2011 [if a public entity properly excludes a service animal, it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises]; DOJ ADA FAQ, *supra* at Question/Answer 23 [If an animal is excluded as a direct threat, staff must still offer their goods or services to the person without the animal present].)

This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 14331(d)(9)

The Council proposes to add the rules regarding not allowing an assistance animal if it would pose a direct threat to the health or safety of others or cause substantial physical damage. This is necessary to balance the rights of people with disabilities and the rights of others regarding assistance animals. In order to prevent broad stereotypes and assumptions from interfering with the rights of people with disabilities to have assistance animals, it is necessary to establish that any determination of direct threat must be based on an individualized assessment of the risk of the animal and consideration of objective evidence (subsection (d)(9)(A)). It is necessary to add further specificity by setting out additional factors that should be considered. Those include the nature, duration, and severity of the risk (subsection (d)(9)(B)(i)); the probability that potential injury will actually occur (subsection (d)(9)(B)(ii)); and whether reasonable accommodations or modifications will mitigate the risk (subsection (d)(9)(B)(iii)); and relevant evidence based on other existing California law regarding dangerous animals (Food & Agric. Code §§ 31601, *et seq.*) (subsection (d)(9)(C)).

This subsection is also necessary to comply with Government Code section 11135(b), which

provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. §§ 35.139(a), revised March 15, 2011 [participation not required if there is direct threat] and (b) [listing factors that must be considered]; and DOJ ADA FAQ, *supra* at Questions/Answers 23-24 [if a particular animal behaves in a way that poses a direct threat to the health or safety of others, or has a history of such behavior, the animal may be excluded, but animals may not be excluded because of fears or generalizations about how an animal or breed might behave].) This subsection is consistent with the FEHA fair housing regulations. (*See* Cal. Code Regs., tit. 2, §§ 12005(d) [definition of “assistance animals”] and 12185 [“Assistance animals”].)

§ 11189 § 14332, Integrated Setting

The purpose of this existing section is to require that people with disabilities be served in the most integrated setting appropriate. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11189 to section 14332.

§ 11190 § 14333, Communications

The purpose of this section is to ensure that individuals with disabilities are not excluded from programs and services under Article 9.5 and that covered entities take appropriate steps to ensure that communications with applicants, participants, members of the public and companions with disabilities are as effective as communications with others. The Council proposes to renumber, update, and expand former subsection 11190 to clarify the broader range of individuals currently covered under Article 9.5 (*i.e.*, all individuals with disabilities, not just individuals with hearing and vision disabilities) and to provide more specifics about the manner in which effective communications are to be provided.

§ 14333(a)

The Council proposes to clarify that is a prohibited practice for a covered entity to fail to take appropriate steps to ensure that communications with individuals with disabilities is as effective as communications with others, and to specify that public entities must give priority to the expressed preference of the person with a disability regarding the method of communication. This is necessary because failure to provide effective communications excludes individuals with communication disabilities from full and equal participation in programs, services, and activities. Furthermore, the individual with the disability is the person best able to understand what types of communications work best for them.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.160(a), revised March 15, 2011 [public entity shall take appropriate

steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others] and § 35.160(b)(2), revised March 15, 2011 [in determining what types of auxiliary aids and services, public entity shall give primary consideration to the requests of individuals with disabilities].)

§ 14333(b)

The Council proposes to add this new subsection to clarify that a broad range of individuals with disabilities may have communication-related disabilities, including people with developmental, mental health, or intellectual disabilities and people with manual and sensory disabilities. This is necessary to dispel stereotypes that only people who are blind or deaf need communication assistance and to ensure that the full range of people with disabilities covered by Article 9.5 receive communication assistance as needed.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. § 35.160(a), revised March 15, 2011 [public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others] and § 35.160(b)(2), revised March 15, 2011 [in determining what types of auxiliary aids and services to provide, public entity shall give primary consideration to the requests of individuals with disabilities].)

§ 14333(c)

The Council proposes to add this new subsection to define the term “companion,” which is used in section 14333(a). This definition and reference to “companion” is necessary because often, in accessing programs, services and activities, individuals with disabilities bring companions with them. Communication assistance thus may be necessary for companions as well, to ensure complete and accurate communication.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” This subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA. (*See* DOJ ADA Title II regulations at 28 C.F.R. §§ 35.160(a) and (b), revised March 15, 2011 [“companions” included in list of individuals for whom communication should be ensured] and § 35.160(a)(2), revised March 15, 2011 [“companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such an individual, is an appropriate person with whom the public entity should communicate].)

§ 14334, Self-Evaluation (Previously § 11188)

The purpose of this existing section is to ensure that public entities evaluate disability policies

and practices. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11188 to section 14334.

§ 11191-§ 14335, Program Accessibility (Previously § 11191)

The purpose of this section is to describe the requirements for covered entities to ensure access to individuals with disabilities to their programs, services, and activities. However, the Council does not propose to make any substantial changes and is simply renumbering and moving section 11191 to section 14335.

§ 14335(a)

The Council proposes a few non-substantial changes to update terminology, such as changing “recipient” to “covered entity,” which is the more inclusive term now used in the proposed regulations. This is necessary for clarity. Similarly, the Council proposes to change references to “qualified disabled person” to “qualified individual with a disability” which is the current, more inclusive term preferred in the revised regulations and which is now defined in proposed subsection 14020(kk). The Council also adds the new term “denial of full and equal access” to this subsection for complete coverage under Article 9.5. This is necessary for full compliance with Government Code 11135(a), which provides that protected individuals shall not “be denied full and equal access” to the benefits of any program or activity.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ ADA Title II regulations at 28 C.F.R. § 35.130(b)(8), revised October 11, 2016 (a public entity shall not impose criteria that § screen out individual with disabilities from “fully and equally” enjoying services, programs and activities).

§ 14335(b)

The Council does not propose to make any substantial changes to this subsection and is simply renumbering and moving subsection 11191(b) to section 14335(b).

§ 14335(c)

The Council proposes to renumber and move former subsection 11191(b) regarding paratransit to subsection 14343(b), consolidating transit provisions into one section. The Council also proposes to add a new subsection 14335(c) making it explicit that one way to demonstrate disparate impact or adverse effect is to demonstrate that selection criterion limit the opportunities of people with disabilities by screening out or tending to screen out persons with disabilities, without recourse to statistical data. This is necessary to ensure full and equal access for people with disabilities under Government Code section 11135(a). For example, a selection criterion for a program that requires participants to have a driver’s license will screen out people who are blind, even if there are other ways for them to participate in the program without a license, such as using public transit or paratransit.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” The proposed definition meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ ADA Title II regulations at 28 C.F.R. § 35.130(b)(8), revised October 11, 2016 (a public entity shall not impose criteria that that screen out individuals with disabilities from “fully and equally” enjoying services, programs and activities). The Council also proposes to renumber and move the last sentence in this subsection, relating to fixed route bus systems, to proposed section 14343(b), as part of the reorganization of the proposed regulations. This is necessary to group transportation provisions together for clarity.

§ 11192- § 14336, Methods of Ensuring Program Accessibility.

The purpose of this existing section is to describe some methods of compliance with program accessibility requirements. The Council does not propose to make any substantial changes to this subsection and is simply renumbering and moving subsection 11192 to section 14336.

Former § 11193, Methods for Small Recipients.

The Council proposes to delete former section 11193, the purpose of which was to prescribe fewer protective rules for recipients with 15 or fewer employees. This is necessary because this provision is no longer useful or justified since Article 9.5 does not distinguish between small and larger recipients.

§ 11194- § 14337, Time Period for Compliance.

The purpose of this existing section is to prescribe the time for compliance with section 14335. The Council does not propose to make any substantial changes to this subsection and is simply renumbering and moving subsection 11194 to section 14337.

§ 11195- § 14338, Transition Plan.

The purpose of this existing section is to require a transition plan for making facilities accessible. The Council does not propose to make any substantial changes to this subsection and is simply renumbering and moving subsection 11195 to section 14338.

§ 11196- § 14339, Notice of the Availability of Accessible Facilities.

The purpose of this existing section is to require responsible state agencies to adopt and implement procedures so that individuals can obtain information about accessible services, activities, and facilities. The Council does not propose to make any substantial changes to this subsection and is simply renumbering and moving subsection 11196 to section 14339.

§ 11197- § 14340, New Construction.

The purpose of this section is to set forth the prohibition on the construction by covered entities of facilities that are not readily accessible to and useable by people with disabilities. The Council does not propose to make any substantial changes to subsection 11197(a) and is simply renumbering and moving subsection 11198(a) to section 14340(a).

The Council has also deleted subsection (b) and moved it to section 14343, which is necessary to address transportation-related issues in a single, consolidated section. Therefore, the cross reference to subsection (b) is deleted.

§ 11198. § 14341, Alteration.

The purpose of this section is to set forth the prohibition on the alteration by covered entities of facilities that are not readily accessible to and useable by people with disabilities. The Council does not propose to make any substantial changes to subsection 11198(a) and is simply renumbering and moving subsection 11198(a) to section 14341(a).

The Council has also deleted subsection (b) and moved it to section 14343, which is necessary to address transportation-related issues in a single consolidated section. Therefore, the cross reference to subsection (b) is deleted.

§ 11199. § 14342, Accessibility Standards.

The purpose of this section is to set out the current architectural standards that apply to the design, construction, or alteration of facilities covered under Article 9.5. The Council proposes to renumber and move pre-existing section 11199 to section 14342 to be part of the new numbering scheme designed to enhance the readability and usability of the regulations. The Council also proposes to update references to the applicable accessibility standards, since those standards and references have been substantially revised since the initial regulations were adopted. These changes are necessary to encompass current architectural standards relating to disability, and for clarity. This is consistent with Government Code section 4450(c) (in no case shall the state architect's regulations and building standards prescribe a lesser standard of accessibility or usability than provided by the guidelines adopted by the U.S. Department of Justice to implement the ADA) and Government Code section 12955.1(c) (under the FEHA, state accessibility standards must provide the same or greater protections for people with disabilities than applicable federal standards). The Council also proposes to delete "[d]epartures from particular requirements of these two standards by the use of other methods by a recipient are permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided" because it is sufficient to rely on exceptions that are set out in the adopted standards, which subsume this previously necessary provision.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state "prescribe stronger protections and prohibitions," in which case the protections afforded by section 11135 "shall be subject to the stronger protections and prohibitions." The proposed subsection meets or exceeds the existing protections and prohibitions of section 202 of the ADA, as set out in DOJ ADA Title II regulations at 28 C.F.R. § 35.151, revised March 15, 2011 (new construction and alteration construction accessibility standards).

§ 11200. § 14343, Consideration of Accessible Public Transportation.

The purpose of this section is to consolidate all public transit accessibility requirements in a single combined and consolidate section, for clarity. The Council proposes to renumber and move pre-existing subsections 11197(b) and 11198(b) and all of pre-existing section 11200 to

section 14343.

§ 14343(a)

The Council does not propose to make any substantial changes to former section 11200 and is simply renumbering and moving section 11200 to section 14341(a).

§ 14343(b)

The Council proposes to add a new subsection (b) to update the nondiscrimination obligations of covered entities relating to public and private transportation by stating that “it is a prohibited practice for covered entities ... to fail to adhere to the nondiscrimination and accessibility requirements of [Section 504 and the ADA].” This provision was formerly in subsection 11197(b), and that subsection has been deleted and moved here. The relevant regulatory standards for public and private transportation under the ADA and Section 504 have changed since the date of the prior regulations under this Act, and therefore it is necessary to provide updated standards. These changes are necessary to clarify current transportation standards relating to disability.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” In addition, there are some areas of public and private transportation where other California statutes regulate accessibility rather than federal law, so it is necessary to ensure that accessibility complies with the most protective of applicable state and federal laws by saying “[i]f California laws prescribe stronger protections for the benefit of people with disabilities, the stronger protections shall apply.”

§ 14343(c)

The Council proposes to add a new subsection (c) to update the nondiscrimination obligations of covered entities relating to fixed route bus systems and para-transit systems by stating that “it is a prohibited practice for covered entities ... to fail to adhere to the accessibility requirements for new vehicles or alterations of existing vehicles as set forth in [Section 504 and the ADA].” This provision was formerly in subsection 11181(b), and that subsection has been deleted and moved here. The relevant regulatory standards for fixed route bus systems and para-transit systems under the ADA and Section 504 have changed since the date of the prior regulations under this Article, and therefore it is necessary to provide updated standards. These changes are necessary to clarify encompass current transportation standards relating to disability.

This subsection is also necessary to comply with Government Code section 11135(b), which provides that protections for people with disabilities under subdivision (a) of that section shall meet the requirements of section 202 of the ADA unless the laws of the state “prescribe stronger protections and prohibitions,” in which case the protections afforded by section 11135 “shall be subject to the stronger protections and prohibitions.” In addition, there are some areas of public and private transportation where other California statutes regulate accessibility rather than federal law, so it is necessary to ensure that accessibility complies with the most protective of applicable state and federal laws by saying “[i]f California laws prescribe stronger protections

for the benefit of people with disabilities, the stronger protections shall apply.”

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

The Council relied upon the following technical, theoretical, or empirical studies, reports, or similar documents in proposing the adoption of these regulations:

1. U.S. Dept. of Justice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (June 18, 2002) 67 FR 41455-01 *et seq.*, 2002 WL 1310207.
2. U.S. Dept. of Justice, Guidance under Title VI of the Civil Rights Act, “Commonly Asked Questions and Answers Regarding Limited English Proficient (LEP) Individuals” (April 2011) <https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf> (as of Jan. 25, 2023).
3. U.S. Dept. of Justice, “Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs” (August 2011) <<https://www.lep.gov/faq/faqs-federally-conducted-and-assisted-programs/common-language-access-questions-technical>> (as of Jan. 25, 2023).
4. U.S. Dept. of Justice, “Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs” (May 2011) <https://www.lep.gov/sites/lep/files/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf> (as of Jan. 25, 2023).
5. EEOC Guidance Documents <<https://www.eeoc.gov/guidance>> (as of Jan. 25, 2023), including the following updated sections:
 - Section 12: Religious Discrimination (Jan. 15, 2021) <<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>> (as of Jan. 25, 2023);
 - Section 13: EEOC Enforcement Guidance on National Origin Discrimination (Nov. 18, 2016), superseding EEOC Compliance Manual, Vol. II, Section 13: National Origin Discrimination. <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518821> (as of Jan. 25, 2023).
 - Section 15: Race and Color Discrimination (Apr. 19, 2006) <<https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination>> (as of Jan. 25, 2023).
 - Facts about Race/Color Discrimination (Jan. 15, 1997) <<https://www.eeoc.gov/laws/guidance/facts-about-racecolor-discrimination>> (as of Jan. 25, 2023).
6. Peery, *(Re)defining Race: Addressing the Consequences of the Law’s Failure to Define Race*, (2017) 38 Cardozo Law Review 1817, 1876.
7. U.S. Dept. of Justice, ADA Title II Technical Assistance Manual:

<<https://archive.ada.gov/taman2.htm> > (as of Jan. 25, 2023).

8. U.S. Dept. of Justice Title VI Legal Manual, Section V (last updated Feb. 3, 2021)
<<https://www.justice.gov/crt/book/file/1364106/download>> (as of Jan. 25, 2023).

9. U.S. Equal Employment Opportunity Commission Technical Assistance Manual for the ADA
<<https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm>> (as of Jan. 25, 2023).

10. U.S. Dept. of Justice, Civil Rights Division, “Effective Communication” (Jan. 31, 2014),
<<https://www.ada.gov/effective-comm.htm>> (as of Jan. 25, 2023).

11. U.S. Dept. of Justice, Civil Rights Division, “Frequently Asked Questions about Service Animals and the ADA” (July 20, 2015)
<https://www.ada.gov/regs2010/service_animal_qa.html> (as of Jan. 25, 2023).

12. U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section, “Service Animals” (issued July 12, 2011, and updated February 24, 2020)
<https://www.ada.gov/service_animals_2010.htm> (as of Jan. 25, 2023).

13. U.S. Dept. of Justice Notice of Final Rule, 28 C.F.R. Part 35, “Nondiscrimination on the Basis of Disability in State and Local Government Services” (July 26, 1991) 56 FR 35694-01 et seq., 1991 WL 304268.
(Excerpts of this located in Appendix B to 28 C.F.R. Part 35, 18 C.F.R. Pt. 35, App. B.)

14. U.S. Dept. of Justice Notice of Final Rule, 28 C.F.R. Parts 35, “Nondiscrimination on the Basis of Disability in State and Local Government Services” (Sept. 15, 2010) 75 FR 56164-01 et seq., 2010 WL 3561889.
(Excerpts of this located in Appendix A to Part 35, 28 C.F.R. Part 35, App. A.)

15. U.S. Dept. of Justice Notice of Final Rule, 28 C.F.R. Parts 35 and 36, “Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008” (Aug. 11, 2016) 81 FR 53204-01 et seq., 2016 WL 4210327.
(Excerpts of this located in Appendix C to 28 C.F.R. Part 35, 18 C.F.R. Part 35, App. C.)

16. U.S. Dept. of Housing and Urban Development, “Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act” (Final Rule) (Sept. 14, 2016) 81 FR 63054-01, 63066 – 63073, 2016 WL 4762170.

17. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make A Federal Case Out of It?* (2011) 61 Case W. Res. L. Rev. 865.

18. U.S. Dept. of Health and Human Services, “What is section 504 and how does it relate to Section 508?” (Aug. 19, 2015) <<https://www.hhs.gov/web/section-508/what-is-section-504/index.html>> (as of Jan. 25, 2023).

19. Koon, *Government Code § 11135: A Challenge to Contemporary State Funded Discrimination* (2011) 7 Stan. J. Civ. Rts. & Civ. Liberties 239, 251-52.

20. U.S. Dept. of Housing and Urban Development, “Reinstatement of HUD's Discriminatory Effects Standard” (June 25, 2021) 86 FR 33590-01, 2021 WL 2590054.

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 that 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 describe and clarify the FEHA 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; the expansion of businesses currently doing business within the state; or worker safety and the environment because the regulations centralize and codify existing law, clarify terms, and make technical changes without affecting the supply of jobs or ability to do business in California. To the contrary, 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.