

SUBCHAPTER 14. MAKING OR PURCHASING ELIGIBLE LOANS FOR [SINGLE FAMILY] **SINGLE-FAMILY HOMES** [IMPROVEMENT]

5:80-[14.4]**14.1** Unsecured [single family] **single-family** home improvement loans

[Single family] **Single-family** home improvement loans, if offered by the Agency and which are not secured by a mortgage on the property being improved or rehabilitated, shall be limited to loans specified in the [Term Sheet] **term sheet or fact sheet** for each [single family Home Improvement Loan Program] **single-family home improvement loan program** fully insured [under] **pursuant to** the Federal Housing Administration Title I Property Improvement Loan Program.

5:80-[14.5]**14.2** Eligibility requirements

The Agency may designate income and other limitations with respect to persons eligible to receive [single family] **single-family** home improvement loans and with respect to the use of proceeds of [single family] **single-family** home improvement loans by such persons, which limitations may vary according to geographical area, in order that the purchase of [single family] **single-family** home improvement loans by the Agency shall best effectuate the general purpose of the Act and the objectives of expansion of the supply of funds in the State available for [single family] **single-family** home improvement loans, provision of additional housing needed to remedy the shortage of adequate housing in the State, and elimination of substandard and energy inefficient dwellings. The Agency may set limitations on the principal amounts of [single family] **single-family** home improvement loans to effectuate the aforesaid purposes of the Act.

5:80-[14.6]**14.3** Regulation of points charged by mortgage sellers

The Agency may regulate, limit, or prohibit the charge or collection of any commitment fee, premium, bonus, points, or other fees in connection with the origination of [single family] **single-family** home [improvement] loans by a mortgage seller **on loans** to be purchased by the Agency.

5:80-[14.8]**14.4** Purchase of Agency bonds

No mortgage seller (including any related person thereof, as defined [in] at Section 103(b)(6)(C) of the Internal Revenue Code) shall, pursuant to any arrangement, formal or informal, purchase the bonds of the Agency in an amount related to the amount of the [single family] **single-family** home improvement loans to be purchased from such mortgage seller (or related person, as aforesaid) by the Agency.

SUBCHAPTER 21. TRANSFER OF SERVICING OF [SINGLE FAMILY] **SINGLE-FAMILY MORTGAGE LOANS**

5:80-21.1 General applicability

(a) The rules set forth [within] at N.J.A.C. 5:80-21.1 [through], **21.2, 21.3, and 21.4** shall apply to all servicers of Agency [single family] **single-family** mortgage program loans upon:

1.-2. (No change.)

3. Sale or transfer of the portfolio of Agency loans to another [service] **servicer**; or

4. (No change.)

(b) (No change.)

(c) The rules within this subchapter shall not apply to loan originators who are not servicers or to newly originated loans that are being transferred from the originating lender to an approved servicer.]

**5:80-21.2 Servicer and sub-servicer compliance requirements**

**Servicers and sub-servicers proposing to service mortgage loans made or acquired by the Agency shall comply with the terms of any contract entered into with the Agency and with the Agency's Policy and Procedures for Participating Lenders (Seller's Guide) and Mortgage Program Servicing Guide. The Seller's Guide and the Mortgage Program Servicing Guide are both available on the Agency's website at [https://www.nj.gov/dca/hmfa/lenders/docs/len-sellerguide\\_07012024.pdf](https://www.nj.gov/dca/hmfa/lenders/docs/len-sellerguide_07012024.pdf) and <https://www.nj.gov/dca/hmfa/lenders/docs/len-servicingguide.pdf>, respectively.**

5:80-[21.2]**21.3** Agency review and approval of transfer

(a) No servicer may enter into any transfer as specified [in] at N.J.A.C. 5:80-21.1 without obtaining prior written consent of the Agency. Approval of all transfers shall be made by the Executive Director [of the Agency].

(b) In order for a transfer to be approved, the successor servicer must meet all of the **requirements set forth at the Agency's current Seller's Guide and, if applicable, form of Mortgage Servicing Agreement, including the following** [requirements]:

1. [Is a currently approved Agency seller/servicer and has] **Have** a demonstrable ability to service an Agency portfolio[,] of the size to be transferred;

2.-7. (No change.)

8. [Evidence] **Provide evidence** of fidelity insurance, errors and omission insurance, and other insurance required by the Agency;

9.-10. (No change.)

(c) (No change.)

## LAW AND PUBLIC SAFETY

### (a)

#### DIVISION ON CIVIL RIGHTS

#### Notice of Proposed Substantial Changes Upon Adoption to Rules Pertaining to Disparate Impact Discrimination

#### Proposed Changes: N.J.A.C. 13:16-1.3, 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

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

Authorized By: Sundeep Iyer, Director, Division on Civil Rights.

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

Proposal Number: PRN 2024-063.

Submit comments by January 17, 2025, to:

Kaley Lentini, Deputy Associate Director for Policy  
Department of Law and Public Safety  
Division on Civil Rights  
31 Clinton Street, 3rd Floor  
PO Box 46001  
Newark, New Jersey 07102  
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**Take notice** that the Division on Civil Rights (the Division) proposed to adopt new N.J.A.C. 13:16, Disparate Impact Discrimination, on June 3, 2024, at 56 N.J.R. 969(a), to clarify that the New Jersey Law Against Discrimination ("the Act" or "LAD") prohibits practices or policies that result in a disproportionately negative effect on members of a protected class, even if these practices or policies are not discriminatory on their face (that is, they are "facially neutral") and are not intended to discriminate, unless it is shown that such practices or policies are necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory alternative that would achieve the same interest. The public comment period closed August 2, 2024.

The Division is proposing two substantial changes to the new rules in response to comments received. A summary of the comments that prompted these changes, and the Division response to those comments, is provided below. This notice of proposed substantial changes is published pursuant to N.J.S.A. 52:14B-4.10.

Comments were received from the American Civil Liberties Union of New Jersey (ACLU-NJ), Jonathan I. Nirenberg, and the New Jersey State Bar Association (NJSBA).

#### General Comments

COMMENT: As originally proposed, the rules provide that practices and policies that have a disparate impact on members of a protected class violate the 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 a 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 proposes removing the phrase “equally effective” each time it appears throughout the proposed new rules before the word “alternative.” The Division is proposing 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 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 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. 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. *Lehman v. Toys ‘R’ Us, Inc.*, 132 N.J. 587, 604-605 (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 in 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 (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. 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 LAD, it may not establish standards that are less protective than the standards set forth by HUD. 24 CFR 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 (2013). In 2020, the phrase “equally effective” was added to HUD’s regulations, 85 Fed. Reg. 60288, 60321 (2020), 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. 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 (2023). 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. 2023); *MHANY Mgmt, Inc. v. Cnty of Nassau*, No. 5-2301, 2017 WL 414787, at \*8 (E.D.N.Y. 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

COMMENT: As originally proposed, the rules define the term “complainant” as “any person filing a verified complaint alleging discrimination pursuant to the Act.” Jonathan I. Nirenberg, a New Jersey employment attorney, suggests changing the definition of “complainant” to include any person who files a complaint alleging an 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 new rules unintentionally limits complainants to those who file verified complaints with the Division. The Division is proposing to define the term “complainant” as “any person filing a complaint alleging unlawful discrimination pursuant to the Act” to clarify that the new proposed 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 is proposing 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.

#### Effect of Proposed Changes on Impact Statements Included in Original Proposal

The changes to the proposed new rules will not measurably affect the impact statements included in the original notice of proposal. The changes clarify the existing standards for disparate impact liability, consistent with the examples therein, and, therefore, will have only a modest impact on the scope of liability for disparate impact discrimination or the legal analysis for such a claim. Removing the qualifier “equally effective” clarifies that the existence of less discriminatory alternatives may be sufficient to establish disparate impact liability, so long as those alternatives serve the respondent’s interests. This interpretation does not differ from the original notice of proposal, which clearly included examples of less discriminatory alternatives that may require more time or resources than the challenged practice or policy, such as performing individualized assessments of job applicants, rather than excluding them from consideration because of a criminal record. Likewise, revising the definition of “complainant” will have only a modest impact on the scope of liability for disparate impact liability. The revised definition of “complainant” in the proposed new rules aligns the proposed new rules with the LAD and current practice, as the LAD permits persons to raise disparate impact claims in Superior Court and many complainants file complaints in Superior Court. Accordingly, neither of these changes will meaningfully affect the proposed new rules’ impact statements included in the original notice of proposal.

**Full text** of the proposed substantial changes to the proposed new rules follows (additions to proposal indicated in italicized boldface *thus*; deletions from proposal indicated in italicized cursive brackets *thus*):

#### 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.

...

#### 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~~ly~~, equally effective~~d~~ alternative that would achieve the same interest.

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

##### 13:16-2.2 Burdens of proof and evidence for disparate impact discrimination claims

(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~~ly~~, equally effective~~d~~ 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~~ly~~, equally effective~~d~~ alternative means of achieving the substantial, legitimate, nondiscriminatory interest. To meet its burden of showing that there is not a less discriminatory~~ly~~, equally effective~~d~~ 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) (No change from proposal.)

(f) The opposing party may rebut whether the party with the burden of proof at (a), (b), (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~~ly~~, equally effective~~d~~ alternative means of achieving the substantial, legitimate, nondiscriminatory interest.

(g)-(j) (No change from proposal.)

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

(l) (No change from proposal.)

#### 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~~ly~~, equally effective~~d~~ 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)-(c) (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, 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.

#### 13:16-5.3 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.)

## TREASURY—GENERAL

### (a)

#### OFFICE OF THE STATE TREASURER

#### Public Employee Charitable Fund-Raising Campaign

#### Proposed Readoption with Amendments: N.J.A.C. 17:28

Authorized By: Amanda Truppa, Director, Division of Administration.

Authority: N.J.S.A. 52:14-15.9c13 and 52:18A-30.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2024-131.

Submit written comments by January 17, 2025, by email in Microsoft Word format or in a format that can easily be converted to Word to:

Amanda Truppa, Director of Administration at  
[Administration.Email@treas.nj.gov](mailto:Administration.Email@treas.nj.gov); or

On paper to:  
Division of Administration  
PO Box 211  
Trenton, NJ 08625-0211

#### Summary

The Department of the Treasury (Department), Division of Administration (Division) is proposing to readopt its rules governing the Public Employee Charitable Fund-Raising Campaign found at N.J.A.C. 17:28. In accordance with N.J.S.A. 52:14B-5.1.c, these rules were