LAW AND PUBLIC SAFETY

DIVISION ON CIVIL RIGHTS

Rules Pertaining to Disparate Impact Discrimination

Adopted New Rules: N.J.A.C. 13:16

Proposed: June 3, 2024, at 56 N.J.R. 969(a).

Notice of Proposed Substantial Changes Upon Adoption: November 18, 2024, at 56 N.J.R. 2218(a).

Adopted: November 5, 2025, by Yolanda N. Melville, Director, Division on Civil Rights.

Filed: November 6, 2025, as R.2025 d.150, **with substantial changes upon adoption** after additional notice and public comment, pursuant to N.J.S.A. 52:14B-4.10 and **non-substantial changes** not requiring additional notice and public comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 10:5-8, 10:5-12, and 10:5-18.

Effective Date: December 15, 2025.

Expiration Date: December 15, 2032.

Summary of Public Comments and Agency Responses:

The official comment period for the original notice of proposal ended on August 2, 2024. The Division on Civil Rights ("Division" or "DCR") appreciates receiving comments on the original notice of proposal from Beverly Aliotta (B.A.); American Civil Liberties Union of New Jersey (ACLU-NJ); American Property Casualty Insurance Association (APCIA); Danielle Antonelli (D.A.); M. Badran (M.B.1); Barbara Bauer (B.B.); Makarand Bidwai (M.B.2); Cathrin Bombardier (C.B.); Figen Ceceli (F.C.); Nancy Compton (N.C.); Mary Coogan (M.C.); Rich D. (R.D.); April Dippolito (A.D.); Roy Garms (R.G.); Patrick Griglio (P.G.); Fair Share Housing Center (FSHC); Nathaly Hawley (N.H.); Insurance Council of New Jersey (ICNJ); Robert Jones

(R.J.); J. L.; Legal Services of New Jersey (LSNJ); Martin McDonough (M.M.); Mortgage Bankers Association of New Jersey (MBANJ); National Association of Mutual Insurance Companies (NAMIC); Barbara Nehmad (B.N.); New Jersey Apartment Association (NJAA); New Jersey Association for Justice (NJAJ); New Jersey Bankers Association (NJBankers); New Jersey Business and Industry Association (NJBIA); New Jersey Builders Association (NJBA); New Jersey Civil Justice Institute (NJCJI); New Jersey Manufacturers Insurance Group (NJM); New Jersey Realtors (NJ Realtors); New Jersey State Bar Association (NJSBA); Jonathan I. Nirenberg (J.I.N.); Carmen Peat (C.P.); Maria Plochocki (M.P.); Preferred Mutual Insurance Company (PMIC); Professional Insurance Agents of New Jersey (PIANJ); Jean Public (J.P.); Public Justice; Steven Rosenberg (S.R.); MK Rudd (M.R.); Securities Industry and Financial Markets Association (SIFMA); Selective Insurance Company of America (SICA); Ryan Shaner (R.S.); SPAN Parent Advocacy Network; Holly Stitley (H.S.); John Swanson (J.S.); Peter Terranova (P.T.); J. Watson (J.W.); and Kyle R. Wavro (K.R.W.).

The official comment period for the notice of proposed substantial changes upon adoption to the proposed rules (Notice of Substantial Changes) ended on January 17, 2025. The Division appreciates receiving comments from APCIA, C.B., FSHC, ICNJ, NAMIC, NJAA, NJBankers, NJBIA, NJBA, New Jersey Chamber of Commerce (N.J. Chamber), NJCJI, NJM, C.P., J.P., SIFMA, and the United States Chamber of Commerce (U.S. Chamber). Pursuant to N.J.S.A. 52:14B-4.10(c)(2), the Division provided a 60-day comment period for the substantial changes to a proposed rule upon adoption "in which interested parties may present their views on the new proposed changes." To the extent the comments received by the Division in response to the Notice of Substantial Changes address support for or concerns with the proposed rules separate from the

proposed substantial changes, the Division refers to its responses to comments to the original notice of proposal.

1. **Comments Received During Initial Comment Period Giving Rise to Substantial Changes in Proposal Upon Adoption**

Comments on the original notice of proposal giving rise to substantial changes upon adoption were received from the American Civil Liberties Union of New Jersey (ACLU-NJ), J.I.N., and the New Jersey State Bar Association (NJSBA).

General Comments

1. COMMENT: As originally proposed, the rules provide that practices and policies that have a disparate impact on members of a protected class violate the Law Against Discrimination (LAD) unless it is shown that such practices and policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory, equally effective alternative that would achieve the same interest. ACLU-NJ and NJSBA suggest removing the qualifying phrase "equally effective" from the standard governing the evaluation of less discriminatory alternatives. Both argue that this term was considered and rejected by the United States Department of Housing and Urban Development (HUD) in rulemaking regarding the Federal Fair Housing Act (FHA) as superfluous to the disparate impact standard generally, and likewise should be rejected by the Division. ACLU-NJ points out that requiring a less discriminatory alternative to be "equally effective" could be interpreted as inappropriately creating a heightened burden for complainants in employment, places of public accommodation, and contracting cases in identifying less discriminatory alternatives. ACLU-NJ also notes that requiring a less discriminatory alternative to be "equally effective" could inappropriately lessen the burden on respondents in housing and housing financial assistance cases in proving there are no less discriminatory alternatives. Additionally, ACLU-NJ argues that the phrase "equally effective" could be interpreted to mean

that respondents are not required to adopt alternatives that may be somewhat more burdensome to implement, such as individualized assessments. NJSBA suggests that the Division either remove "equally effective" or clarify its meaning.

RESPONSE: Consistent with these comments, the Division proposed removing the phrase "equally effective" each time it appears throughout the proposed new rules before the word "alternative." The Division proposed this change to align the proposed rules with New Jersey case law, to ensure consistency with the purpose of the rulemaking and the LAD, and to meet the requirements imposed by the Legislature to ensure the LAD meets HUD's requirements to remain substantially equivalent to the FHA.

To start, removing the phrase "equally effective" from the standard governing less discriminatory alternatives better aligns the proposed rules with the New Jersey judicial precedent interpreting the LAD. The "equally effective" standard has not been adopted in case law applying the LAD. Indeed, New Jersey courts describe the standard for less discriminatory alternatives without the qualifying phrase "equally effective." For example, *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 369 *N.J. Super*. 2, 31 (App. Div. Apr. 28, 2004) ("Once plaintiff makes a prima facie case of adverse impact, the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that *no alternative would serve that interest with less discriminatory effect*.") (emphasis added) (internal quotation and citation omitted). Removing the phrase "equally effective" thus ensures that the proposed new rules are consistent with New Jersey case law.

The inclusion of an "equally effective" requirement for less discriminatory alternatives is also inconsistent with the overriding and primary purpose of the rulemaking and the LAD—to eradicate discrimination in New Jersey. *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J*. 587, 604-605 (N.J.

1993). The rulemaking seeks to prevent, mitigate, and eliminate discrimination, in part, by requiring an evaluation of whether there are less discriminatory alternatives that serve the respondent's substantial, legitimate, nondiscriminatory interest. The Division agrees with ACLU-NJ that less discriminatory alternatives in a disparate impact claim pursuant to the LAD need not serve the respondent's interests in exactly the same way as the challenged practice or policy. Imposing such a requirement would make it substantially more difficult to establish that a practice or policy that has a disproportionately negative effect on the basis of a protected characteristic violates the LAD. In using the phrase "equally effective" in the proposed rule, the Division did not intend to incorporate such a requirement, as is evident by other aspects of the proposed rules. This includes the examples provided, which illustrate that a regulated entity may be liable pursuant to the LAD even when a less discriminatory alternative may require somewhat more labor, time, and resources on the part of a regulated entity, or may be less efficient or more costly, than the challenged practice or policy. For example, the proposed rules indicate that individualized assessments may in some instances be viable less discriminatory alternatives. That is true even though individualized assessments may in some circumstances be somewhat less efficient or more costly than the challenged practice or policy. Removing the term "equally effective" clarifies the Division's intent that less discriminatory alternatives need not be equal in all respects to the challenged practice or policy, which is consistent with the goals of the rulemaking and the LAD.

Moreover, removing the phrase "equally effective" from the standard governing less discriminatory alternatives aligns the proposed rules with the statutory mandate that the LAD be construed in a manner that meets or exceeds the minimum standards set forth pursuant to the Federal FHA. N.J.S.A. 10:5-9.2. In HUD's 2023 final rule setting forth the disparate impact standard pursuant to the FHA, HUD did not use the phrase "equally effective" as part of its

standard for evaluating the existence of less discriminatory alternatives. 88 Fed. Reg. 19450, 19490-91 (March 31, 2023). The Division's addition of the qualifier "equally effective" in the proposed rules could, therefore, be interpreted as imposing a higher burden on tenants, buyers, and borrowers than the FHA. In order to maintain certification as a substantially equivalent agency and continue to enter into work-sharing agreements with HUD, the Division must meet or exceed the floor set by HUD in enforcing the FHA. 42 U.S.C. § 3610(f); 24 CFR 115.201. While the Division has the authority to be more protective if it finds the standards set by HUD are inconsistent with the broad, remedial goals of the LAD, it may not establish standards that are less protective than the standards set forth by HUD. 24 CFR 115.204(h). Accordingly, the Division must ensure the LAD standards are at or above the floor set by HUD's disparate impact standard. By removing the "equally effective" qualifier, the proposed new rules better align with the minimum requirements of the FHA, thus ensuring that the Division maintains its certification with HUD in conformity with the Legislature's command to that effect.

As stated by ACLU-NJ and NJSBA, HUD considered and expressly rejected the phrase "equally effective" when it adopted its disparate impact rules in 2023. HUD initially adopted rules regarding disparate impact liability in 2013, and HUD stated at the time that it "does not believe the rule's language needs to be further revised to state that the less discriminatory alternative must be 'equally effective,' or 'at least as effective,' in serving the respondent's or defendant's interests." 78 Fed. Reg. 11460, 11473. In 2020, the phrase "equally effective" was added to HUD's regulations, 85 Fed. Reg. 60288, 60321, but those regulations never went into effect. In October 2020, a Federal district court sitting in the District of Massachusetts preliminarily enjoined HUD from implementing or enforcing the regulations. *Massachusetts Fair Hous. Ctr v. U.S. Dep't. of Hous. and Urb. Dev*, 496 *F. Supp*. 3d 600, 610–11 (D. Mass. Oct. 2020). Ultimately, in 2023, the

phrase "equally effective" was again removed from the rule when HUD reinstated the 2013 regulations. 88 Fed. Reg. 19450, 19490-91. When adopting the 2023 regulations, HUD received comments urging it to maintain the "equally effective" standard, but HUD declined to do so. *Id.* at 19490. Federal courts have also rejected the "equally effective" standard in FHA disparate impact cases, citing HUD's decision to exclude this phrase from the 2013 and 2023 final regulations. See, for example*, Nat'l Ass'n of Mut. Ins. Co. v. U.S. Dep't. of Hous. and Urb. Dev.*, 693 *F. Supp*. 3d 20, 40 (D.D.C. Sept. 2023); *MHANY Mgmt., Inc. v. Cty. of Nassau*, No. 5-2301, 2017 WL 4174787, at *8 (E.D.N.Y. Sept. 19, 2017).

Further, the phrase "equally effective" does not appear in the text of Title VII of the Civil Rights Act of 1964, which sets forth the burden-shifting framework in employment disparate impact cases. 42 U.S.C. § 2000e-2(k)(1). Also, the Uniform Guidelines on Employee Selection Procedures published by the United States Equal Employment Opportunity Commission (EEOC), which are incorporated by reference into the proposed new rules, likewise, do not indicate that less discriminatory alternatives must be "equally effective." 29 CFR 1607.3(B). Federal courts also do not consistently use the phrase "equally effective" when describing the standard for less discriminatory alternatives in disparate impact claims pursuant to Title VII. See, for example, *N.A.A.C.P. v. N. Hudson Reg. Fire and Rescue*, 665 *F*.3d 464, 477 (3d Cir. 2011) (explaining that "a plaintiff can overcome an employer's business-necessity defense by showing that alternative practices would have less discriminatory effects while ensuring that candidates are duly qualified").

To be sure, the Division has authority to interpret the LAD in a manner that departs from the LAD's Federal analogues where doing so is consistent with the LAD's mandate to eradicate discrimination in New Jersey. Here, however, Federal precedent interpreting the FHA and Title

VII, New Jersey case law, and the purposes of the LAD and this rulemaking all point in the same direction: they support removing the phrase "equally effective" from the standard governing less discriminatory alternatives in the proposed new rules.

N.J.A.C. 13:16-1.3

2. COMMENT: As originally proposed, the rules define the term "complainant" as "any person filing a verified complaint alleging discrimination pursuant to the Act." J.I.N., a New Jersey employment attorney, suggests changing the definition of "complainant" to include any person who files a complaint alleging a LAD violation. The commenter suggests this change would clarify that the proposed new rules apply to those who file complaints in court or arbitration, which may not be "verified," because a "verified complaint" is a specific type of complaint required by the Division. The commenter also suggests this change would clarify that the proposed new rules apply to retaliation claims, in addition to discrimination claims.

RESPONSE: The Division agrees that the definition in the proposed rules unintentionally limits complainants to those who file verified complaints with the Division. The Division proposed to define the term "complainant" as "any person filing a complaint alleging unlawful discrimination pursuant to the Act" to clarify that the proposed new rules apply to all people who file complaints that allege LAD violations, including those who file complaints in court or arbitration. The definition the Division proposed includes people filing allegations of retaliation. By using the term "unlawful discrimination" in the definition, the definition includes people filing complaints alleging the unlawful practices and acts specified at N.J.S.A. 10:5-12. The LAD prohibits retaliation at N.J.S.A. 10:5-12.d, meaning people filing retaliation complaints are included.

2. Comments Received During Initial Comment Period, Not Giving Rise to Substantial Changes in the Notice of Proposal

General Comments in Support

3. COMMENT: ACLU-NJ, C.P., FSHC, and Public Justice express support for the rules, and, in particular, for their scope, their clarity, the examples set forth therein, and their anti-discriminatory purpose. C.P. notes that the rules are concise, simple, and fully explanatory. ACLU-NJ expresses support for the rules' inclusion of the examples of practices and policies that may result in disparate impact discrimination concerning the use of automated decision-making tools, language restriction policies, the use of credit history and credit scores in housing, educational policies such as disciplinary policies, and contract bid procedures. ACLU-NJ also supports that the rules clarify their application to practices and policies of law enforcement, correctional facilities, and jails. FSHC applauds the Division's work crafting the rules to combat discrimination, especially in the low-income housing context. Public Justice praises the Division for proposing comprehensive rules clarifying the application of the LAD, commenting that the rules are necessary to provide clear and uniform guidelines and remove ambiguity. Public Justice further comments that the guidance provided by the rules is likely to prevent discrimination and reduce litigation.

RESPONSE: The Division thanks the commenters for their support of the rulemaking.

General Comments in Opposition

4. COMMENT: Some commenters express opposition to the rules. H.S. suggests that "disparate impact is illegal and should remain so." J.P. comments that "to call some colors and races unequal" is a misuse of the word "disparate."

RESPONSE: Disparate impact discrimination, a well-established legal concept, is already prohibited pursuant to the Law Against Discrimination (LAD), making it illegal. *Gerety v. Atl.*

City Casino Resort, 184 *N.J.* 391, 398 (2005) ("The United States Supreme Court has recognized two theories of relief under Title VII—disparate treatment and disparate impact—and we acknowledge both as cognizable under the LAD."). As such, these rules codify existing legal rights and precedents.

General Comments Concerning Format of the Rules

5. COMMENT: B.B., B.N., and C.B. express frustration with the accessibility of the rules and request that the rules be put in a more user-friendly format for New Jersey residents to provide meaningful feedback.

RESPONSE: The Division acknowledges that the rules are extensive. The Division thanks the commentators and will consider ways to better incorporate plain language principles in describing proposed new rules, as well as other ways to explain the content of these rules to the public through the publication of additional guidance or resources related to the rules.

Comments Regarding Effects of the Rule

6. COMMENT: NJBankers comments that the rules fail to adequately consider the economic impact on various entities, particularly small businesses and financial institutions, resulting from new standards and possible legal exposure stemming from those standards. MBANJ and SIFMA concur with all comments made by NJBankers.

RESPONSE: These rules codify existing legal rights and precedents, rather than creating new standards. Thus, any costs that covered entities may choose to incur in response to the adoption of the rules will not be due to new requirements. To the extent that businesses re-evaluate their practices and policies to ensure compliance with preexisting legal standards and administrative

practice, ensuring conformance with the LAD will likely result in decreased legal exposure and costs for covered entities.

Comments Regarding Definitions of Terms

7. COMMENT: LSNJ expresses concern that the definitions of "covered entity" and "housing provider" in the rules improperly narrow the LAD and should be omitted. LSNJ states that N.J.S.A. 10:5-12.h prohibits "any person," not just certain entities within the housing context, from engaging in discrimination. The commenter, therefore, suggests that the rules should use the phrase "any person." LSNJ additionally argues that specifically referencing "housing provider" in the rules is unnecessary.

RESPONSE: The definition of "covered entity" in the rules does not narrow the entities subject to the LAD. The rules define "covered entity" as "an employer; labor organization; employment agency; housing provider; real estate broker, agent, or salesperson; lending institution; place of public accommodation; *or person* who is required to comply with N.J.S.A. 10:5-12." (emphasis added). It is, therefore, clear that "covered entity" applies to "any person" required to comply with the LAD's directives, not only certain entities. Regarding the "housing provider" definition, pursuant to N.J.A.C. 13:16-1.3, "housing provider" is defined as "*any* person who is required to comply with subsection g. or subsection h. of N.J.S.A. 10:5-12." (emphasis added). The rules, therefore, do not limit the LAD in any way by using the term "housing provider."

8. COMMENT: LSNJ recommends that the Division define "consumer credit history" at N.J.A.C. 13:16-1.3 to include any consumer report as defined in the Federal and New Jersey Fair Credit

Reporting Acts. LSNJ also recommends that "consumer credit report" should include tenant screening reports and eviction records.

RESPONSE: The Division makes a technical change in the definition of "consumer credit history" to remove the term "credit" from "consumer credit report," one of the enumerated examples of the defined term "consumer credit history." This technical change better aligns the rules with the Federal Fair Credit Reporting Act (FRCA) and the New Jersey Fair Credit Reporting Act, which both refer to "consumer reports." While tenant screening reports, which may include credit scores and eviction information, are considered consumer reports pursuant to the FCRA, they are relevant to the discussion of "consumer credit history" only insofar as the decision-maker is utilizing the tenant screening report for the credit information included therein. Moreover, even though the rules do not directly discuss the use of tenant screening reports and eviction records, that does not mean that these or other common practices could not result in a disparate impact or that they are not subject to challenge on disparate impact grounds.

Comments Regarding Agency Authority

9. COMMENT: APCIA, ICNJ, NAMIC, NJM, PMIC, PIANJ, and SICA argue that insurance companies, including independent insurance agents, are not covered by the LAD and, therefore, should be explicitly exempted from the rules. They additionally assert that the Division lacks the authority to regulate the insurance industry and is encroaching on DOBI's jurisdiction to do so. NJM additionally argues that the Division lacks the authority to include insurance in its definitions of "housing financial assistance" and "lending institutions." Commenters make several additional related arguments regarding the appropriateness of the rulemaking, including concerns about how the Federal Fair Housing Act discriminatorily effects rulemaking and pending litigation, the

existence of prohibitions on unfair discrimination in the State's insurance code, and how the rules undermine the essential risk-based nature of insurance. Additionally, LSNJ recommends that the Division clarify that the rules apply to disparate impact discrimination in the insurance context, noting that the rules do not address claims pursuant to N.J.S.A. 10:5-12.i, which involve certain forms of discrimination by insurance companies and other entities.

RESPONSE: In response to comments questioning application of the LAD in general, or of disparate impact liability, in particular, in the insurance context, DCR is excising from the rule all of the provisions that reference insurance; to wit, the definitions of "housing financial assistance," "lending institutions," and "real estate-related transaction." The removal of these definitions does not alter the existing scope of the LAD.

With the excision of these definitions, the rules no longer expressly reference insurance. The rules do not alter the LAD's application to the insurance industry. While it is clear from the text of the LAD that the law has some application to insurance companies involved in the making or purchasing of any loan or extension of credit, N.J.S.A. 10:5-12.i, DOBI has statutory authority as the regulator of matters involving insurance, including rates, forms, and underwriting. By excising these definitions, the Division makes clear that the rule is not intended to extend or limit the reach of the LAD.

10. COMMENT: NJCJI expresses concerns that the rules will likely face legal challenges because it believes that the rules are intruding on areas left to the exclusive authority of the courts. Specifically, NJCJI asserts that the rules violate separation of powers principles by establishing a burden-shifting framework, lowering the burden of proof for plaintiffs, and altering the business necessity defense. According to NJCJI, burdens of proof are meant to be left to the judiciary, which

has the authority to establish courtroom practice and procedures. NJBA echoes these concerns.

RESPONSE: There is ample support in the language of the LAD, New Jersey case law, the New Jersey Uniform Administrative Procedure Rules, and the practices of other agencies in creating rulemakings to establish the Division's authority to issue these rules. To start, the Legislature empowered the Division to issue rules to enforce the LAD. See N.J.S.A. 10:5-5.1, 8.g, and 18. The Division has broad rulemaking authority, including over procedural matters. See, for example., *General Motors Corp. v. Blair*, 129 *NJSuper* 412, 418 (1974) (rejecting the argument that the Division's rules establishing an interrogatory default procedure rule "constitute[d] a usurpation of the judicial function and [were] contrary to the constitutional doctrine of separation of powers"). Indeed, in its Regulations Pertaining to Discrimination on the Basis of Disability, the Division places the burden on an employer to show that providing a reasonable accommodation would impose an undue hardship on its business operations. N.J.A.C. 13:16-2.5(b). This provision has been cited favorably by courts. See *Potente v. Cty. of Hudson*, 187 N.J. 103, 110 (2006); *Victor v. State*, 203 N.J. 383, 401 (2010). The present rules are consistent with the Division's authority, as they serve to carry out and interpret the LAD. Also, courts must afford the Division's interpretation of the LAD "great weight." *Peper v. Princeton Univ. Bd. of Trs*., 77 *N.J.* 55, 69-70 (1978); *N.J. Builders, Owners and Managers Ass'n v. Blair*, 60 *N.J.* 330, 339-340 (1972) (rejecting challenge to the Division's Multiple Dwelling Reporting Rule and concluding that the rulemaking was a proper exercise of agency authority).

To the extent the rules create a burden-shifting framework or codify burdens of proof, these standards are a substantive, not procedural, aspect of the rules. Just as the Legislature can choose to set burdens of proof notwithstanding judicial precedent, it can also leave room for the interpreting agency to interpret burdens of proof consistent with the statute. See, for example, *New*

Jersey Div. of Child Prot. & Permanency v. J.R.-R., 248 *N.J.* 353, 373-76 (upholding provision of N.J.S.A. 9:6-8.46.b(1) that places the burden of proving by a preponderance of the evidence that a parent abused or neglected a child on the Division of Child Protection and Permanency and finding that the family court erred in deviating from this statutorily set burden of proof); see also 42 U.S.C. § 2000e-2(k) (setting a burden-shifting framework for disparate impact cases under Title VII and specifically rejecting the burden set by the United States Supreme Court in its ruling in *Wards Cove Packing Co. v. Antonio*, 490 *U.S.* 642, 661 (1989)). The Division is not intruding on judicial authority in establishing these rules, as the rules do not impact court practices because they do not establish rules of judicial or civil procedure or evidence.

11. COMMENT: NJ Realtors does not believe that the Division has enforcement authority over real estate licensees, arguing that the New Jersey Real Estate Commission has sole authority over this group. NJBankers similarly argues that DOBI has sole authority to "examine and police financial institution practices." NJ Realtors and NJBankers note that relevant existing regulations regarding their respective industries—the real estate industry and banking industry—already cover areas addressed by the Division's rules.

NJBankers suggests adding a safe harbor provision for creditors who comply with Federal fair lending laws, in particular, the Equal Credit Opportunity Act, Regulation B, and the FHA. MBANJ and SIFMA concur with NJBankers' concerns and requests.

RESPONSE: Real estate and financial institution practices are expressly covered by the LAD at N.J.S.A. 10:5-12.g, h, and i, and these rules do not alter the LAD's application to these practices. The Division agrees that the Real Estate Commission has sole authority over licensing determinations and that DOBI has authority to regulate financial institution practices. With respect

to NJBankers' proposed safe harbor provision, the Division lacks the authority to add a safe harbor provision for creditors who comply with Federal fair lending laws because that safe harbor is contemplated nowhere in the plain language of the LAD, and Federal fair lending laws do not generally preclude states from applying their own anti-discrimination laws to the conduct of creditors or lenders. Nevertheless, N.J.A.C. 13:16-4.6(b) provides that "[n]othing in this section shall preclude a housing provider from evaluating the consumer credit history of an applicant where such evaluation is required for a Federal loan product or formula or enforces Federal guidelines, including those requiring minimum credit scores for Federal Housing Administration loans."

Comments Regarding Included Protected Characteristics

12. COMMENT: ACLU-NJ suggests clarifying that all protected characteristics pursuant to the LAD are covered by the rules. F.C., M.C., M.R., and S.R. comment that the characteristic of age is not explicitly listed in the rules. A.D. and P.G. assert that prohibiting discrimination based on certain protected characteristics is inherently discriminatory and unfair and that the rules do not account for discrimination against white people. B.N. and R.G. comment that gender identity should not be included as a protected characteristic.

RESPONSE: The rules do not change the protected characteristics set out in the LAD and should be read as consistent with the LAD. The rules address disparate impact claims pursuant to the LAD. They do not modify any legal protections established by Federal or State law or by the New Jersey and Federal Constitutions.

Pursuant to the LAD, age is a protected characteristic in employment, credit, and contracting, and will continue to be a protected characteristic in those contexts for disparate impact

claims. Age, however, is not a protected characteristic in housing and public accommodations pursuant to the LAD.

The prohibition on discrimination based on the LAD-protected characteristic of race includes discrimination based on any race, including discrimination against a person who is white.

Gender identity is also a protected characteristic pursuant to the LAD (and has been since 2006) and is, therefore, protected pursuant to the rules. The Division does not have the authority to alter the protected characteristics set forth in the LAD.

Comments Regarding Evidentiary Burdens

13. COMMENT: NJAA and NJCJI urge the Division to ensure that the evidentiary burdens at N.J.A.C. 13:16-2.1(b) are consistent with New Jersey case law. NJAA and NJCJI state that New Jersey case law provides that to make out a prima facie case of disparate impact discrimination, a complainant must show that a facially neutral policy resulted in a significantly disproportionate or adverse impact on members of a protected class. Relatedly, NJCJI suggests adding a requirement that the statistical evidence relied upon by the complainant to prove discrimination be reliable. SPAN additionally recommends defining the term "disproportionately negative effect" at N.J.A.C. 13:16-2.1(b). NJBA concurs with NJAA and NJCJI's comments.

RESPONSE: The Division finds that the evidentiary burdens at N.J.A.C. 13:16-2.1(b) are consistent with Federal and New Jersey precedent. Whether a complainant has made out a prima facie case of disparate impact discrimination requires a case-by-case assessment. Adding any additional standards to N.J.A.C. 13:16-2.1(b), including a definition of "disproportionately negative effect," could impede this assessment. Accordingly, the Division declines to amend N.J.A.C. 13:16-2.1(b).

To start, taking an individualized approach to assessing disparate impact rather than codifying a particular standard is consistent with New Jersey precedent. *Compare Schiavo v. Marina Dist. Dev. Co., LLC,* 442 *N.J. Super* 346, 369 (App. Div. 2015) (providing that "simple statistical disparities are insufficient to show" disparate impact), *with In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan,* 369 *N.J. Super*. 2, 19 (App Div. 2004) (using "substantial" instead of "significant" and providing only that "'some impact' is not enough to establish a prima facie case" of disparate impact discrimination). This approach is also consistent with Federal precedent. See, for example, *Watson v. Fort Worth Bank & Tr.*, 487 *U.S*. 977, 995–96 n.3 (1988) ("We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged the 'significance' or 'substantiality' of numerical disparities on a case-by-case basis.") (internal citations omitted). Further, any standard for demonstrating a disparate impact at step one of the burden-shifting framework that is codified in the rules could be misconstrued to suggest a categorical threshold below which discrimination is permitted. This runs counter to the language and purpose of the LAD—to eradicate discrimination and to remediate the harm both to individuals and the State itself that flows from any unlawful discrimination. Accordingly, consistent with Federal and New Jersey precedent and the purpose of the LAD, the Division declines to codify a particular standard for demonstrating a disparate impact at step one of the burden-shifting framework, instead leaving to the adjudicating tribunal the task of assessing the disparate impact in each case.

For the same reasons, the Division declines to add an *ex ante* requirement that any statistical

evidence used to show a disparate impact be reliable. The Division agrees with NJCJI that in establishing the disproportionate impact at step one of the burden-shifting framework, the evidence "usually focuses on statistical disparities." *Newark Branch, N.A.A.C.P. v. Town of Harrison N.J.*, 940 *F*.2d 792, 98 (3d Cir. 1991) (quoting *Watson v Fort Worth Bank and Trust,* 487 *U.S*. 977, 987 (1988)); see also *Morgan v. New Jersey Transit*, A-4730-11T1, 2013 WL 5809404 at *6 (App. Div. Oct. 30, 2013) ("Commonly, a plaintiff will endeavor to show this disparate impact through the use of statistical evidence."). However, determining whether the data presented is reliable is the domain of the factfinder in deciding whether to admit evidence and what weight to assign it. As such, any assessment of the reliability of statistical evidence to prove a disproportionately negative effect is best left to the tribunal based upon the testimony and proffered evidence.

14. COMMENT: APCIA, ICNJ, NAMIC, NJBankers, and PMIC express concerns over the ability of respondents to meet the evidentiary burdens provided in the rules, particularly in the housing and housing financial assistance contexts. Their concerns include that respondents will not have access to the type of evidence required to meet the burdens, including because some entities do not collect the information necessary to produce such evidence and because it is impossible to meet the burdens altogether. For example, commenters argue that there cannot be a less discriminatory means of achieving a nondiscriminatory interest because, as characterized by the commenters, the rules state there cannot be any discrimination whatsoever. They assert that the rules would require respondents to prove a negative—that there is no less discriminatory alternative available to the respondent. According to NJBankers, this requirement will lead to an increase in disparate impact litigation and "could potentially raise the stakes of legal disputes, as defendants would be compelled to provide detailed evidence of policy considerations and

selection." NJBankers requests that the rules include a requirement that respondents search for less discriminatory alternatives, rather than requiring them to prove the non-existence of alternatives. MBANJ and SIFMA concur with NJBankers' concerns and request.

RESPONSE: While the Division appreciates commenters' concerns regarding evidentiary burdens, the rules provide a general standard to be applied on a case-by-case basis and with consideration of the alleged facts. Just as the Division cannot prejudge hypothetical complaints, the Division cannot predetermine how a specific respondent can meet an evidentiary burden in a hypothetical complaint, as many of the issues will be left to the factfinder or the tribunal based on the specific circumstances as alleged.

With respect to the concern about the rules setting out a standard that shifts the burden onto respondents to show that there are no less discriminatory alternatives in housing cases, courts have utilized a similar standard by requiring respondents to prove that there is no less discriminatory means of achieving a nondiscriminatory interest in the housing context. *Ewing Citizens for Civ. Rights, Inc. v. Twp. Of Ewing*, No. 05-1620, 2007 U.S. Dist. LEXIS 50826, at *13-14 (D.N.J. July 13, 2007)). Nonetheless, the rules provide at N.J.A.C. 13:16-2.3(b) that to meet this burden, a respondent may, but is not required to, identify what alternative practice or policy options it considered and how and why it decided to select the practice or policy it chose. This allows respondents to present the outcomes of a search for less discriminatory alternatives as a part of meeting the burden to show that there are no less discriminatory alternatives but does not allow them to present the outcomes instead of meeting the burden to show that there are no less discriminatory alternatives. To the extent NJBankers contends that this will lead to an increase in disparate impact litigation, the Division refers to its Response to Comment 17. As stated therein,

because the rule codifies the framework currently employed by the Division and New Jersey courts, the rule is unlikely to result in increased litigation.

As to the comments stating there cannot be a less discriminatory means of achieving a nondiscriminatory interest, the rules do not prohibit all practices or policies that result in a disparate impact. Rather, the rules prohibit the use of practices or policies that result in unlawful discrimination. For example, if a respondent in the housing context identifies a substantial, legitimate, nondiscriminatory interest and proves that no less discriminatory alternative exists, the practice or policy would not violate the LAD based on a disparate impact theory of discrimination. That is true even if the policy or practice in question has a disparate impact on a protected class. Insofar as the requirement for respondents to prove that there are no less discriminatory alternatives in housing cases deviates from Federal practice, the Division refers to its Response to Comment 17.

15. COMMENT: ACLU-NJ expresses concerns that the rules list criminal justice system data as evidence that can be used to rebut or establish a claim of disparate impact because it believes the data is unreliable, inaccurate, and biased. ACLU-NJ further suggests that the Division identify in the rules the problems ACLU-NJ identifies with this data and that the Division permits the use of criminal justice system data only in LAD claims against correctional facilities and law enforcement.

RESPONSE: The Division declines to adopt the commenter's suggestions. N.J.A.C. 13:16-2.4(a) sets forth an extensive but non-exhaustive list of types of evidence that "may be relevant to establish or to rebut the existence of disparate impact ... depending on the facts of the case." The language of this section indicates that each type of evidence could be relevant in some cases and

not relevant in others. Based on the case-by-case and fact-specific nature of discrimination claims, it is not possible for the Division to expressly delineate in the rules the kinds of cases for which each type of evidence may be relevant. Instead, the Division leaves such determinations to the adjudicator responsible for making the necessary fact-specific inquiries. However, the Division acknowledges that such data will not be relevant in all cases, and whether data is relevant, accurate, and unbiased will typically be a component of the disparate impact discrimination analysis.

Comments Regarding Who May File Complaints

16. COMMENT: The rules provide that a complaint of disparate impact discrimination may be filed by any person claiming to be aggrieved by an unlawful employment practice or unlawful discrimination, the Attorney General, the Director of the Division, the Commissioner of the Department of Labor and Workforce Development, or the Commissioner of the Department of Education. N.J.A.C. 13:16-2.1(c). Commenters urge the Division to specify that individuals or organizations beyond those expressly listed at N.J.A.C. 13:16-2.1(c) may bring a complaint of discrimination, consistent with N.J.S.A. 10:5-13 and N.J.A.C. 13:4. Specifically, SPAN recommends clarifying that nonprofit advocacy organizations may bring a complaint of discrimination based on disparate impact, and LSNJ asks that the Commissioner of Banking & Insurance and the Director of the Division of Consumer Affairs be added to the list of agency chiefs authorized to file complaints.

RESPONSE: Consistent with the recommendation of SPAN, the Division amends N.J.A.C. 13:16-2.1(c) to add "any other person or organization authorized by the Division's Rules of Practice and Procedure, N.J.A.C. 13:4, or the LAD" to the list of those authorized to file a complaint alleging disparate impact discrimination. The Division intends for the disparate impact rules to be

consistent with the LAD and the Division's other rules and regulations. Adding this phrase to the rules clarifies that the rules do not deviate from these pre-existing authorities and that claims for disparate impact discrimination may be brought in the same manner as all other claims pursuant to the LAD. This is a clarifying, non-substantial change that does not alter the rights or responsibilities of any person or entity pursuant to these rules. Rather, this change simply makes clear that "any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination" who can bring a complaint includes anyone so authorized by the Division's Rules of Practice and Procedure, N.J.A.C. 13:4 or the LAD.

The Division declines to adopt LSNJ's recommendation to add additional agency heads to the list of agency heads who are authorized to file complaints. The LAD expressly identifies the Attorney General, Commissioner of Education, Commissioner of Labor, and the Division Director as governmental officials who may file a complaint with DCR. The Attorney General may also file a complaint in their capacity as head of the Division of Consumer Affairs. Changes to the agency heads authorized by statute to file complaints are more appropriately made through the legislative process.

Comments Regarding Housing Burden-Shifting Framework

17. COMMENT: MBANJ, NJAA, NJBA, NJBankers, NJCJI, NJM, and SIFMA argue that the two-step burden-shifting framework for analyzing claims of disparate impact discrimination in the housing and housing financial assistance contexts is contrary to the legislative intent of the LAD to mirror Federal anti-discrimination law, including HUD's discriminatory affects rule, the U.S. Supreme Court's decision in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, and the United States Court of Appeals for the Second Circuit's decision in *Mhany Management,*

Inc. v. County of Nassau. According to the commenters, these Federal authorities provide for a three-step burden-shifting framework for the housing context, including housing financial assistance. Commenters also argue that the caselaw relied on by the Division does not adequately support a two-step burden-shifting framework in the housing context. NJAA argues that the LAD must be construed in such a way as to be substantially equivalent to the FHA. Commenters additionally argue that the two-step burden-shifting framework set forth in the proposed rules will result in an increase in litigation because it lowers the burden for complainants.

ACLU-NJ advocates for the adoption of a two-step burden-shifting framework across all contexts of the LAD, particularly in cases involving the use of automated decision-making tools, arguing that the justifications for using this framework for analyzing claims of disparate impact in housing applies equally to other contexts.

NJBankers, meanwhile, asserts that the implications of the two-step burden-shifting framework could extend to other areas, increasing the risk of litigation in those industries. MBANJ and SIFMA concur with all comments made by NJBankers. NJBA concurs with NJAA and NJCJI's comments.

RESPONSE: The Division finds that placing the burden of showing that there is not a less discriminatory alternative on the respondent in the housing context, including the housing financial assistance context, is consistent with and furthers the legislative intent underlying the LAD.

The burden-shifting framework in the rules does not depart from how the Division and New Jersey courts have interpreted the LAD in the housing context for decades, thus imposing no new liability on respondents. Rather, it codifies and provides further guidance and clarity regarding the longstanding application of disparate impact liability pursuant to New Jersey law. As there is a clear precedent for treating housing differently from other contexts and the housing context has

unique features, the Division codifies the two-step burden-shifting framework only in the housing context and declines to similarly impose a two-step burden-shifting framework in other contexts in the absence of judicial precedent or agency practice supporting this approach.

To start, the Appellate Division has stated a two-step burden-shifting framework applies in housing cases pursuant to the LAD. In *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, the Appellate Division placed the burden on the respondent to establish that there is not a less discriminatory alternative: "Once plaintiff makes a prima facie case of adverse impact, the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." 369 *N.J. Super*. 2, 30-31 (App. Div. 2004) (internal citation omitted). Despite the defendant in this case being a governmental entity, nothing in the Appellate Division's decision limits the burden-shifting framework itself to cases involving governmental entities, and the Appellate Division did not make any distinction between claims involving governmental defendants and private entities in stating and applying the burden-shifting framework. Rather, the court simply substituted the term "government interest" in lieu of the more common phraseology of "business necessity" in light of the identity of the defendant before the court.

The Division disagrees with commenter NJAA that *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan* has been "abrogated" by *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 *F*.3d 581 (2d Cir. 2016), and is no longer good law. According to NJAA, the Appellate Division cited the United States Court of Appeals for the Second Circuit's earlier decision in *Huntington Branch, N.A.A.C.P. v. Township of Huntington*, 844 *F*.2d 926 (1988), which NJAA says has since been superseded by *Mhany Management*. Neither the Supreme Court nor the Appellate Division, however, has overruled *In re Adoption of 2003 Low Income Hous. Tax Credit*,

and it remains valid precedent interpreting State law. The framework for LAD claims that was articulated in that decision has remained in place for more than two decades, and it continues to be good law in New Jersey.

Moreover, an out-of-circuit Federal court decision interpreting Federal law cannot abrogate a decision by a New Jersey court interpreting New Jersey State law. Indeed, nothing about the logic of the Appellate Division's decision is cast into doubt by the Second Circuit's decision in *Mhany Management*. The Appellate Division merely cited the Second Circuit's decision *Huntington Branch*, along with other Federal court decisions addressing the FHA, as persuasive authority in interpreting the LAD. Any changes to *Huntington Branch* or Federal interpretations of the FHA do not alter the Appellate Division's interpretation of the LAD.

Consistent with the Appellate Division's two-step burden-shifting framework for housing cases, the Division has routinely employed this framework in its administrative practice enforcing the LAD. For example, a 2019 Finding of Probable Cause issued by the Division similarly placed the burden to show that no less discriminatory alternative practice or policy would serve the housing provider's interest on the housing provider. In *Ricardo Moran v. Tower Mgmt. Servs., L.P.*, the Division concluded that "after a prima facie case is established, the burden shifts to the housing provider to demonstrate that the practice serves a legitimate nondiscriminatory business interest, and that no alternative practice or policy could be adopted that would serve the housing provider's legitimate business interest with less of a discriminatory impact against members of a protected class." N.J. DCR DOCKET NO. HB52WR-61415 (2019). *Moran* reflects agency practice on housing disparate impact cases. Other recent administrative determinations issued by the Division are also in accord. See *Stephanie Johnson v. Legacy Realty Group, LLC*, N.J. DCR DOCKET NO. H2022-000379 (2024).

Although this framework differs slightly from the framework outlined in the 2013 HUD Discriminatory Effects Standard, the Division is empowered to issue rules to enforce the LAD and is not bound by HUD's regulations implementing the FHA. For example, in the employment context, the New Jersey Supreme Court has stated that it will "'not hesitate[] to depart' from Federal precedent" in interpreting the LAD "'if a rigid application of its standards is inappropriate under the circumstances.'" *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 600–01 (1993) (quoting *Grigoletti v. Ortho Pharm. Corp.*, 118 *N.J.* 89, 107 (1990)); *L.W. v. Toms River Reg. Sch. Bd. of Ed.*, 189 *N.J.* 381, 405 (2007); see also *Grigoletti*, 118 *N.J.* at 107 (explaining that while New Jersey "has incorporated Title VII philosophy into the LAD," it has "applied the Title VII standards with flexibility").

The State has the authority to enact and enforce anti-discrimination laws that offer protections above and beyond those afforded at the Federal level. N.J.S.A. 10:5-9.2; *Lehmann*, 132 *N.J.* at 600-601; 24 CFR 115.204(h). Indeed, the LAD predates the Federal Civil Rights Act of 1964 by almost 20 years. Also, while the LAD must comport with the minimum standards set by the FHA, the LAD may exceed these Federal standards. The LAD safeguards the civil rights of New Jerseyans independent of changes in Federal law that may curtail Federal civil rights protections. Further, the LAD continues to meet the minimum standards set by the FHA and is substantially equivalent to the FHA, even though the standards set forth in the Division's disparate impact rule are more protective than HUD's. As explained further below, the Division finds that its longstanding burden-shifting framework best serves the remedial goals of the LAD and provides greater protections than provided by the HUD standards.

In the Division's experience investigating housing discrimination claims, this framework has proven workable and strikes the appropriate balance between allowing respondents to defend

against claims of discrimination while permitting complainants to demonstrate valid claims. The Division further finds that the framework best serves the LAD's broad remedial purpose—to root out discrimination in housing and other contexts in New Jersey. See, for example, *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* at 604-05, 612.

Requiring the respondent in housing cases to bear the burden of proving that there is no less discriminatory alternative, also draws strong support from several unique features of the housing context. Complainants alleging housing discrimination are significantly less likely than housing providers to have access to information regarding covered entities' practices and policies, interests, and alternative practices or policies. For example, providers of housing financial assistance possess information regarding rate-setting and terms typically unavailable to complainants. See *Associates Home Equity Servs. v. Troup*, 343 *N.J. Super*. 254, 268-71 (App. Div. 2001) (ordering discovery "respecting any guidelines" used by provider of housing financial assistance "in fixing the rate and terms" in claim of reverse redlining, noting that the information may "disclose a pattern of discriminatory lending practice"); Neil Bhutta, Aurel Hizmo & Daniel Ringo, "How Much Does Racial Bias Affect Mortgage Lending? Evidence from Human and Algorithmic Credit Decisions," Finance and Economic Discussion Series 2022-067, Washington: Board of Governors of the Federal Reserve System (2022), 4-5 (finding that "lenders often impose stricter standards ... [that] can disproportionately affect minority applicants"). This asymmetry is further compounded by the increasing use of automated decision-making tools in this industry. *Id.* at 2. Also, the increasing use of tenant screening reports and online platforms in housing sale and rental markets has made it especially difficult for complainants to access information about specific housing providers' practices and policies.

Placing the burden on the respondent at this stage of the analysis in housing cases is also appropriate in light of the particularly significant imbalance in access to legal representation in housing cases. Landlords have legal representation in 90 percent of housing cases involving eviction, for example, while renters have legal representation in less than 10 percent of cases. See Ashley Balcerzak, *Most Tenants Don't Have Lawyers in Eviction Cases. NJ Looks to Change that in 3 Cities*, NorthJersey.com (Sept. 2, 2021), https://www.northjersey.com/story/news/new-jersey/2021/09/02/new-jersey-eviction-moratorium-end-date-coming-eviction-lawyer/5599029001/. That stark imbalance means that housing providers are far better situated to identify possible alternatives than claimants. Moreover, placing the burden on the respondent at this stage in housing cases is appropriate in light of our Supreme Court's longstanding recognition that housing is among the "most basic" rights, *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 67 *N.J.* 151, 178 (1975), and that equal access to housing is necessary for individuals to "be in a position to take an active and beneficial role in the cultural, social, and economic life of the community." *Levitt & Sons, Inc. v. Div. Against Discrimination in State Dep't of Ed.*, 31 *N.J.* 514, 533 (1960).

Finally, as the rule codifies the framework currently employed by the Division and New Jersey courts, it is unlikely to result in increased litigation.

18. COMMENT: APCIA, ICNJ, NAMIC, NJAA, NJCJI, and NJM express concerns about the rules deviating from the Federal burden-shifting framework. Commenters argue that this framework improperly changes the burden of proof and deviates from fundamental principles of our legal system. Commenters also assert that because disparate impact is rooted in Federal law, the Division cannot depart from Federal law and precedent in adopting its disparate impact rules,

particularly with regard to the housing burden-shifting framework. They argue that, unlike its Federal counterparts, the LAD does not include an explicit cause of action for disparate impact discrimination and New Jersey courts have looked to Federal courts for guidance when interpreting the LAD. Commenters, therefore, suggest that the Division lacks the authority to depart from Federal law, including the procedural safeguards embedded in the "robust causality requirement" set forth in the U.S. Supreme Court's *Inclusive Communities* decision, and the approach taken by our State's courts. NJBA concurs with the comments made by NJCJI and NJAA.

RESPONSE: The Division has the authority to adopt suitable rules and regulations to carry out the provisions of the LAD, N.J.S.A. 10:5-8(g), and fulfill the Legislature's objective of eradicating discrimination. *NJ Builders, Owners and Managers Association v. Blair*, 60 *N.J.* 330, 339-340 (1972). New Jersey courts have recognized disparate impact as a theory of liability pursuant to the language and purpose of the LAD, separate from a cause of action pursuant to Federal law. Such claims have been recognized for nearly 50 years. *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55 (1978). The LAD prohibits discrimination but does not define theories of liability. Thus, disparate treatment is also not referenced in the LAD itself. The Division has long explained these separate theories of liability in its guidance documents and other public materials, and codifying the standard in these rules is consistent with the law, judicial precedent, and past agency practice. As explained further in Response to Comment 17, the Division is empowered to issue rules to enforce the LAD and is not bound by HUD's regulations implementing, or Federal decisions construing, the FHA.

Furthermore, the rules incorporate the causation requirement described in *Inclusive Communities.* The rules include a causation requirement at the prima facie stage by requiring a complainant to identify the practice or policy maintained by the respondent that causes a disparate

impact. N.J.A.C. 13:16-2.3(a). A claimant who points to a statistical disparity, without challenging a practice or policy of the respondent causing that disparity, would not meet the requirements of a prima facie case. *Ibid.* Finally, shifting the burden to respondents in a multi-step burden-shifting framework does not offend fundamental principles of our legal system.

Comments Regarding Whether the Rules Are Contrary to Public Policy

19. COMMENT: NJAA comments that the rules are contrary to public policy and will lead to abusive disparate impact legal claims by failing to incorporate what it describes as the robust safeguards set forth by the Supreme Court of the United States in *Inclusive Communities*. NJAA believes these safeguards are necessary to protect respondents from "abusive disparate impact claims." NJBA concurs with the comments made by NJAA and expresses particular concern that the rules will give rise to additional litigation.

RESPONSE: NJAA is correct that the rules must be consistent with public policy goals—but the relevant guidepost must be the public policy animating the enabling statute, the LAD. See *Smith v. Millville Rescue Squad*, 225 *N.J.* 373 (2016). The rulemaking is consistent with not only the text of the LAD but also its express remedial purpose. In enacting the LAD, the Legislature expressly recognized that "because of discrimination, people suffer personal hardship, and the State suffers a grievous harm." N.J.S.A. 10:5-3. In light of the enduring injury resulting from discrimination, "the Legislature intends that such damages be available to all persons protected by this act and that this act shall be *liberally construed* in combination with other protections available under the laws of this State." *Ibid.* (italics added). Likewise, New Jersey courts have repeatedly recognized that the LAD is "remedial legislation, intended 'to eradicate the cancer of discrimination[,]' protect employees, and deter employers from engaging in discriminatory practices." *Acevedo v.*

Flightsafety Int'l, Inc., 449 *N.J. Super*. 185, 190 (App. Div. 2017) (quoting *Jackson v. Concord Co.*, 54 *N.J*. 113, 124 (1969)); see *Lehmann v. Toys 'R' Us*, 132 *N.J*. 587, 600 (1993). Thus, it is well established that the LAD should be "liberally construed 'in order to advance its beneficial purposes, and that "[t]he more broadly [the LAD] is applied, the greater its antidiscriminatory impact." *Smith*, 225 N.J. at 390 (quoting *Nini v. Mercer Cty. Cmty. Coll.*, 202 *N.J*. 98, 115 (2010)). These rules are consistent with and in furtherance of the Division's authority to enforce the LAD. Furthermore, as stated in Response to Comment 18, these rules include the safeguards described in *Inclusive Communities*.

Comments Concerning Burdens on Respondents and Obligations of Covered Entities

20. COMMENT: LSNJ recommends that the Division utilize stronger language requiring certain actions instead of encouraging such actions. For example, instead of encouraging entities to make efforts to ensure their advertising does not disparately impact members of a protected class, LSNJ believes the rules should explicitly state that entities "must" make such efforts.

RESPONSE: The Division does not find it necessary to add "stronger language" to the rules, as LSNJ suggests. Disparate impact discrimination claims pursuant to the LAD are fact-dependent in nature. The goal of the rules is to provide further insight and guidance into which actions may run afoul of the LAD pursuant to this fact-intensive inquiry. With respect to advertising, the rules clarify that the use of advertising that results in a disparate impact violates the LAD in the employment and public accommodations context unless respondent can show that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and the complainant cannot show that there is a less discriminatory alternative. In the housing context, the rules clarify that the use of advertising that results in a disparate impact violates the LAD unless the respondent can show

that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that no less discriminatory alternative exists. Therefore, if a covered entity does not ensure that their advertising does not result in a disparate impact, they may be liable pursuant to the LAD. For these reasons, the Division does not amend the relevant language.

21. COMMENT: SPAN recommends that the rules explicitly state each party's burden of proof.

RESPONSE: Cases regarding potential LAD violations are civil cases. Thus, every element must be proven by a preponderance of the evidence. As this standard applies to all civil cases, because LAD claims are subject to the rules generally applicable to all civil cases unless otherwise noted in the relevant statutes or regulations, the Division does not believe it is necessary to include the burden of proof in the rules.

Comments Regarding Substantial, Legitimate, Nondiscriminatory Interest Standard

22. COMMENT: ACLU-NJ recommends further defining "legitimate" as not only genuine, but reasonably related to the purpose of the entity at issue, and further defining or providing guidance on what would satisfy the requirement that a practice or policy "has been shown to effectively carry out the identified interest."

RESPONSE: The Division does not find it necessary to further define these terms in the rules. The standard codified by these rules requires that covered entities prove that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. The rules' definition of "substantial interest" as "a core interest of the entity that has a direct relationship to the function of that entity" addresses the commenter's main concern that the substantial, legitimate, nondiscriminatory interest be reasonably related to the purpose of the entity at issue. As to

determining whether a practice or policy effectively carries out that interest, as explained in the Summary of the notice of proposal, "a justification that is not supported by empirical evidence will not meet the burden" of proving that the challenged practice or policy effectively carries out the identified interest. The rules define empirical evidence as "evidence that is not hypothetical or speculative." Therefore, whether a practice or policy "effectively carries out the identified interest" turns on whether the respondent can provide evidence that is not hypothetical or speculative as proof of their claim that the practice or policy satisfies this requirement. Ultimately, whether a practice or policy effectively carries out an identified interest will require a case-by-case assessment, and the Division declines to provide more specific guidance in the rules so as not to prejudge this case-by-case assessment.

23. COMMENT: APCIA, ICNJ, NAMIC, NJBIA, and NJCJI express concerns around the use of the phrase "substantial, legitimate, nondiscriminatory interest." These concerns include that this standard allegedly differs from the existing "business necessity" standard, is not supported by current caselaw, and increases the standard that respondents must meet. Commenters request that the Division remove "legitimate" and "nondiscriminatory" from the phrase "substantial, legitimate, and nondiscriminatory" in the rules. Relatedly, NJAA recommends that the Division explicitly state that the "substantial, legitimate, nondiscriminatory" standard does not create a higher burden than the "legitimate business necessity" standard. NJBA concurs with NJAA and NJCJI's comments. SIFMA concurs with NJBIA's comments.

RESPONSE: As explained in the notice of proposal, substantial, legitimate, nondiscriminatory interest is functionally the same standard as legitimate business necessity. See, for example, *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.,* 576 *U.S.* 519, 527 (2015)

("prov[ing] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests ... is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related"). Similarly, the definition of "substantial interest" as a "core interest of the entity that has a direct relationship to the function of the entity" is supported by Title VII, which prohibits employment practices that exclude members of a protected class when the practice cannot be shown to be related to job performance. See, for example, *Griggs*, 401 *U.S.* at 431.

The Division uses the phrase "substantial, legitimate, nondiscriminatory interest" to "encompass claims of disparate impact against non-business entities, such as nonprofit organizations and government agencies" and to cover more contexts than simply employment. *Inclusive Communities*, 576 *U.S.* at 541. Additionally, courts have previously required pursuant to Title VII that, as part of the legitimate business necessity standard, employers provide legitimate, nondiscriminatory reasons for challenged employment decisions. See, for example*, Cronin v. Booz Allen Hamilton, Inc.*, 2021 U.S. Dist. LEXIS 83461 (D.N.J. April 30, 2021) ("After a plaintiff makes a prima facie showing of disparate impact, the employer then must 'articulat[e] some legitimate, nondiscriminatory reason for its treatment of the employee.'" *Massarsky v. Gen. Motors. Corp.*, 706 *F.*2d 111, 118 (3d Cir. 1983) (citation omitted)); *Kaplan v. State*, 2012 *N.J. Super*. Unpub. LEXIS 1802, at *16-17 (July 26, 2012) ("[A]n employment discrimination claim based on disparate impact involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity or other legitimate nondiscriminatory reasons.").

Finally, requiring that the respondent prove that the challenged practice or policy effectively carries out the stated interest is also supported by case law. See *Newark Branch,*

NAACP, 940 *F.*2d 792, 803 (3d Cir. 1991) (stating that "the employer need not show that a challenged practice is absolutely necessary, it *must* demonstrate that the practice furthers legitimate business goals 'in a significant way'"). That standard ensures that the challenged policy or practice bears a direct relationship to the substantial, legitimate, nondiscriminatory interest identified by the respondent, and it plays a role in ensuring that the interest identified by the respondent is not merely pretextual. See, for example, *Griggs*, 401 *U.S.* at 432. Without this requirement, respondents would be more likely to continue discriminatory practices or policies that are related to a substantial, legitimate, nondiscriminatory interest even if those practices do not further the stated interest in any way, thus making it easier to justify practices and policies based on pretextual interests. The Division does not believe further clarification or amendments are necessary.

24. COMMENT: NJAJ and NJCJI express concerns regarding N.J.A.C. 13:16-2.2(j) (now included at N.J.A.C. 13:16-2.4(c)) providing that "[a]n interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest" for purposes of rebutting a *prima facie* claim of disparate impact discrimination) and N.J.A.C. 13:16-3.1(b) (providing that "[n]othing in this subchapter shall preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented or underserved members of a protected class"). NJCJI argues that these provisions are contrary to the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 *U.S.* 181 (2023), and NJAJ argues that N.J.A.C. 13:16-2.2(j) may unintentionally operate in practice to create a new defense for intentional discrimination in connection with affirmative action programs that favor priority groups. NJAJ further points out that the terms "interest," "diversity," "underrepresented," and

"underserved" are undefined in the rules and asks that the Division rephrase this language or add into the rules an affirmative prohibition against creating such a defense. NJBA concurs with NJCJI's comments.

RESPONSE: N.J.A.C. 13:16-2.4(j) and 3.1(b) are not contrary to the holding of *Students for Fair Admissions* and do not create any new defenses for any form of intentional discrimination. The *Students for Fair Admissions* decision invalidated the use of race-conscious admissions policies in the higher education context and did not address other aspects of Federal or State law, including the application of state anti-discrimination laws. The decision did not address whether an interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest for purposes of rebutting a prima facie claim of disparate impact discrimination. Also, the decision did not address the use of recruitment practices to attract an individual who is a member of an underrepresented or underserved group that is part of a protected class. See *Students for Fair Admissions*, 600 *U.S.* at 346 (noting that the decision does not limit the use of "admissions and recruitment efforts that seek to enroll diverse classes without using racial classification") (Sotomayor, J., dissenting).

New Jersey courts and the United States Supreme Court have held that "[t]he existence of an affirmative action plan serves as a legitimate nondiscriminatory reason for considering race in an employment decision" pursuant to the LAD and pursuant to Title VII. *Klawitter v. City of Trenton*, 395 *N.J. Super*. 302, 333 (App. Div. 2007) (citing *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 *U.S.* 616, 630 (1987) ("[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and [] Title VII should not be read to thwart such efforts."). *Students for Fair Admissions* does not displace these longstanding precedents. Accordingly, the Division finds these rules to be within its

statutory authority pursuant to the LAD and consistent with current practices and case law in New Jersey.

The relevant language exists to clarify that a court or the Division may find that achieving diversity or increasing access for underrepresented or underserved members of a protected class is a substantial, legitimate, nondiscriminatory interest in certain cases involving claims of disparate impact discrimination. This determination must be made after a case-specific, fact-intensive inquiry, and all other burdens of proof must be met in order for any practice or policy to be upheld pursuant to the LAD. This language also does not affect disparate treatment claims. The Division, therefore, has determined that it is not necessary to revise N.J.A.C. 13:16-2.4(c).

Comments Concerning Employment Practices

25. COMMENT: NJBIA and SIFMA remark on the examples of practices or policies that may result in unlawful disparate impact discrimination included in the rules. The commenters express concern about the inclusion of word-of-mouth recruiting at N.J.A.C. 13:16-3.2(a)2, the use of automated employment decision tools at N.J.A.C. 13:16-3.2(c)2, and employment practices or policies concerning language, dress, driver's license, and citizenship requirements at N.J.A.C. 13:16-3.4. The commenters argue that these practices or policies are common business practices or policies that improve efficiency and benefit underserved communities and that including them in these rules will hurt businesses, particularly small businesses, and result in increased litigation. NJBIA also argues that the rules are inconsistent because they include both the use of word-of-mouth recruitment and automated employment decision tools as possible prohibited practices.

RESPONSE: The Division declines to remove any examples of possible prohibited practices or policies from N.J.A.C. 13:16-3.2 or 3.4. The rules do not state that these practices or policies are

per se prohibited. Rather, the rules provide that any of these practices or policies may result in a disparate impact if it actually or predictably results in a disproportionately negative effect on potential applicants or employees who are members of a protected class. As with any challenged practice or policy, an employer has the opportunity to demonstrate that its practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To the extent any of the practices or policies benefit underserved communities, the rules provide that an interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest. N.J.A.C. 13:16-2.4(c). Nevertheless, as with any challenged practice or policy, a complainant may overcome this showing by proving that there are less discriminatory recruitment or employment practices or policies the employer could have adopted instead.

Additionally, the rules are not inconsistent just because they mention both word-of-mouth recruitment and automated employment decision tools. The rules do not indicate that the use of either word-of-mouth recruitment or automated employment decision tools is *per se* discriminatory. Also, even where an employer's particular use of these recruitment practices is impermissible, there are other alternative recruitment practices that are available to employers.

Notably, the inclusion of these examples does not create any new liability or burdens for businesses. The examples merely clarify the method for evaluating liability pursuant to the LAD, providing for greater predictability and consistency for all parties. The adoption of these rules should encourage regulated entities to review their own practices and policies and evaluate the availability of less discriminatory alternative practices and policies, thereby reducing potential litigation and liability exposure.

26. COMMENT: ACLU-NJ, LSNJ, and SPAN recommend the inclusion of additional examples of practices or policies that may violate the LAD as disparate impact discrimination and provide examples for potential inclusion. Specifically, ACLU-NJ requests that the rules include examples related to disability and national origin discrimination, specifically requesting the inclusion of an example "stating that a law enforcement agency's failure to provide comprehensive, certified language interpretation services, including continuous access to language line services for officers in the field, may constitute disparate impact discrimination based on national origin." LSNJ recommends adding examples that address policies on hair textures and styles that may result in disparate impact discrimination, consistent with the CROWN Act. SPAN requests that the rules include examples of practices or policies that could have a disparate impact on protected groups of students, such as practices and policies related to the use of restraints and seclusion that disproportionately impact students with disabilities.

RESPONSE: The Division does not find that the chapter is the most appropriate place to include such information. The rules include extensive, non-exhaustive examples of possible disparate impact discrimination, but the rules cannot include every possible example of disparate impact discrimination. Further examples are more appropriately addressed in public education resources, such as guidance documents. The Division refers commenters to its Hair Discrimination Guidance, available at www.nj.gov/oag/dcr/downloads/dcr-guide_Hair-Discrimination.pdf, for further information regarding hair discrimination.

Comments Concerning Automated Decision-Making Tools

27. COMMENT: ACLU-NJ and Public Justice suggest that the Division amend these rules, adopt separate rules, or issue guidance addressing the potentially discriminatory use of automated

decision-making tools in all contexts covered by the LAD, instead of limiting the rules to automated *employment* decision tools. They suggest updating any resources regularly as these tools change. Relatedly, ACLU-NJ points out that, to bring a claim of discrimination resulting from the use of automated decision-making tools or request reasonable accommodations from their use, New Jerseyans need transparency about when and how these tools are used to make decisions that impact them. To that end, ACLU-NJ suggests that the Division explore ways to compel covered entities to disclose information about their use of automated decision-making tools.

RESPONSE: While the Division was not able to capture all possible use-cases for automated decision-making tools in these rules, these rules apply to the use of automated decision-making tools by covered entities in all contexts covered by the LAD, not just in the employment context. At this time, the Division believes that these rules, which pertain to disparate impact discrimination more generally, are not the appropriate place for notice requirements. Nevertheless, the Division will continue to provide guidance in future public education resources on how the use of automated decision-making tools in employment, housing, places of public accommodation, credit, and contracting may violate the LAD and how entities can comply with the LAD. For example, the Division launched a Civil Rights and Technology Initiative and published a guidance on Algorithmic Discrimination and the LAD in January 2025, available at https://www.nj.gov/oag/newsreleases25/2025-108_DCR-Guidance-on-Algorithmic-Discrimination.pdf.

28. COMMENT: ACLU-NJ comments that N.J.A.C. 13:16-2.2(l) (now included at N.J.A.C. 13:16-2.4(e)) could be read to create an unintended defense or safe harbor from algorithmic discrimination. Specifically, N.J.A.C. 13:16-2.2(l) provides that if a respondent's practice or

policy that results in a disparate impact relies on conduct, standards, products, procedures, or systems of an outside person's or vendor, the respondent must take reasonable steps to ensure that the outside vendor's conduct, standards, products, procedures, or systems are consistent with the LAD. N.J.A.C. 13:16-2.2(l) further provides an example of an employee selection algorithm that results in a disparate impact based on gender or race, where the employer uses an algorithm developed by an outside technology company. It then provides that, even when the employer did not develop the algorithm, the employer may still be liable for this disparate impact "unless the employer took reasonable steps to ensure that the algorithm would not result in a disparate impact." ACLU-NJ argues that this language can be interpreted as creating an affirmative defense to algorithmic discrimination if a respondent takes "reasonable steps." It suggests removing this possible defense and clarifying that taking reasonable steps to assess a new piece of technology before implementing it does not absolve a covered entity from liability for discrimination that results from the use of that technology. Alternatively, ACLU-NJ asks the Division to provide further guidance on what would constitute "reasonable steps."

NJSBA points out that it is not clear what "reasonable steps" a covered entity can or should take before using an automated decision-making tool it did not develop or whether liability could still attach even if a covered entity took such "reasonable steps." NJSBA suggests clarifying these points in the rules.

RESPONSE: This subsection was drafted to provide in the first sentence an affirmative requirement that a respondent take reasonable steps to ensure that any outside person or vendor's conduct, standards, products, procedures, or systems are consistent with the LAD and this chapter if the respondent relies on the conduct, standards, products, procedures, or systems. In the second sentence, the Division intended to provide only an example of when reasonable steps may be

necessary. The example was not intended to create a defense to or safe harbor from algorithmic discrimination. Accordingly, to avoid confusion, the Division removes the example.

Consistent with the comments, the Division amends N.J.A.C. 13:16-2.2(l) (now included at N.J.A.C. 13:16-2.4(e)) to remove the example in the proposed rules, which stated:

> For example, if an employer uses an employee selection algorithm that results in a disparate impact based on gender or race, the fact that the employer did not create the algorithm itself, but instead used an algorithm created by a technology company will not shield the employer from liability, unless the employer took reasonable steps to ensure that the algorithm would not result in a disparate impact based on a protected characteristic and was otherwise consistent with the Act and this chapter before using it.

While the rules include an affirmative requirement to take reasonable steps to carefully consider and evaluate the design and testing of automated decision-making tools, taking reasonable steps is not a complete defense against discrimination if they do not prevent or mitigate disparate impact discrimination. A respondent may still be liable if unlawful discrimination results from their use of an outside person's or vendor's conduct, standards, products, procedures, or systems. This point is made clearer by including only the affirmative requirement in the first sentence of this subsection and not the example in the second sentence. This technical change provides additional clarity and does not change the scope of the rulemaking's requirements.

The Division anticipates providing additional guidance in future public education resources on what may constitute reasonable steps when covered entities choose to use automated decision-making tools.

29. COMMENT: NJSBA points out that, while the rules include a definition of "automated employment decision tool" at N.J.A.C. 13:16-1.3, the rules use the term "online application technology" at N.J.A.C. 13:16-3.2(c)2. NJSBA suggests the Division clarify whether "automated

employment decision tool" is synonymous with "online application technology."

RESPONSE: The Division uses the term "automated employment decision tool" to refer to a wide range of possible tools employers may use in employment decision-making. "Online application technology" that limits or screens out applicants based on their schedules is included as one example of an automated employment decision tool. Nonetheless, to avoid any confusion and to keep the language used at N.J.A.C. 13:16-3.2(c)1, 2, and 3 consistent, the Division replaces "online application technology" with "automated employment decision tool." This technical change is made only for the purpose of clarifying the rules and does not in any way alter the scope of the proposed rules or the rights and responsibilities of any person or entity pursuant to the rules.

Comments Concerning Employee Selection Procedures

30. COMMENT: NJSBA requests clarification on the extent to which the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978), which are incorporated by reference at N.J.A.C. 13:16-3.3, are mandatory in disparate impact cases pursuant to the LAD; the extent to which the Uniform Guidelines apply to each stage of litigation; and whether all of the Uniform Guidelines are incorporated in the rules.

RESPONSE: The rules provide that the Uniform Guidelines apply to disparate impact claims pursuant to the LAD concerning employee selection procedures to the same extent they apply to such disparate impact claims pursuant to Federal law. The Uniform Guidelines supply non-binding guidance, but the Uniform Guidelines are not themselves a part of the rules and do not have the force and effect of law. The rules indicate that all aspects of the Uniform Guidelines will be treated as non-binding guidance and if there is a conflict between the Uniform Guidelines and the rules, the rules prevail. The Division will implement the Uniform Guidelines in enforcement actions to

the same extent as the EEOC and other Federal agencies implement the Uniform Guidelines in Federal enforcement actions concerning employee selection procedures. As for litigation, the Uniform Guidelines should be accorded the same weight and deference in disparate impact actions concerning employee selection procedures pursuant to the LAD as in comparable actions pursuant to Title VII of the Civil Rights Act of 1964. While the Uniform Guidelines provide best practices and should be afforded deference, they do not create any mandatory legal prescriptions. *Guardians Ass'n of New York City Police Dep't, Inc. v. Civ. Serv. Comm'n of City of New York*, 630 *F.*2d 79, 91 (2d Cir. 1980).

Comments Regarding Criminal History

31. COMMENT: Commenters K.R.W., P.T., and R.D. express concerns about the provisions regarding consideration of an applicant's criminal history in employment, housing, and places of public accommodations. The commenters state that employers and housing providers should have the right to consider and make decisions based on an applicant's criminal history information.

RESPONSE: The Division disagrees with these comments. To clarify, the rules do not affirmatively require employers to hire, or housing providers to rent to, individuals who have a criminal history. Rather, the rules provide that a blanket policy of excluding applicants because of a criminal history is likely to have a disparate impact based on a protected characteristic, and that an individualized assessment is likely to be a less discriminatory alternative to such blanket policies. The rules include factors that may be relevant to such an individualized assessment, including the nature and severity of the criminal charges and how the charges relate to any job requirements in the employment context or, in the housing context, the degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's

other tenants or property. These considerations will safeguard employers and housing providers from the harm the commenters discuss. Further, employers and housing providers may rebut a prima facie case of disparate impact discrimination by demonstrating that they have a substantial, legitimate, nondiscriminatory interest in maintaining their policy or practice. If they do, the question then becomes whether there is a less discriminatory alternative to the challenged policy or practice. This burden-shifting framework also protects covered entities against the harm the commenters cite. Separately, the Fair Chance in Housing Act (FCHA) imposes limits on the circumstances in which a housing provider can make housing decisions based on an applicant's criminal history. The Division, therefore, declines to remove the consideration of criminal history in employment or housing decisions as examples of a practice which may violate the LAD as disparate impact discrimination.

32. COMMENT: ACLU-NJ and LSNJ express concerns that the rules related to employers' and housing providers' consideration of job and housing applicants' criminal history are insufficiently protective of applicants. ACLU-NJ comments that the inclusion of certain factors in an individualized assessment of an applicant—in particular, the nature and severity of a criminal record and whether employment or tenancy poses an unreasonable risk to property or to the safety or to welfare of the public—has the potential to result in further discrimination and improperly suggests a likelihood of recidivism. ACLU-NJ comments that allowing employers or housing providers to consider evidence regarding rehabilitative psychiatric treatment "presents serious privacy concerns" and strongly recommends removing references to these records from the factors that may be considered in an individualized assessment to avoid suggesting that employers or housing providers can routinely request or expect to receive such records. ACLU-NJ also

recommends revising the language of the rules to create a presumption against criminal history being a legitimate consideration in hiring practices and a presumption that criminal history has no bearing on a person's conduct as a tenant and neighbor. In the alternative, ACLU-NJ suggests strictly construing any consideration of criminal history such that an employer should not be permitted to evaluate other factors if there is no nexus between prior criminal charges or convictions and a position's requirements and to allow applicants to explain and contextualize their criminal history. ACLU-NJ additionally recommends that the rules provide further clarification on what constitutes a reliable source of criminal history information when an employer or housing provider examines an applicant's criminal history. LSNJ recommends providing further examples of policies related to the consideration of criminal history in employment that are likely to constitute unlawful disparate impact discrimination. LSNJ recommends, for example, that the rules mention "blanket bans" or categorical exclusions for certain types of criminal convictions or activity.

RESPONSE: The Division declines to make these changes. While the rules state that an individualized assessment is likely to be a less discriminatory alternative to a blanket ban on individuals with a criminal history, the Division wishes to clarify that all claims of disparate impact discrimination due to consideration of criminal history should be evaluated on a case-by-case basis. This case-by-case evaluation includes the specific policies or practices of the covered entity, the purported nexus between the criminal history, and the substantial, legitimate, nondiscriminatory interest of the covered entity, and the reliability of the sources considered. The Division has identified several factors that, among others, may be relevant to an individualized assessment of an applicant's criminal record. The nature and severity of a criminal record and whether employment or tenancy poses an unreasonable risk to property or to the safety or welfare

of the public or other tenants are examples of factors that may be relevant to an individualized assessment of an applicant's criminal record in some circumstances. Likewise, whether there is a nexus between the applicant's previous criminal convictions and the position's requirements is also a factor that may bear on the disparate impact analysis.

While the Division appreciates that some factors could be understood to suggest a risk of recidivism, the rules expressly include other factors that may help mitigate this possibility. The rules also provide applicants with the opportunity to contextualize their criminal history, including through evidence of rehabilitation, "the facts and circumstances of the conduct underlying" the criminal record, "the age of the individual at the time of the occurrence of the offense," and "any evidence of rehabilitation that the applicant or others may wish to provide." Records regarding counseling or psychiatric treatment may be one example of evidence of rehabilitation. However, the chapter in no way requires an individual to provide this information. Indeed, the chapter specifically provides that the "lack of information relating to any one of these factors shall not be considered a negative factor when conducting an individualized assessment." As drafted, the rules identify the risk of disparate impact discrimination stemming from reliance on criminal history screening while also acknowledging the competing interests of employers and housing providers.

Moreover, separate from the LAD, the FCHA addresses which aspects of criminal history can be considered in an application for tenancy and when they can be considered, and nothing in the LAD or these rules displaces the requirements set forth pursuant to the FCHA.

Comments Regarding Criminal History in Housing

33. COMMENT: NJAA suggests that the rules should not include criminal background screening as a practice that may result in unlawful disparate impact discrimination because the FCHA is not

a part of the LAD. According to NJAA, the Legislature made a specific decision to separate the FCHA from the LAD. NJBA concurs with NJAA's comments.

RESPONSE: The Division declines to remove criminal background screening as an example of a practice that may result in unlawful disparate impact discrimination pursuant to the LAD. The FCHA and the Division's rules implementing the FCHA make clear that any violation of the FCHA is separate from and does not preclude a possible LAD violation. See, for example, N.J.S.A. 46:8-63(e); N.J.A.C. 13:5-2.6. The Division has determined that including discussion on criminal background screening in the rules is appropriate, as these practices may in fact violate the LAD, separate and apart from the FCHA. The disparate impact rules indicate that a policy that requires an individualized assessment of the facts and circumstances of a housing applicant's criminal record and other mitigating information is likely to be a less discriminatory alternative to a policy that excludes individuals from housing based on criminal history without conducting an individualized assessment. See, for example, N.J.A.C. 5:80-7.3(b)4ii (recognizing that "HUD and the New Jersey Division on Civil Rights have determined that some tenant selection practices that include criminal background checks may have the result of unlawful discrimination because they have a disparate impact based on race or national origin or because they are often used as a pretext for treating prospective tenants differently based on race or national origin ...").

Comments Concerning Housing, Real Estate, and Housing Financial Assistance

34. COMMENT: LSNJ recommends that the Division clarify that the rules apply to disparate impact discrimination in consumer credit and in the terms and conditions in any type of consumer contracts, including residential leases and real estate sales. LSNJ notes that the rules do not address claims pursuant to N.J.S.A. 10:5-12(i), which involve certain forms of discrimination by lenders

and other financial institutions. LSNJ recommends that the rules address credit discrimination in all types of loans.

RESPONSE: The rules apply to every context covered by the LAD, including those included at N.J.S.A. 10:5-12.g, h, i, k, and l. The rules set forth an extensive list of examples and contexts in which covered entities may violate the LAD based on a disparate impact analysis. However, that list is not exhaustive, and the rules apply to all contexts covered by the LAD.

35. COMMENT: LSNJ recommends that the Division include additional examples of potential disparate impact violations, such as certain tenant screening procedures and reliance on eviction records. LSNJ also recommends that where tenant screening reports highlight eviction records, those reports should be evaluated on an individualized basis because the reports are often inaccurate or misleading.

RESPONSE: While the rules do not directly discuss the practice of relying on tenant screening reports or eviction records, these practices could result in a disparate impact depending on the specific facts at issue. Though the rules do not prohibit the use of tenant screening reports, reliance on tenant screening reports may result in disparate impact discrimination depending on what records the report considers, the accuracy of those records, and whether the housing provider conducts an individualized assessment of the prospective tenant.

Comments Regarding Credit and Income

36. COMMENT: LSNJ expresses concern over the statement in the rules that "an interest in collecting rent on time" may constitute a "substantial, legitimate, nondiscriminatory interest" justifying a housing provider's practice or policy to consider credit history in evaluating potential

tenants. LSNJ cautions the Division against any suggestion that this interest alone will suffice to demonstrate that the consideration of credit history does not violate the LAD. LSNJ cites reports from the National Consumer Law Center finding that there are no quantitative or scientific studies "showing that credit reports and scores accurately predict a successful tenancy."

RESPONSE: The Division respectfully disagrees that the rules make such a suggestion. While the proposed rules identify "an interest in collecting rent on time" as an example of an interest that may be a "substantial, legitimate, nondiscriminatory interest," this does not foreclose the possibility that a housing provider's practice or policy of considering credit history may violate the LAD. Indeed, the rules explicitly state that relying on an applicant's credit score without an individualized assessment could violate the LAD. As the rules already set forth the standards that apply to a housing provider's consideration of credit history, the Division declines to amend the rules.

37. COMMENT: NJAA recommends that the Division remove the example included at N.J.A.C. 13:16-4.3(c), which provides that relying on an applicant's credit score without an individualized assessment could violate the LAD. NJAA states that requiring an individualized assessment instead of relying on an applicant's credit score is contrary to Federal and State law because it would limit a housing provider's ability to consider creditworthiness. NJAA further expresses concerns that conducting individualized assessments will lead to unnecessary delay and expense, increased litigation, and related increases in rent. Additionally, they argue that the use of automatic screening tools that categorically deny applicants with low credit scores apply in a neutral, non-discriminatory manner. Finally, NJAA states that attempts to limit consideration of

creditworthiness and require individualized assessments have been considered and rejected by the Legislature in the course of enacting the FCHA. NJBA concurs with NJAA's comments.

RESPONSE: The Division respectfully disagrees with the commenters. The rules do not conflict with Federal or State law and do not bar housing providers from considering creditworthiness. However, if a provider's chosen policy or practice for assessing creditworthiness results in a disparate impact on members of a protected class, such as a policy or practice of deciding not to rent based solely on a credit score below certain minimum thresholds, that policy or practice could violate the LAD. Furthermore, these rules do not state that the LAD requires housing providers to conduct an individualized assessment of creditworthiness in all circumstances. Instead, the rules state that a practice or policy that includes an individualized assessment is likely to be a less discriminatory alternative to a blanket policy or practice that automatically excludes applicants based on a lack of credit history or based on a credit score below a certain threshold without conducting an individualized assessment.

The Division also disagrees that the inclusion of this example will lead to increased litigation or expense for housing providers. The examples set forth in the rules attempt to provide all parties with greater clarity regarding their existing rights and obligations pursuant to the LAD. However, the examples do not prejudge the lawfulness of any specific practice. Each claim of disparate impact discrimination turns on the facts at issue, and these rules do not attempt to create automatic liability for any particular practice, as the commenter suggests. Housing providers can avoid litigation and possible liability by employing less discriminatory alternative practices, such as engaging in individualized assessments of applicants' ability to timely pay rent, rather than using practices that have been identified as likely to have a disparate impact. Also, by using screening and review criteria that are more carefully calibrated to assessing whether individual

prospective tenants will be able to pay their rent, housing providers will reduce the risk that the tenants they ultimately select do not pay their rent, in turn, reducing the costs they may incur seeking payment from tenants who are not able to pay their rent on time.

With respect to the commenter's assertion that a housing provider's consideration of creditworthiness involves a neutral, nondiscriminatory criteria and, therefore, does not violate the LAD, the disparate impact analysis set forth in existing law and codified in these rules does not turn on whether a particular policy or practice is facially neutral. Pursuant to existing law and the rules, a policy or practice may violate the LAD pursuant to a disparate impact theory of liability even if it relies on facially neutral criteria. The rules clarify the disparate impact standards that apply to a policy or practice that considers creditworthiness—even one that is facially neutral. Nothing in existing Federal or State law supports a blanket exclusion from disparate impact liability for a housing provider's consideration of creditworthiness. While the commenter's cited cases held that creditworthiness may be an appropriate factor, among others, to consider in determining whether to accept tenancy, those decisions do not address whether employing an individualized assessment of a prospective tenant's creditworthiness may be a less discriminatory alternative to blanket bans or minimum score requirements. See *Pasquince v. Brighton Arms Apartment*, 378 *N.J. Super*. 588 (App. Div. 2005); *T.K. v. Landmark West*, 353 *N.J. Super*. 223 (App. Div. 2002); *Franklin Tower One v. N.M.*, 157 *N.J*. 602 (1999).

While the Legislature could enact legislation that would preclude housing providers from considering creditworthiness altogether pursuant to the LAD, it has not done so here. Nor does the Legislature's failure to adopt any proposed legislative language affect or limit the Division's authority to interpret the LAD or promulgate regulations clarifying the legal standards that apply to claims pursuant to the LAD.

38. COMMENT: LSNJ recommends that N.J.A.C. 13:16-4.3(a) should not limit its analysis to "source of income discrimination." LSNJ recommends that this provision include any "minimum income requirement that has a disparate impact on members of a protected class ... in all rental situations, not just those where a rent subsidy is involved."

RESPONSE: The application at N.J.A.C. 13:16-4.3(a) is not limited only to those individuals paying with governmentally subsidized rents. The rule specifically states that a "minimum income requirement, financial standard, or income standard may have a disparate impact based on source of lawful income, *including, but not limited to*, for people who seek to pay rent with forms of government rental assistance." (emphasis added). As the rule states that it applies to, but is not limited to, individuals paying with rental assistance, the rule applies to all renters. The Division, therefore. does not believe it is necessary to add the clarification requested by the commenter.

Comments Regarding Disparate Impact Discrimination in Public Accommodations

39. COMMENT: SPAN recommends adding a requirement at N.J.A.C. 13:16-5.1 that places of public accommodation maintain relevant records for at least two years from the date the record was made.

RESPONSE: While the Division recognizes the importance of recordkeeping requirements, the rules do not include recordkeeping requirements for any other covered entities (employers, housing providers, lending institutions, etc.). The Division declines to include any recordkeeping requirements in these rules at this time.

40. COMMENT: SPAN requests that the Division define the phrase "exclusionary discipline" to include the practice of schools calling parents to pick up students early from school due to behavioral concerns but not recording this as a disciplinary action. SPAN states that this practice has a disproportionate impact on students with disabilities. SPAN additionally suggests that the Division state in the rules that "zero tolerance policies" that rely on exclusionary discipline are unlawful unless necessary to achieve a substantial, legitimate, nondiscriminatory interest and there are no less discriminatory alternatives that would achieve the same interest.

RESPONSE: N.J.A.C. 13:16-1.3 defines "exclusionary discipline" as "expulsion, out-of-school suspension, in-school suspension, or any other type of punitive school disciplinary action, whether or not labeled as such, that limits, removes, or excludes a student from their usual educational setting or usual educational program." The Division interprets this definition to encompass any practices of exclusion regardless of whether they are labeled or recorded as exclusionary discipline by the school. Therefore, the Division has determined that amendment of this definition is not necessary at this time.

Regarding "zero tolerance policies," the rules make clear that practices and policies that result in a disparate impact, including in the context of school discipline, are unlawful unless necessary to achieve a substantial, legitimate, nondiscriminatory interest and there are no less discriminatory alternatives that would achieve the same interest. The rules also state that practices and policies like zero-tolerance policies that rely on exclusionary discipline may have a disparate impact based on a protected characteristic. That said, any claim of disparate impact is fact-dependent, and the Division is not aware of any New Jersey case law that calls for evaluating zero tolerance policies pursuant to a different disparate impact framework than other practices and policies. The proposed rules also mirror the Guidance on Discrimination in School Discipline

published by the Division in 2023, which further discusses the interplay of zero tolerance policies and disparate impact discrimination. Therefore, the Division has determined not to amend this provision at this time.

3. Comments Received Upon Publication of Notice of Proposed Substantial Changes to Rules Pertaining to Disparate Impact Discrimination

General Procedural Comments

41. COMMENT: NJM comments that the Division failed to comply with N.J.S.A. 52:14B-4.10.b in issuing the Notice of Substantial Changes. Specifically, NJM states that N.J.S.A. 52:14B-4.10.b requires that the public notice include a report listing all parties submitting comments on the originally proposed rule provisions that are subject to the additional changes and a summary thereof. NJM states that the Division only summarized comments it supported and failed to consider comments made by other commenters to the provisions impacted by the proposed changes. J.P. similarly comments that the Division should consider all comments to the proposed rules, not just "two non[-]profits who pay no taxes."

RESPONSE: As discussed below, the Division complied with the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B, in the adoption of these rules.

Pursuant to N.J.S.A. 52:14B-4.10(b), when making substantial changes to a proposed rule upon adoption, an agency must submit a public notice that includes, among other things, "a report listing all parties submitting comments on the originally proposed rule provisions subject to the proposed additional changes, summarizing the content of the submissions on those provisions, and providing the agency's response to the data, views, and arguments contained in the submissions." The Division's Notice of Substantial Changes complied with these requirements.

In its Notice of Substantial Changes, the Division made two changes. First, the Division

changed the definition of "complainant" at N.J.A.C. 13:16-1.3, the section providing definitions for terms used throughout the rules. As part of the Notice of Substantial Changes, the Division included a list of all parties submitting comments on the definition of "complainant," as well as summaries of those comments.

Second, the Division removed the phrase "equally effective" each time it appeared throughout the rules to modify "less discriminatory alternatives." The phrase "equally effective" appeared at N.J.A.C. 13:16-2.1, 2.2, 3.1, 3.2, 3.4, 4.1, 4.3, 4.4, 4.5, 4.6, 5.1, 5.3, 5.4, 5.5, 6.1, and 6.2—nearly every section in the rules. However, only two of the comments the Division received addressed the words "equally effective." Rather than include extraneous comments unrelated to the proposed change, the Division included a list of all parties submitting comments addressing the use of the phrase "equally effective," along with summaries of each of those comments. The fact that "equally effective" is repeated throughout the rules does not make every comment on a section of the rule including the phrase "equally effective" a "comment on the originally proposed rule provisions subject to the proposed additional changes." N.J.S.A. 52:14B-4.10(b). In requiring agencies to summarize comments on "rule provisions" that are subject to substantial changes, the Legislature required agencies to list and summarize comments impacting the particular part of the rules that is "subject to the proposed additional changes," and that particular part of the rules can be smaller than an entire section or subsection.

Notice and comments improve the Division's rulemaking, and the Division carefully considers every comment, including those with which the Division ultimately disagrees. To the extent parties state that their comments to the original proposal are impacted by the removal of "equally effective," the Division responds to these comments now. All comments to the sections of the rules impacted by the substantial changes but not relevant to the substantial changes—in

other words, all the comments addressing portions of the original proposal not addressed in the Notice of Substantial Changes—are summarized and responded to in the responses to Comments 3 through 54.

Comments Pertaining to the Removal of the Phrase "Equally Effective"

42. COMMENT: FSHC expresses support for the removal of the phrase "equally effective." It comments that removing this phrase aligns the rules with New Jersey judicial precedent and HUD's regulations implementing the FHA, supporting the Division's certification as a substantially equivalent agency with HUD. It also comments that the removal "strengthens protections against discriminatory housing practices that disproportionately affect historically marginalized communities" and helps the Division respond to "the complex realities of modern discrimination." Finally, it comments that the rules "encourage[] entities to evaluate the broader implications of their actions and proactively adopt less discriminatory alternatives."

RESPONSE: The Division thanks the commenter for its support of the rules.

43. COMMENT: NJAA comments that the concept of "equal effectiveness" of less discriminatory alternatives "has long been part of disparate impact jurisprudence," even if the phrase was rejected by HUD in its FHA regulations and was not included in the United States Supreme Court's decision in *Inclusive Communities*. According to NJAA, requiring equal effectiveness is consistent with the reasoning in *Inclusive Communities* because it safeguards against abusive disparate impact claims and judicial overreach. NJCJI, U.S. Chamber, and N.J. Chamber raise similar concerns, asserting that the change deviates from Federal precedent on Title VII, which they state requires a less discriminatory alternative to be as effective as the challenged practice or policy.

NJCJI, U.S. Chamber, N.J. Chamber, NJAA, NJBIA, SIFMA, and NJBA furthermore assert that removing the phrase "equally effective" weakens protections for respondents in disparate impact cases. The commenters assert that removing the phrase "equally effective" will undermine the business necessity defense by making it easier to overcome and will force respondents to adopt alternative practices that are less discriminatory but also less effective at achieving their stated business interest. NJAA expresses concern that by both placing the burden on respondents to show that there are no less discriminatory alternatives and removing the "equally effective" requirement, "a housing provider could only survive a disparate impact lawsuit by showing that *no less discriminatory alternative to its challenged practice exists, period*—without regard to whether an alternative practice equally serves its legitimate interests or, instead, imposes materially greater costs" (emphasis in original). NJBIA concurs with all comments made by NJCJI, and SIFMA concurs with all comments made by NJBIA. NJBA concurs with all comments made by NJAA.

RESPONSE: As indicated in the Notice of Substantial Changes and below, removing "equally effective" is consistent with New Jersey and Federal precedent. The Division disagrees that removing "equally effective" will undermine the business necessity defense for any respondent.

As stated in the Notice of Substantial Changes and reproduced in Response to Comment 1, contrary to the commenters' assertions, removing "equally effective" is consistent with New Jersey judicial precedent interpreting the LAD and with Federal standards for interpreting Title VII and the FHA. As stated, the phrase "equally effective" has not been used in case law applying the LAD. See, for example, *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 369 *N.J. Super* 2, 31 (App. Div. 2004) ("Once plaintiff makes a prima facie case of adverse impact, the defendant must prove that its actions furthered, in theory and in practice, a

legitimate bona fide governmental interest and that *no alternative would serve that interest with less discriminatory effect*.") (emphasis added) (internal quotation and citation omitted).

Additionally, as NJAA acknowledges, in HUD's discriminatory effects rule setting forth the disparate impact standard pursuant to the FHA, HUD did not use the phrase "equally effective" as part of its standard for evaluating the existence of less discriminatory alternatives. 88 Fed. Reg. 19450, 19490-91 (2023). In fact, HUD rejected the suggestion made by commenters to its rulemaking that the phrase be incorporated into the discriminatory effects rule. *Id.*

The phrase "equally effective" also does not appear in the text of Title VII of the Civil Rights Act of 1964, which sets forth the burden-shifting framework in employment disparate impact cases. 42 U.S.C. § 2000e-2(k)(1). Moreover, the Uniform Guidelines on Employee Selection Procedures, published by EEOC and incorporated by reference into the adopted rules, likewise, do not use the phrase "equally effective." 29 CFR 1607.3(B). The Uniform Guidelines provide that "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact." *Id.* Validity and effectiveness are not the same, and a practice that "serve[s] the user's legitimate interest in efficient and trustworthy workmanship" and is "substantially equally valid for a given purpose" may not necessarily be "equally effective" at meeting a stated interest in all cases.

The commenters have not cited, nor has the Division found, any case law from the United States Supreme Court or the Third Circuit that requires less discriminatory alternatives to be equal in every way to the challenged practice or policy. The commenters point to the Supreme Court's decision in *Wards Cove Packing Co. v. Antonio*, which remanded a disparate impact case back to

the district court for consideration of less discriminatory alternatives and noted that "any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving the petitioners' legitimate employment goals." 490 *U.S.* 642, 661 (1989). However, *Wards Cove* was superseded by statute at 41 U.S.C. § 2000e-2(k)(C), which provides that, with respect to showing an "alternative employment practice," the required demonstration "shall be in accordance with the law as it existed on June 4, 1989," one day before the Supreme Court issued its decision in *Wards Cove* on June 5, 1989. The Supreme Court's language in *Wards Cove*, therefore, does not control. More recent Supreme Court precedent also does not use the phrase "equally effective." See *Texas Dep. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 *U.S.* 519, 533 (2015) (explaining that "before rejecting a business justification ... a court must determine that a plaintiff has shown that there is 'an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs") (quoting *Ricci v. DeStefano*, 557 *U.S.* 557, 578 (2009) (alterations in original)). The Division disagrees with commenters' assertions that *Inclusive Communities* supports a requirement that less discriminatory alternatives be equal in every way to a challenged practice or policy. *Inclusive Communities* did not use the phrase "equally effective." Also, HUD rejected this same argument when it declined to include "equally effective" in its discriminatory effects rule in 2023. HUD noted that "a requirement that alternative policies be 'equally effective' did not appear in *Inclusive Communities*, despite citation to ... *Wards Cove*," and despite the Court's "significant discussion of the checks on liability that have always been part of the Fair Housing Act jurisprudence." 88 Fed. Reg. 19450, 19490-91.

Case law from the Third Circuit also does not support the commenters' position. Recent Third Circuit precedent does not use the phrase "equally effective" to describe the standard relating

to less discriminatory alternatives and supports the Division's position that less discriminatory alternatives need not be equal in every way to the challenged practice or policy. See, for example, *N.A.A.C.P. v. N. Hudson Reg. Fire and Rescue*, 665 *F.*3d 464, 477 (3d Cir. 2011) (explaining that "a plaintiff can overcome an employer's business-necessity defense by showing that alternative practices would have less discriminatory effects while ensuring that candidates are duly qualified"). In *N.A.A.C.P.*, the Third Circuit endorsed the district court's position that a less discriminatory alternative to limiting hiring to a certain geographic area to ensure "a certain number of Spanish-speaking firefighters in a region that is 69% Hispanic" was to affirmatively seek out bilingual candidates. 665 *F.*3d at 482. This alternative practice is likely more time-consuming than simply limiting hiring to a certain geographic area but is also less discriminatory and likely more effective at meeting the stated interest in hiring Spanish-speaking firefighters. In this regard, the identified alternative in *N.A.A.C.P.* was not equal in every way to the challenged practice—but the court agreed with the district court that this alternative would suffice to establish that there were in fact less discriminatory alternatives to the challenged policy.

Meditz v. City of Newark, cited by the commenters, is not inconsistent with *N.A.A.C.P.* or with the Division's position that less discriminatory alternatives need not be equal in every way to the challenged practice or policy. 658 *F.*3d 364, 370 (3d Cir. 2011). *Meditz* concerns the evidentiary standard for making a prima facie case of differential impact and does not use the phrase "equally effective" to describe the standard relating to less discriminatory alternatives. See *id.* ("[T]he successful assertion of the business necessity defense is not an ironclad shield; rather, the plaintiff can overcome it by showing that an alternative policy exists that would serve the employer's legitimate goals as well as the challenged policy with less of a discriminatory effect.") (quoting *El v. SEPTA*, 479 *F.*3d 232, 239-40 (3d Cir. 2007)). Further, while the commenters cite

to the Third Circuit's 1999 decision in *Powell v. Ridge*, that case does not support their position. Therefore, the Third Circuit considered the pleading standards for a Title VI case to survive a motion to dismiss and adopted the Title VII burden-shifting framework. In doing so, the court stated *in dicta* that at the third step "the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination." 189 *F.*3d 387, 394 (3d Cir. 1999) (overruled on other grounds by *Fowler v. UPMC Shadyside*, 578 *F.*3d 203, 213 (3d Circ. 2009)). The case, however, involved no meaningful discussion of less discriminatory alternatives, and the court did not indicate that they must be equal in every way to the challenged practice or policy. That single, isolated mention of the words "equally effective" does not displace more recent Third Circuit precedent that does squarely address the disparate impact analysis of less discriminatory alternatives.

NJAA also cites to several Federal cases outside the Third Circuit for support of the inclusion of the phrase "equally effective." See *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 *F.*4th 950, 970 (9th Cir. 2021); *Jones v. City of Bos*., 845 *F.*3d 28, 34-35 (1st Cir. 2016); *Shollenbarger v. Planes Moving & Storage*, 297 *F*. App'x 483, 486-87 (6th Cir. 2008); *Allen v. City of Chicago*, 351 *F.*3d 306, 312-16 (7th Cir. 2003). As NJAA notes, some of these cases were issued prior to the Supreme Court's decision in *Inclusive Communities* in 2015, which does not use the phrase "equally effective." In any event, while the Division may look to Federal precedent, the Division is not bound to follow Federal precedent, much less out-of-circuit precedent.

Removing the phrase "equally effective" is also consistent with the purposes of the LAD to "eradicate discrimination, whether intentional or unintentional." *Lehmann v. Toys 'R' Us, Inc.*,

132 *N.J.* 587, 604-605 (1993). In this case, including the phrase "equally effective" could disincentivize respondents from adopting practices that are less discriminatory than the challenged practice just because they are not equal in every last respect to the challenged practice. This outcome would be inconsistent with the broad remedial purpose of the LAD. It would also be inconsistent with the purposes of the disparate impact theory of liability pursuant to the LAD, which seeks to remove unnecessary barriers to housing, employment, places of public accommodation, credit, and contracting that have a disproportionate negative effect based on a protected characteristic. Removing the phrase "equally effective" ensures that covered entities do not impose such unnecessary barriers when there are other alternatives that serve a respondent's stated interest.

The Division disagrees with the commenters that removing the words "equally effective" undermines the business necessity defense or forces respondents to adopt less discriminatory alternatives that are less effective at achieving the stated business interest. Far from eliminating business necessity, the rules explicitly preserve it. N.J.A.C. 13:16-2.2 ("whether a practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and *consistent with legitimate business necessity*") (emphasis added); see also the Response to Comment 23.

Pursuant to the rules, after establishing that a challenged practice or policy serves a substantial, legitimate, nondiscriminatory interest, the practice or policy may still violate the LAD if there is a less discriminatory alternative practice or policy that achieves the substantial, legitimate, nondiscriminatory interest. In removing "equally effective," the rules are clear that less discriminatory alternatives need not serve the respondent's interests in exactly the same way as the challenged practice or policy. However, the change to remove "equally effective" does not

eliminate the required nexus between a less discriminatory alternative and the substantial, legitimate, nondiscriminatory interest, as suggested by the commenters. In other words, for a policy or practice to be a less discriminatory alternative, it still must actually serve the respondent's substantial, legitimate, nondiscriminatory interest. For that reason, the removal of "equally effective" does not conflict with the precedent cited by the commenters establishing that the less discriminatory alternative be effective at meeting that interest. Accordingly, the removal of "equally effective" from the rules maintains the business necessity defense and safeguards against respondents having to adopt less discriminatory alternatives that do not achieve their business interests.

With respect to the commenters' assertion that removing "equally effective" increases the burden respondents bear under a two-step burden-shifting framework in the housing and housing financial assistance contexts, any additional burden on respondents resulting from the removal of "equally effective" is minimal. Regardless of the burden-shifting framework employed, respondents must review available less discriminatory alternatives to their challenged practice or policy—either to demonstrate that there are no less discriminatory alternatives or to rebut a showing by a complainant that less discriminatory alternatives are available. The removal of "equally effective" will not greatly affect this burden because it does not alter the business necessity defense and only minimally changes the analysis of less discriminatory alternatives. To the extent the burden is increased at all, housing providers are better positioned than complainants to consider and assess how less discriminatory alternatives meet their stated interests. See *State v. Wright*, 410 *N.J. Super.* 142, 150 (Law Div. 2009) ("We generally have imposed the burdens of persuasion and production on the party best able to satisfy those burdens. . . . Our decisions have recognized that the party with greater expertise and access to relevant information should bear

those evidentiary burdens.") (quoting *J.E. ex rel. G.E. v. State*, 131 *N.J.* 552, 569-70 (1993)) (alterations in original).

44. COMMENT: In their joint submission, NJCJI, U.S. Chamber, and N.J. Chamber comment that the phrase "equally effective" provides a safeguard for respondents in disparate impact litigation, and that removing this phrase may "intensify the consideration of race and protected-class status by both government and private entities." According to the commenters, in order to avoid statistical disparities based, for example, on race, covered entities will be incentivized to affirmatively consider race to ensure statistical parity, violating the principles set forth in the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll*., 600 *U.S.* 181, 208, 212 (2023). The commenters assert that covered entities will "seek safe harbor" for this race-based discrimination at N.J.A.C. 13:16-2.2(j) and 3.1(b), which provide that an interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest. The commenters state that this outcome is more likely to occur if the Division removes the phrase "equally effective" from the rules because respondents will not have a robust enough defense to disparate impact liability, making affirmative practices to reduce statistical disparities a safer choice. NJBIA concurs with all comments made by NJCJI, and SIFMA concurs with all comments made by NJBIA.

RESPONSE: The Division disagrees that removing "equally effective" will incentivize covered entities to engage in invidious discrimination. As stated in Response to Comment 44, removing "equally effective" does not reduce a complainant's burden to show a policy or practice had a disparate impact, nor does it weaken the business necessity defense or increase the risk to covered entities of disparate impact liability. To the contrary, removing this phrase aligns these rules with

New Jersey precedent and does not prevent covered entities from arguing that a less discriminatory alternative practice does not serve their stated interest.

N.J.A.C. 13:16-2.2(j) and 3.1(b), which provide that an interest in achieving diversity or increasing access for underrepresented or underserved members of a protected class may constitute a substantial, legitimate, nondiscriminatory interest, also does not create a safe harbor for invidious discrimination or make intentional discrimination less risky for covered entities. The Division refers to its Response to Comment 24, which raised similar concerns with respect to the original notice of proposal. As stated in those responses, N.J.A.C. 13:16-2.4(j) and 3.1(b) do not conflict with the holding in *Students for Fair Admissions*, are consistent with New Jersey precedent, and do not create any new defenses for any form of intentional discrimination. The Division disagrees with the commenters' assertion that the rules create a "Hobson's Choice" between risking disparate impact liability and affirmatively discriminating to eliminate statistical disparities, and the Division disagrees that removing the phrase "equally effective" will somehow exacerbate that purported dilemma.

Comments Pertaining to the Housing Burden-Shifting Framework

45. COMMENT: NJAA, NJBA, NJBankers, SIFMA, APCIA, ICNJ, NAMIC, and NJM renew their concerns that the rules deviate from the Federal disparate impact standard in housing and housing financial assistance claims by shifting the burden to respondents to prove that there is no less discriminatory alternative available to the challenged practice. Commenters also argue that the rules do not comply with the burden-shifting approach adopted by HUD in its FHA regulations and by the United States Supreme Court in its decision in *Inclusive Communities*. NJAA raises a new concern that a provision of the LAD states that the LAD must be interpreted in a manner that

permits the Division to be certified by HUD and that the burden-shifting framework in the rules violates this LAD provision. NJBankers renews its comments that there is no need for New Jersey to exceed existing Federal standards, and that this deviation could increase the risk of litigation for covered entities. It also renews its comments that the implications of this deviation in housing and housing financial assistance could extend to other areas, such as employment and lending. NJBankers also renews its comments that the two-step burden-shifting framework for housing and housing financial assistance will lead to an increase in litigation and will require respondents to prove a negative. Also, it comments that removing the phrase "equally effective" "would exacerbate the issues with the Proposed Regulations." NJBA concurs with all comments made by NJAA. SIFMA concurs with all comments made by NJBankers.

RESPONSE: To the extent the commenters renew comments regarding the original notice of proposal, the Division refers to its Responses to Comments 17 and 18, which address concerns with the burden-shifting framework for housing and housing financial assistance claims; Comment 19, which addresses concerns that the rule will lead to an increase in "abusive" disparate impact claims; and Comment 14, which addresses the concern that the two-step burden-shifting framework requires respondents to prove a negative.

With respect to the commenters' statement that removing the phrase "equally effective" exacerbates their concerns with the rules' burden-shifting framework in housing and housing financial assistance cases and increases the risk of litigation to covered entities, the Division respectfully disagrees. As indicated in Responses to Comments 1 and 43, respectively, removing "equally effective" aligns the rules with HUD regulations on the FHA and is consistent with Federal precedent on Title VII. The business necessity defense, meanwhile, is still available and protects respondents from "abusive" disparate impact claims, irrespective of who bears the burden

of identifying less discriminatory alternatives.

To the extent the commenters assert that the LAD must be construed in a manner that enables the Division to be certified by HUD, the Division refers to its Response to Comment 1. As stated there, in order to maintain certification as a substantially equivalent agency, the Division must meet *or exceed* the floor of protection against discrimination set by HUD in enforcing the FHA. 42 U.S.C. § 3610(f); 24 CFR 115.201. As stated in Response to Comment 17, the Division has the authority to be more protective if it finds the standards set by HUD are inconsistent with the broad, remedial goals of LAD, but it may not establish standards that are less protective than the standards set forth at HUD. 24 CFR 115.204(h). By adopting a two-step burden-shifting framework and removing the words "equally effective" from the proposed rules, the Division has met the floor set by HUD and has adopted a more protective standard that is consistent with New Jersey case law and the broad remedial goals of the LAD.

To the extent the commenters take issue with the rules because the Division sometimes adopts standards consistent with HUD's rules and sometimes adopts standards that are more protective than HUD's rules, the commenters misunderstand the relationship between the LAD and Federal law. As the New Jersey Supreme Court has stated, it will "not hesitate[] to depart from Federal precedent in interpreting the LAD if a rigid application of its standards is inappropriate under the circumstances." *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 600-01 (1993) (quoting *Grigoletti v. Ortho Pharm. Corp.*, 118 *N.J.* 89, 107 (1990)); *see also L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 *N.J.* 381, 405–06 (2007) (rejecting Title IX's "deliberate indifference" standard as insufficiently protective in LAD school discrimination case). To that end, the Division has an obligation to independently interpret the LAD in a way that accords with the text of the LAD and case law interpreting it, safeguards the civil rights of New Jerseyans, and

meets the LAD's broad remedial goals. At times, this may result in alignment between Federal regulations and LAD rules. However, as the New Jersey Supreme Court has recognized, it may not always.

With respect to the burden-shifting framework for housing and housing financial assistance discrimination claims, as indicated in the Response to Comment 17, the Division and New Jersey courts have utilized the two-step burden-shifting framework for claims of housing discrimination, unlike the burden-shifting framework used in other contexts. As any departure from Federal standards in this respect is consistent with New Jersey practice, it will not lead to an increase in litigation.

46. COMMENT: NJAA renews its concern that the rules do not require plaintiffs to demonstrate that a practice or policy results in a *significantly* disproportionate negative effect on members of a protected class. NJBA concurs with all comments made by NJAA.

RESPONSE: To the extent the commenters renew comments made to the original notice of proposal, the Division refers to its Response to Comment 13, which addresses previous comments made to the original notice of proposal concerning the rules' purported failure to include a requirement that a practice or policy result in a *significantly* disproportionate impact on members of a protected class.

47. COMMENT: NJAA renews its concern that the rules fail to require a robust causal link between alleged discrimination and a respondent's practice or policy. NJBA concurs with all comments made by NJAA.

RESPONSE: To the extent the commenters renew comments made to the original notice of

proposal, the Division refers to its Responses to Comments 18 and 19, which address previous comments that the rules lack a "robust causality" requirement.

48. COMMENT: NJAA, NJBA, NCJI, U.S. Chamber, N.J. Chamber, NJBIA, SIFMA, and NJM comment that the Division lacks authority to issue the rules. NJAA renews its comment on the original notice of proposal that the Legislature intended that the LAD be read in a manner consistent with Federal anti-discrimination law, and that the Division, therefore, lacks the authority to enact rules that deviate from Federal anti-discrimination law. NJBA concurs with all comments made by NJAA.

Similarly, in their joint comment, NJCJI, U.S. Chamber, and N.J. Chamber renew the concerns raised by NJCJI in its comments to the original notice of proposal that the Division lacks the authority to adopt disparate impact rules because disparate impact discrimination is not expressly mentioned in the text of the LAD. They comment that by removing "equally effective," the proposed rules deviate from Federal precedent on Title VII, and the Division lacks the statutory authority to create rules that deviate from Federal precedent and to alter "a plaintiff's burden in rebutting the business necessity defense." NJBIA concurs with all comments made by NJCJI, and SIFMA concurs with all comments made by NJBIA.

RESPONSE: The Division refers to its Responses to Comments 1, 17, and 18, which address the commenters' assertions that the Division lacks the authority to adopt the rules. In addition, as set forth in the Response to Comment 43, removing the phrase "equally effective" is consistent with Federal precedent interpreting Title VII and the FHA and does not alter the business necessity defense or the burden of proof with respect to that defense.

49. COMMENT: In their joint comment, NJCJI, U.S. Chamber, and N.J. Chamber renew the concerns raised by NJCJI in its comments to the original notice of proposal that the rules will likely face legal challenges because they believe that the rules are intruding on areas left to the exclusive province of the courts—namely, the authority to set burdens of proof. NJBIA concurs with all comments made by NJCJI, and SIFMA concurs with all comments made by NJBIA.

RESPONSE: The Division refers to its Response to Comment 10, which addresses this concern raised by NJCJI in response to the original notice of proposal. As stated there, government agencies have authority to codify in their regulations a burden-shifting framework that implements the statutes over which they have jurisdiction, as HUD did in promulgating its discriminatory effects rule interpreting the FHA. These rules, including the burden-shifting framework they codify, are supported by relevant case law and consistent with agency practice.

50. COMMENT: NJAA comments that the two-step burden-shifting framework for housing and housing financial assistance claims will increase disparate impact litigation, and "[t]he inevitable flood of disparate impact litigation invited by [the rules] may result in housing providers either avoiding affordable housing projects altogether ... or settling even the flimsiest of cases to avoid the expense of litigation." The commenter also states that developers will construct less affordable housing because of this projected rise in litigation. NJBA concurs with the comments made by NJAA.

RESPONSE: The Division refers to its Response to Comment 17, which addresses the concern raised by the commenter in response to the original notice of proposal that the two-step burden-shifting framework in housing will result in an increase in litigation because it lowers the burden for complainants to establish an LAD violation. As noted there, the rules codify the two-step

burden-shifting framework currently employed by the Division and New Jersey courts, so the rules are unlikely to result in increased litigation. As a result, the rules are unlikely to impact housing providers' incentives to engage in affordable housing projects or to litigate disparate impact claims. Nor are they likely to affect developers' incentives to build affordable housing. Indeed, the rule does not in any way change or implicate mandates for developing affordable housing.

Comments Pertaining to Changing the Definition of "Complainant"

51. COMMENT: FSHC expresses support for the revision to the definition of "complainant" in the rules. It comments that the modified definition of "complainant" "affirms the LAD's intent to provide comprehensive remedies for all individuals seeking justice under its provisions."

RESPONSE: The Division thanks the commenter for its support of the rules.

Comments Pertaining to Other Provisions of the Rules

52. COMMENT: SIFMA renews its concern that the rules include word-of-mouth recruitment as an example of a practice that may result in unlawful disparate impact discrimination and renews its request that the Division narrow or further clarify this section of the rules.

RESPONSE: The Division refers to its Response to Comment 25, which addresses this concern as raised by the commenter in its comment to the original notice of proposal.

53. COMMENT: NJAA renews its request that the Division remove the example included at N.J.A.C. 13:16-4.3(c), which provides that relying on an applicant's credit score without an individualized assessment could violate the LAD. It renews its concerns with the inclusion of this example, including that judicial precedent allows consideration of creditworthiness in housing,

that the rules attempt to accomplish what the New Jersey legislature has rejected, and that requiring individualized assessments of housing applicants will hinder the provision of housing and increase rents. It additionally comments that requiring individualized assessments of each housing applicant "will further clog the already congested applicant screening processes hampering housing authorities across New Jersey." NJBA concurs with all comments made by NJAA.

RESPONSE: The Division refers to its Response to Comment 37, which addresses the commenters' concerns with the rules' treatment of credit scores as raised in their comments on the original notice of proposal.

54. COMMENT: APCIA, ICNJ, NAMIC, and NJM renew their concerns about the application of the LAD and the rules to the insurance industry. Commenters make several additional arguments about issues related to the appropriateness of the rulemaking, including concerns that the lack of a robust casualty requirement and the broadening of the term "complainant" will increase litigation disputing DOBI's approval of rates or underwriting criteria, potentially undermining DOBI's authority, and that the removal of "equally effective" will undermine the business necessity defense as applied to insurance rating, and that insurers will be required to adopt less discriminatory alternatives that are less effective in predicting risk.

RESPONSE: The Division refers to its Response to Comment 9.

Summary of Agency-Initiated Changes:

The Division removes the term "employee" and the definition thereof from N.J.A.C. 13:16-1.3. The term "employee" and its definition were removed from the LAD pursuant to the Domestic Workers' Bill of Rights, P.L. 2023, c. 262, which went into effect in New Jersey on July 1, 2024. Accordingly, this technical change is made to ensure these rules are aligned with the LAD.

The Division additionally makes a technical change to the reference to the LAD in the definition of "housing provider" at N.J.A.C. 13:16-1.3.

The Division additionally makes a technical change at N.J.A.C. 13:16-2.2 to provide additional clarity around the burdens of proof for disparate impact discrimination claims in different contexts without changing the substantial provisions of the notice of proposal. The Division moves the burdens of proof for disparate impact claims in housing and housing financial assistance to new N.J.A.C. 13:16-2.3 and moves the evidence for disparate impact claims to new N.J.A.C. 13:16-2.4, leaving the burdens of proof for disparate impact discrimination claims in employment, public accommodations, and contracting at N.J.A.C. 13:16-2.2. The Division makes a technical change to remove the housing example set forth at N.J.A.C. 13:16-2.2(e), as provisions about the burdens of proof for the housing context have been moved at N.J.A.C. 13:16-2.3. The operative provision at N.J.A.C. 13:16-2.2(e) remains the same and the Division finds that the example is not necessary to increase understanding of the provision. The Division makes a technical change at N.J.A.C. 13:16-4.1(a) to make the reference therein at N.J.A.C. 13:16-2.2 consistent with the move of the referenced section at N.J.A.C. 13:16-2.3. Providing the burdens of proof for different contexts and the evidence provisions in three separate sections improves readability.

The Division additionally makes a technical change to the heading at N.J.A.C. 13:16-5.2, replacing "of" with "or" to correctly refer to "practices or policies."

Federal Standards Statement

The adopted new rules generally align with Federal laws, rules, regulations, and guidelines on disparate impact discrimination liability. The standard for disparate impact liability in the

employment, public accommodation, and contracting contexts is the standard used by the U.S. Equal Employment Opportunity Commission (EEOC) in Title VII of the Civil Rights Act of 1964, at 42 U.S.C. § 2000e-2(k), and in the Uniform Guidelines for Employee Selection Procedures, at 29 CFR 1607. The standard for disparate impact liability in the housing and housing financial assistance contexts is the standard used by the U.S. Department of Housing and Urban Development (HUD) as set forth in the Reinstatement of HUD's Discriminatory Effects Standard, 24 CFR 100 (2023). The standards regarding criminal history in housing are those set forth in the April 4, 2016 Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.

The burden-shifting frameworks in the new rules also generally align with the frameworks used at the Federal level, with the exception of the housing and housing financial assistance frameworks set forth in the proposed new rules. Pursuant to 42 U.S.C. § 2000e-2(k)(1), a Title VII disparate impact claim can be established if a complaining party meets its burden of proving that the employer's selection procedure causes a disparate impact, but the user fails to meet its burden of proving that its selection procedure is job related and consistent with business necessity; or even if the user meets its burden of proving that its selection procedure is job related and consistent with business necessity, the complaining party can still prevail by proving that there is an alternative procedure that will meet the user's needs with less of an adverse impact, but the user refuses to adopt it.

HUD's rule requires the complainant to prove that a challenged practice caused or predictably will cause a discriminatory effect. If the complainant makes this *prima facie* showing, the respondent must then prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent. If the

respondent meets its burden, the complainant may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged policy or practice could be served by another practice that has a less discriminatory effect. The rulemaking differs from HUD's rule by requiring the respondent to show that there is a no less discriminatory, equally effective alternative that would meet the interest, rather than requiring the complainant to show there is such an alternative. This aligns with the burden-shifting framework used by New Jersey courts and the Division to determine disparate impact liability pursuant to the LAD.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicted in brackets with asterisks *[thus]*):

CHAPTER 16

DISPARATE IMPACT DISCRIMINATION

SUBCHAPTER 1. PURPOSE, CONSTRUCTION, AND DEFINITIONS

13:16-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

…

"Complainant" means any person filing a *[verified]* complaint alleging ***unlawful*** discrimination pursuant to the Act.

"Consumer credit history" means an individual's creditworthiness, credit standing, credit capacity, and borrowing or payment history, as indicated by, but not limited to:

1. A consumer *[credit]* report, including any written, oral, or other

communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living;

2.-3. (No change from proposal.)

…

["Employee" shall have the same meaning as in the Act.]

…

*["Housing financial assistance" means the process of making or purchasing loans, grants, securities, or other debts; the pooling or packaging of loans or other debts or securities, which are secured by residential real estate; or the provision of other financial assistance relating to the purchase, organization, development, construction, improvement, repair, maintenance, rental, leasing, occupancy, or insurance of dwellings**,** including:

1. Mortgages, reverse mortgages, home equity loans, and other loans secured by residential real estate;

2. Insurance and underwriting related to residential real estate, including construction insurance, property insurance, liability insurance, homeowner's insurance, and renter's insurance; and

3. Loan modifications, foreclosures, and the implementation of the foreclosure process.]*

…

*["Lending institutions" include banks, building and loan associations, insurance companies, and any other enterprise whose business consists in whole or in part in the making or purchasing of any loan or extension of credit, for whatever purpose, whether secured by residential

real estate or not, including, but not limited to, financial assistance for the purchase, acquisition, construction, rehabilitation, repair, or maintenance of any real property or part or portion thereof. The term includes, but is not limited to, affiliates, agents, officers, or employees of these enterprises.]*

…

*["Real estate-related transaction" includes:

1. Providing financial assistance;

2. Buying, selling, brokering, or appraising of real estate; or

3. The use of territorial underwriting requirements, for the purpose of requiring a borrower in a specific geographic area to obtain flood insurance, required by an institutional third party on a loan secured by real property.]*

…

SUBCHAPTER 2. DISPARATE IMPACT DISCRIMINATION

13:16-2.1 Disparate impact liability pursuant to the Act

(a) Practices and policies that have a disparate impact, as defined at (b) below, on members of a protected class, even if these practices and policies are not discriminatory on their face (that is, facially neutral) and are not motivated by discriminatory intent, will be considered discriminatory and a violation of the Act, unless it is shown that such practices and policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory*[, equally effective]* alternative that would achieve the same interest.

(b) (No change from proposal.)

(c) Any person claiming to be aggrieved by an unlawful employment practice or an unlawful

discrimination, the Attorney General, the Director of the Division, the Commissioner of the Department of Labor and Workforce Development, or the Commissioner of the Department of Education***, or any other person or organization authorized by the Division's Rules of Practice and Procedure, N.J.A.C. 13:4, or the LAD,*** may bring a complaint of discrimination based on disparate impact liability pursuant to the Act to the Division or initiate suit in Superior Court.

(d) (No change from proposal.)

13:16-2.2 Burdens of proof *[and evidence]* for disparate impact discrimination claims ***in employment, public accommodations, and contracting***

(a)-(b) (No change from proposal.)

(c) In the employment, public accommodations, and contracting contexts, if the respondent meets the burden at (b) above, the complainant has the burden of showing that there is a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

[(d) In the housing and housing financial assistance contexts, if the complainant meets the burden at (a) above, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest. To meet its burden of showing that there is not a less discriminatory, equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest, the respondent can identify what policy or practice options it considered and how and why it decided to select the policy or practice it chose.]

[(e)] ***(d)*** To meet its burden of proof at (a), (b), ***or*** (c)*[, or (d)]* above, a party must provide empirical evidence, meaning evidence that is not hypothetical or speculative, to support its allegations. For example, a complainant would not meet its burden to show an employment policy has a disparate impact on job applicants based on gender by speculating that the policy harms women more than men, but could meet its burden by providing empirical evidence, which could include applicant files or data or applicant selection rates by gender. Anecdotal evidence, while not sufficient on its own, may be introduced along with empirical evidence. For example, a complainant would not meet its burden to show an employment policy has a disparate impact on job applicants based on gender by solely providing that they know women who applied and did not receive a position but men who did. However, a complainant could introduce anecdotal evidence along with empirical evidence, such as applicant selection rates by gender.

[(f)] ***(e)*** The opposing party may rebut whether the party with the burden of proof at (a), (b), ***or*** (c)*[, or (d)]* above has met its burden. *[For example, a complainant challenging a housing practice may rebut whether the respondent met its burden at (d) above by showing there is not a less discriminatory equally effective alternative means of achieving the substantial, legitimate, nondiscriminatory interest.]

[(g)] ***(f)*** (No change in text.)

***13:16-2.3 Burdens of proof for disparate impact claims in housing and housing financial assistance**

(a) A complainant challenging a practice or policy of a covered entity must show that the practice or policy challenged has a disparate impact on members of a protected class.

(b) In the housing and housing financial assistance contexts, if the complainant meets the

burden of proof at (a) above, the respondent has the burden of showing that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory alternative means of achieving the substantial, legitimate, nondiscriminatory interest. To meet its burden of showing that there is not a less discriminatory alternative means of achieving the substantial, legitimate, nondiscriminatory interest, the respondent can identify what policy or practice options it considered and how and why it decided to select the policy or practice it chose.

(c) To meet its burden of proof at (a) or (b) above, a party must provide empirical evidence, meaning evidence that is not hypothetical or speculative, to support its allegations. For example, a complainant would not meet its burden to show a policy has a disparate impact on housing applicants based on gender by speculating that the policy harms women more than men, but could meet its burden by providing empirical evidence, which could include applicant files or data or applicant selection rates by gender. Anecdotal evidence, while not sufficient on its own, may be introduced, along with empirical evidence. For example, a complainant would not meet its burden to show a policy has a disparate impact on housing applicants based on gender by solely providing that they know women who applied and did not receive housing but men who did receive housing. However, a complainant could introduce anecdotal evidence along with empirical evidence, such as applicant selection rates by gender.

(d) The opposing party may rebut whether the party with the burden of proof at (a) or (b) above has met its burden.

(e) Additional proof may be required when challenging or defending particular practices or

policies. Such requirements are noted in this chapter, where relevant.*

13:16-2.4 Evidence for disparate impact claims

Recodify proposed (h)-(j) as **(a)-(c)** (No change in text from proposal.)

[(k)] ***(d)*** The determination of whether there is a less discriminatory*[, equally effective]* alternative means of achieving a substantial, legitimate, nondiscriminatory interest requires a case-specific, fact-based inquiry.

[(l)] ***(e)*** If a respondent's practice or policy that results in a disparate impact based on a protected characteristic relies on conduct, standards, products, procedures, or systems of an outside person or vendor, the respondent must take reasonable steps to ensure that the outside person or vendor's conduct, standards, products, procedures, or systems are consistent with the Act and this chapter. *[For example, if an employer uses an employee selection algorithm that results in a disparate impact based on gender or race, the fact that the employer did not create the algorithm itself, but instead used an algorithm created by a technology company will not shield the employer from liability, unless the employer took reasonable steps to ensure that the algorithm would not result in a disparate impact based on a protected characteristic and was otherwise consistent with the Act and this chapter before using it.]*

SUBCHAPTER 3. EMPLOYMENT

13:16-3.1 Disparate impact discrimination in employment

(a) Employment practices and policies may be unlawful if they have a disparate impact on members of a protected class. An employment practice or policy that has a disparate impact is prohibited unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to

achieve a substantial, legitimate, nondiscriminatory interest. Whether an employment practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a legitimate business necessity. An employment practice or policy may still be prohibited if necessary to achieve a substantial, legitimate, nondiscriminatory interest if a complainant shows there is a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

(b)-(c) (No change from proposal.)

13:16-3.2 Pre-employment practices

(a) Job recruitment, advertising, and solicitation practices are as follows:

1. (No change from proposal.)

2. An employer's reliance on word-of-mouth recruitment may be a prohibited recruitment practice or policy if its use actually or predictably results in a disproportionately negative effect on potential applicants who are members of a protected class unless the employer can satisfy its burden of showing that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and the complaining party cannot show that there is a less discriminatory*[, equally effective]* alternative.

i. (No change from proposal.)

(b) (No change from proposal.)

(c) Automated employment decision technology practices are as follows:

1. (No change from proposal.)

2. The use of *[online application technology]***an automated employment decision tool*** that limits or screens out applicants based on their schedule may have a disparate impact on

applicants based on their religion, disability, or medical condition and must include a mechanism for applicants to request a reasonable accommodation. By way of example, but not limitation, an application asking if an applicant is available to work a proposed schedule of Monday through Saturday may screen out applicants who answer the question in the negative due to religious practices they engage in on Saturdays; and

3. (No change from proposal.)

13:16-3.4 Employment practices

(a) The following employment practices and policies may have a disparate impact on members of a protected class and, if so, would be prohibited, unless a respondent shows a specific practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even with a showing of a substantial, legitimate, nondiscriminatory interest, it is still unlawful if the complainant can show that there is a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

1.-3. (No change from proposal.)

4. Health or physical ability requirements. Health or physical ability requirements may have a disparate impact on applicants or employees based on gender, age, or disability. By way of example, but not limitation, a requirement that an applicant have the ability to lift 20 pounds that has a disparate impact on members of a protected class would be unlawful, unless the employer can show that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest, meaning that it must be job related and consistent with a legitimate business necessity. The employer would have to show that lifting 20 pounds is necessary to the successful performance of the job. Even then, it would still be unlawful if the complainant can show that there is a less

discriminatory*[, equally effective]* alternative that would achieve the same interest.

5.-8. (No change from proposal.)

(b) Criminal history. An employment practice or policy of excluding from consideration an applicant based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Such a practice or policy that results in a disparate impact would, therefore, be unlawful unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, the practice or policy would still be unlawful if the complainant can show that there is a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

1.-3. (No change from proposal.)

SUBCHAPTER 4. HOUSING, REAL ESTATE, AND HOUSING FINANCIAL ASSISTANCE

13:16-4.1 Disparate impact discrimination in the sale or rental of real property

(a) Housing and real estate practices and policies may be unlawful if they have a disparate impact on members of a protected class. A housing or real estate practice or policy that has a disparate impact is prohibited unless, in accordance with N.J.A.C. 13:16-*[2.2]***2.3***, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

(b) (No change from proposal.)

13:16-4.3 Sale or rental practices

(a) (No change from proposal.)

(b) Criminal history. A housing provider's practice or policy of excluding from consideration,

housing applicants based on criminal history information may have a disparate impact based on race (particularly for Black applicants), national origin (particularly for Latinx/e applicants), or ancestry. Such a practice or policy that results in a disparate impact would, therefore, be unlawful, unless the housing provider could show it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is not a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

1.-4. (No change from proposal.)

(c) Credit score. Due to widespread historical disparities in credit and wealth, a practice or policy that excludes housing rental applicants from housing because of information associated with their consumer credit history may have a disparate impact based on race or national origin, particularly against Black, Hispanic, and Latinx/e applicants.

1. If a rental housing applicant shows that a particular practice or policy related to consumer credit history results in a disparate impact based on race or national origin, a housing provider would then have the burden to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, an interest in collecting rent on time, and that there is not a less discriminatory*[, equally effective]* alternative that would achieve the same interest. For purposes of this subsection, a housing practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest when it is required by Federal or State law, rule, or regulation.

i. Examples of practices or policies for which a housing provider may not be able to satisfy its burden of showing that the practice or policy achieves a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory*[, equally effective]* alternative that would achieve the same interest include, but are not limited to, a practice or policy

of automatically refusing all rental housing applicants who have:

(1)-(2) (No change from proposal.)

ii. (No change from proposal.)

2.-3. (No change from proposal.)

(d) (No change from proposal.)

13:16-4.4 Real estate-related practices or policies

(a) Real estate-related practices or policies may have a disparate impact on members of a protected class. A residential real estate-related practice or policy that has a disparate impact on members of a protected class is prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest. The practice or policy may involve: making available, or unavailable, a real estate-related transaction; establishing the price or other terms or conditions of a real estate-related transaction; providing, or refusing to provide, information regarding a real estate-related transaction; and the creation, dissemination, or application of criteria, requirements, procedures, or standards for the review and approval of a real estate-related transaction.

(b) (No change from proposal.)

13:16-4.5 Residential property management practices

(a) Housing providers' residential property management practices and policies may have a disparate impact on members of a protected class. A housing provider's residential property management practice or policy that has a disparate impact on members of a protected class is

prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) (No change from proposal.)

13:16-4.6 Housing financial assistance practices

(a) Housing financial assistance practices and policies may have a disparate impact on members of a protected class. A housing financial assistance practice or policy that has a disparate impact on members of a protected class is prohibited, unless the respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and that there is not a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest. The practice or policy may involve: making available, making unavailable, or discouraging the provision of housing financial assistance; establishing the terms or conditions of housing financial assistance; providing, or refusing to provide, information regarding housing financial assistance; determining the type of housing financial assistance to be provided; servicing of housing financial assistance; and the creation and application of criteria requirements, procedures, or standards for the review and approval of a real estate-related transaction.

(b)-(c) (No change from proposal.)

SUBCHAPTER 5. PUBLIC ACCOMMODATIONS

13:16-5.1 Disparate impact discrimination in public accommodations

Practices and policies of places of public accommodation may have a disparate impact on

members of a protected class. A practice or policy of a place of public accommodation that has a disparate impact on members of a protected class is prohibited unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a practice or policy of a place of public accommodation may still be prohibited if a complainant shows there is a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

13:16-5.2 Practices *[of]* ***or*** policies related to religious garb or articles of faith

(a)-(c) (No change from proposal.)

13:16-5.3 Educational practices or policies

(a) Educational practices or policies may have a disparate impact on members of a protected class. An educational practice or policy that has a disparate impact on members of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, an educational practice or policy may still be prohibited if a complainant shows there is a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b) (No change from proposal.)

(c) Student discipline. An educational institution's disciplinary practice or policy may have a disparate impact on members of a protected class. If a complainant shows that a particular practice or policy related to student discipline results in a disparate impact based on membership in a protected class, a school would then have the burden to show that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, for example, in creating a safe learning

environment for all students or teachers. A complainant would then have the opportunity to show that a less discriminatory*[, equally effective]* alternative exists that would achieve the same interest, for example, non-exclusionary disciplinary measures that have been shown to be *[equally or more]* effective at addressing minor or subjective infractions.

1. (No change from proposal.)

(d)-(e) (No change from proposal.)

13:16-5.4 Law enforcement practices and policies

(a) Law enforcement practices or policies may have a disparate impact on members of a protected class. A law enforcement practice or policy that has a disparate impact on members of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a law enforcement practice or policy may still be prohibited if a complainant shows there is a less discriminatory*[, equally effective]* alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b)-(d) (No change from proposal.)

13:16-5.5 State and county correctional facility and municipal jail practices and policies

(a) State correctional facility, county correctional facility, and municipal jail practices or policies may have a disparate impact on members of a protected class. A State or county correctional facility or municipal jail practice or policy that has a disparate impact on members of a protected class is prohibited, unless it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a State or county correctional facility or municipal jail practice or policy may still be prohibited if a complainant shows there is a less discriminatory*[, equally effective]*

alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(b)-(d) (No change from proposal.)

SUBCHAPTER 6. CONTRACTING

13:16-6.1 Disparate impact discrimination in contracting

(a) Contracting practices and policies may have a disparate impact on members of a protected class. A contracting practice or policy that has a disparate impact on members of a protected class is prohibited, unless, in accordance with N.J.A.C. 13:16-2.2, a respondent shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even then, a contracting practice or policy may still be prohibited if a complainant shows there is a less discriminatory*[, equally effective]* alternative that would achieve the same interest.

(b) (No change from proposal.)

13:16-6.2 Contract bid selection and recruitment

(a) A contractor's use of bid selection procedures or selection criteria may have a disparate impact on members of a protected class. It is an unlawful contracting practice for any contractor to make use of any bid selection procedure or selection criteria that has the effect of screening out members of a protected class, unless the contractor shows it is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Whether a practice or policy of using a bid selection procedure or selection criteria is necessary to achieve a substantial, legitimate, nondiscriminatory interest is equivalent to whether the practice or policy is job related and consistent with a legitimate business necessity. A bid selection procedure or selection criteria may still be prohibited if necessary to achieve a substantial, legitimate, nondiscriminatory interest if a complainant shows there is a less

discriminatory*[, equally effective]* alternative that would achieve the same interest. An alternative selection procedure is less discriminatory where it does not screen out, or screens out fewer, members of the protected class. For example, a contractor's practice of refusing bids from people who live in a city or geographic area where the majority of residents are people of color may have a disparate impact by screening out people of color with whom they could contract, and therefore, having the effect of excluding people on the basis of race or national origin. The use of geographic location as selection criterion that resulted in a disparate impact would be unlawful unless necessary to achieve a substantial, legitimate, nondiscriminatory interest. Even if the contractor could show it was necessary to achieve a substantial, legitimate, nondiscriminatory interest, the bid selection criterion may still be prohibited if a complainant could show that alternative job-related tests or criteria that do not screen out, or screen out fewer, members of the protected class are available. The guidelines set forth in the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607 (1978), are incorporated herein by reference, and applied to all protected characteristics listed in the Act. Where there is a conflict between such guidelines and this chapter, the rules in this chapter shall control. Upon request, the Division will make the guidelines available for public inspection and make available a printed copy of the guidelines.

(b) (No change from proposal.)