

INITIAL STATEMENT OF REASONS  
PROPOSED AMENDMENT TO TITLE 10, CHAPTER 6  
DISCRIMINATORY CONDUCT AS THE BASIS FOR DISCIPLINARY ACTION  
SECTION 2780

This regulation proposal amends Section 2780 of the Regulations of the Real Estate Commissioner (California Code of Regulations, Title 10, Chapter 6) ("the Regulations"), "Discriminatory Conduct as the Basis for Disciplinary Action." For that section, this proposal updates the list of protected classes to match the list set out in Section 51 of the Civil Code, as referenced in Section 125.6 of the Business and Professions Code ("the Code"). The proposal eliminates an allowance for licensee actions that is not supported by current federal and state anti-discrimination law. The proposal implements AB 2884 (Irwin, Chapter 285, Statutes of 2018), modifying the regulation for consistent applicability given that legislation's revision of statutory terminology. Finally, the proposal makes other amendments for clarity and current class identification language.

PROBLEM STATEMENT

Section 2780 of the Regulations sets out discriminatory practices that are prohibited pursuant to Sections 125.6 and 10177 of the Code. The Department of Real Estate (DRE) adopted Section 2780 in 1977 and amended it 1978 and 1980.

Since 1980, anti-discrimination statutes have advanced considerably. The federal Americans with Disabilities Act (42 U.S.C. Section 12101) was adopted in 1990, the federal Fair Housing Amendments Act (modifying the existing Fair Housing Act) was passed in 1988, and both the California Disabled Persons Act (Civil Code Section 54 et seq.) and the Unruh Civil Rights Act (Civil Code Section 51) were repeatedly amended.

The list of protected classes within the Unruh Civil Rights Act also has expanded considerably since 1980. While that list was duplicated within Section 2780 as of its last amendment in 1980, subsequent additions to the protected class list in Civil Code Section 51 do not appear in the present regulations section.

DRE and the real estate industry are familiar with the history of discriminatory laws and practices that brought significant harm to persons in protected classes. The level of detail found in the existing Section 2780 illustrates the broad variety of discriminatory practices this section needed to address in 1977.

Today, DRE reports seeing few recent complaints involving accusations of discrimination by real estate licensees. Where such complaints are made, DRE typically refers these cases to the Department of Fair Employment and Housing (DFEH) or local law enforcement since they likely involve civil rights violations. The subsequent prosecution outcomes from those agencies become the foundation for DRE administrative discipline, if warranted. For this reason, Section 2780 has seen little or no recent prosecutorial use, and the section's inconsistency with current statutes was not apparent.

DRE's attention turned to Section 2780 because of AB 2884 (Irwin, Chapter 285, Statutes of 2018). That bill affected a large number of statutory sections within the Code. The sponsor of the legislation stated that the bill's goal was to update language in the Real Estate Law (Code Sections 10000, *et seq.*) to match present industry terminology, particularly relating to the employment status of subsidiary licensees. The terminology used in the Real Estate Law is reflected in the Regulations. Given the changes that AB 2884 made to the Real Estate Law, DRE must update the Regulations to maintain consistency with the underlying statutes.

DRE is addressing most of the amendments prompted by AB 2884 in a separate regulations package. That proposal includes amendments to 13 regulations sections and the repeal of a 14<sup>th</sup> section. However, DRE also identified Section 2780 as an additional Regulation section where the change from the "old" terminology necessitates an amendment. In reviewing the language of this voluminous section and consulting with the DFEH, DRE determined that the substantive updates to the statutory anti-discrimination law supporting this section warrants a more detailed and focused regulations proposal for this section alone.

In this proposal, DRE addresses Section 2780, which prohibits discrimination by real estate licensees against protected classes of individuals. This proposal:

- Updates the section's list of protected classes to match the list that appears in Section 51 of the Civil Code, as set out in Section 125.6 of the Business and Professions Code, which this section implements.
- For ease of reading and clarity, eliminates repetitious listing of the protected classes to allow the reader to focus on specific discriminatory actions that the regulation prohibits.
- Eliminates an allowance in subdivision (b) that lacks support in underlying anti-discrimination statutes, affording clients the opportunity to decide for themselves if a property is suitable for their circumstances.
- Rephrases the language in subdivisions (d), (q), (w), and (z) to more clearly express permissible allowable differences in situations involving persons with physical disabilities.
- Clarifies the language of subdivision (h) and (s) to highlight that prohibited efforts to encourage discrimination may target entire protected classes, rather than only specific individuals of a protected class.
- Eliminates language in subdivision (i) that is redundant, and adds language to more accurately reflect the intent of the subdivision.
- Adds further clarity to subdivision (l) by breaking out prohibited acts into further subdivisions.
- Adds further clarity to subdivisions (t) and (u) through rephrasing of allowed advertising practices.
- Eliminates instances of archaic and/or binary gendered language.
- Adds clarity in subdivision (aa) through explicit inclusion of two regular types of persons regularly present on real property who may be in protected classes.
- In subdivision (bb), addresses terminology updated by AB 2884, as described above.
- Expands the applicability of subdivision (cc)'s protection against discriminatory practices at multiple listing or other real estate services to include establishment or implementation of rules with the purpose of discrimination along with those that actually have a discriminatory effect.

#### PURPOSE, BENEFITS, AND GOALS OF THIS ADOPTION

In general, the purpose of Section 2780 is to protect consumers who are members of protected classes from a wide variety of discriminatory conduct by the real estate licensees that they directly work with, as well as those licensees

who may influence the licensees who are working for consumers in protected classes. Although this protection originates in both federal and state anti-discrimination statutes, this specific regulation ensures that real estate licensees are on notice regarding specific professional behavior that will not be tolerated. By updating this regulation, DRE intends to improve the effectiveness and enforceability of the section through a more complete listing of statutorily protected classes, as well as significantly improved clarity. Specific issues addressed in the proposal include:

**Protected Classes:** This proposal updates the section's list of protected classes to match the list that appears in Section 51 of the Civil Code, as set out in Section 125.6 of the Business and Professions Code, which this section implements. This is necessary for consistency with statutory law, clarity, and enforceability.

For ease of reading and clarity, this proposal eliminates the section's current repetitious listing of the protected classes. Instead, the protected classes are listed in the section's preamble, labeled as protected classes, and that label is used in the subsequent subdivisions. DRE believes that, as presently drafted, the repetition of protected classes within each subdivision serves no useful purpose, while distracting from the core goal of the section: Enumerating the discriminatory practices that licensees must avoid. The proposed redraft allows the reader to focus on specific discriminatory actions that the regulation and underlying statutes prohibit.

**Subdivision (b):** This proposal eliminates a discriminatory allowance in subdivision (b) that lacks support in underlying anti-discrimination statutes. Presently, the second paragraph of the subdivision allows a licensee to unilaterally decide not to give a client with a physical disability the opportunity to see, rent, sell or finance the purchase of a property because of a hazardous condition or architectural barrier on that property. DRE has not identified a sufficient statutory or common law legal basis for the allowance described by this paragraph. In the absence of that foundation, DRE is compelled to eliminate the existing allowance embodied in the second paragraph of subdivision (b). Clients can and should be allowed to decide for themselves which residence suits their needs.

**Subdivisions (d), (q), (w), and (z):** At the recommendation of DFEH, the proposed amendments rephrase the language in the second paragraphs of subdivisions (d), (q), (w), and (z). These paragraphs address instances where

treatment or cost/quote impacts on a person in a protected class – persons with a disability – may legally differ from the impact on those not in a protected class. DRE believes the new phrasing more clearly expresses the limits on permissible differences, while enhancing the decision-making information available to the person in the protected class.

**Subdivision (h):** The current subdivision (h) prohibits, “Making any effort to encourage discrimination against any persons because of their (protected class) in the showing, sale, lease or financing of the purchase of real property.” DRE believes the intent was to prohibit all such efforts, even where specific identifiable persons were not targeted. However, this phrasing could be litigated as requiring the targeting of specific individuals (because of their protected class). This sort of discriminatory prompting behavior may instead occur in a more abstract fashion, targeting all persons of a protected class. For this reason, this proposal rephrases the prohibition to encompass efforts that target not just persons, but the entire protected class. DRE asserts that this rephrasing does not change the scope of the prohibited actions, but rather clarifies the existing scope.

**Subdivision (i):** Within subdivision (i), along with the section-wide revision to protected class language, this proposal eliminates language that is redundant. Twice, the existing subdivision prohibits “refusing or failing” to act because of a client’s protected class. In this context, however, every enforceable “failure” would also be a “refusal,” however passive, while the same is not true in reverse. DRE proposes to eliminate the redundant language, but states that the intended impact of the language is unchanged by this amendment.

Also within subdivision (i), and at the recommendation of DFEH, DRE also proposes to add the term “occupant” to the list of prospective clientele who may be within the covered protected classes for this subdivision. This is consistent with underlying federal and state housing discrimination statutes.

**Subdivision (j):** The existing subdivision (j) uses the word, “retard” in a way synonymous with the word, “hinder,” and DRE proposes to change to the synonym. The original word has another, pejorative use that makes it an unfortunate choice for use in regulation where alternatives exist. For clarity, DRE also proposes to insert the word “otherwise” before “discourage” in the list of prohibited behaviors, as any effort to “obstruct” or “hinder” a person may or

may not also discourage the person. In this context, any form of discouragement is intended to be prohibited via the subdivision.

**Subdivision (k):** The existing subdivision (k) is a single paragraph that prohibits acts, notations, questions, or written or oral statements that express or imply discrimination against persons in a protected class. An allowance is made, however, for such instances involving persons with disabilities, “in order to serve the needs of such a person.” For clarity and to update the terminology without changing the meaning of the paragraph, DRE proposes to (1) separate the allowance language into a second paragraph, as is presently done in subdivisions (d) and (w), and (2) amend the archaic language into current terminology.

**Subdivision (l):** The existing subdivision (l) is a lengthy paragraph describing a series of acts that are prohibited. The existing subdivision presents the reader with a significant comprehension challenge even after the list of protected classes is removed. For clarity and ease of reading, DRE proposes to break this subdivision into a preamble and four further subdivisions. Again, DRE intends no change to the scope of the subdivision’s impact, proposing this revision purely for the sake of clarity.

**Subdivision (s):** The current subdivision (s) prohibits, “Entering into an agreement, or carrying out any instructions of another, explicit or understood, not to show, lease, sell or finance the purchase of real property because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.” As described above with regard to subdivision (h), DRE believes the intent was to prohibit all such efforts, both where classes of persons or specific identifiable persons are targeted. In order to rephrase this list of protected classes without changing the meaning of the subdivision, DRE rephrases the prohibition to encompass efforts that may target either specific persons or the entire protected class. DRE asserts that this rephrasing does not change the scope of the prohibited actions, but rather clarifies the existing scope.

**Subdivisions (t) and (u):** The second paragraphs in the existing subdivisions (t) and (u) are identical, and include identical arcane references to persons with physical disabilities. In addition to updating those references to currently acceptable terms, DRE proposes to delete some of the verbosity of these paragraphs, without changing the meaning of the paragraphs.

**Subdivision (y):** The proposal eliminates a typographical error by deleting an unneeded comma.

**Subdivision (aa):** The existing subdivision (aa) prohibits discrimination against an owner or occupant of real property on the basis of the protected status of “guests, visitors or invitees.” At the recommendation of DFEH, DRE proposes to amend this subdivision for clarity and to explicitly cover caregivers and sublessees who are in protected classes. Arguably, these persons fall within the existing category of either “occupants” or “invitees.” In that interpretation, this explicit inclusion is redundant. However, DFEH justifiably expresses concern for situations where a prospective sublessee (not yet an occupant) in a protected class is barred from completing a sublease (as alleged in *Broome v. Biondi*, 17 F.Supp.2d 211). DFEH also highlights the variety of relationships that persons who are caregivers may have with an owner or resident. Caregivers may be occupants in their own right, whether or not named on a lease, but the term caregiver may also include a range of relationships down to infrequent but regular invitee status. This raises the risk of litigation regarding a caregiver’s status and the protection it affords the owner or occupant. DRE agrees with DFEH’s suggestion that explicit inclusion of these relatively common categories within this listing helps ensure their protection (and that of their host) under the law.

**Subdivision (bb):** This proposal amends subdivision (bb) to address AB 2884’s update to the terminology used in the Real Estate Law. In subdivision (bb), the proposal adds specific references to retained salespersons and retained broker associates. Prior to the adoption of AB 2884, these subsidiary licensees were referred to as employees within the Real Estate Law. At the same time, the reference to “employees” is kept within the subdivision in order to account for any persons that a broker may employ (rather than affiliate with) to assist in conducting any aspect of the broker’s business. The addition of specific references to retained subsidiary licensees without deleting “employees” ensures the consistent application of the law, avoiding a change in applicability of the law that does not appear to be an intended consequence of AB 2884.

**Subdivision (cc):** This current subdivision (cc) affords protection to protected classes of persons when they seek to “secure real property through a multiple listing or other real estate service,” ensuring that such services are not designed to discriminate in an effective way. However, the present subdivision is

drafted only to address situations where a discriminatory rule is established or implemented *and has a discriminatory effect*. DRE believes that any effort to discriminate in this fashion, whether effective or not, should be subject to discipline. To ensure this consumer protection, DRE proposes to insert the words, “purpose or” before the word “effect.”

The proposal eliminates other instances of archaic and/or binary gendered language.

#### NECESSITY OF THIS ADOPTION

The list of protected classes identified by the regulation is out of date and must be updated in order to maintain consistency between the statutes and this regulation. The terminology changes made to the Real Estate Law by AB 2884 require a corresponding update to the Regulations for consistency and clarity.

#### TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

DRE did not rely upon any technical, theoretical, or empirical study in developing this proposed regulation.

#### ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Given the detailed savings clause now appearing at Section 10010.5, the changes in terminology brought about by AB 2884 do not impact the legal relationships between the parties affected by the Real Estate Law or its associated Regulations.

Further, with regard to the updated list of protected classes, the underlying statute is already in effect and enforceable. This update simply ensures consistency and clarity when the statute and regulation are applied together.

DRE relies upon these facts to make the following findings.

- The proposal will not have a significant adverse economic impact on business.
- The proposal will not impact the creation or elimination of jobs available within the State of California, as the demand for licensed real estate services will not be impacted.



- The proposal will not affect the creation of new business or the elimination of existing businesses within the State of California, again because the proposal does not impair or enhance the demand for real estate services.
- The proposal does not affect the expansion of existing businesses within the State of California. The addition of clarity and consistency with statute will not impair or enhance the demand for real estate services.
- The proposal does not affect the elimination of existing businesses within the State of California. Again, this update to the regulation's language does not impact the work and workloads of existing licensees.
- The proposal will enhance the health and welfare of California residents, as it will reinforce the existing protections against discrimination. The proposal will not impact worker safety or the State's environment, as those considerations do not involve discrimination.

#### REASONABLE ALTERNATIVES TO THE PROPOSED REGULATION AND DRE'S REASONS FOR REJECTING THOSE ALTERNATIVES

- **Alternative 1: Redraft the section to merely refer to violations of the foundational statutory anti-discrimination law.** The existing Section 2780 is lengthy, describing a long list of discriminatory practices that may occur in the real estate industry. One may question whether such a list is necessary, or whether it is simply a product of the earlier era when Section 2780 was drafted. As noted above, DRE most frequently refers current complaints involving discrimination to agencies that focus on these serious civil rights violations. Perhaps this regulation should simply speak generally to violations of anti-discrimination statutes. **Reason for rejection:** The real estate industry's history of discriminatory activity is considerable, and discriminatory practices were so deeply ingrained in the business that this long list of prohibited actions was needed. Focus closely on subdivision (l) of Section 2780. This section prohibits, "Making any effort to coerce, intimidate, threaten, or interfere with any person" in a discriminatory way in a variety of contexts that extend beyond acts that require a real estate license. Regulations do not arise out of thin air, so this subdivision alone reflects regulators and industry leaders effort to address and attack what was a complex, self-reinforcing pattern of discrimination in the industry. Section 2780 should be preserved as a reminder to current licensees that even the most subtle of discriminatory acts is not appropriate and will not be tolerated.
- **Alternative 2: Make no change to the regulation, and continue to rely upon underlying statutory civil rights protections.** This regulation is little

used and has not been updated for decades, without an appreciable lack of consumer protection. Why bother? **Reason for rejection:** Inconsistency between the foundational statutes and the regulations that implement them should be avoided. With AB 2884 bringing this regulation back to administrative attention, this is also an opportune moment to remind both industry and DRE's own staff and leadership of the regulation's important requirements.

The Commissioner finds that no alternatives considered would be (1) more effective in carrying out the purpose of the proposed regulation to set out discriminatory real estate practices that are prohibited and (2) would be as effective and less burdensome to affected private persons than the proposed regulation amendment.

#### DETERMINATION REGARDING USE OF SPECIFIC TECHNOLOGY OR EQUIPMENT

The proposed regulation does not include any requirement that a specific technology or equipment be used by any affected party.