

# The Banking Law Journal

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**Editor's Note: Tech for Banks**

Victoria Prussen Spears

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# New Jersey Issues Disparate Impact Regulations

By *Kris D. Kully\**

*In this article, the author explains that New Jersey has joined certain other states in its broader approach to disparate impact enforcement and litigation than the federal government's, at least for the foreseeable future.*

The New Jersey Division on Civil Rights (the Division) recently finalized revisions to the state's disparate impact regulations.<sup>1</sup> The regulations implement New Jersey's Law Against Discrimination (LAD), which state Attorney General Matthew Platkin describes<sup>2</sup> as the "oldest and strongest state civil rights law in the country." Certainly, the LAD predates the federal Civil Rights Act by nearly 20 years.

The LAD<sup>3</sup> prohibits discrimination on prohibited bases in employment, public accommodations, housing, and lending. Prohibited bases under the LAD go beyond categories under the federal Equal Credit Opportunity Act (ECOA) or Fair Housing Act. The LAD prohibits discrimination based not only on race, color, national origin, marital status, or sex, but also (in the lending context) on creed, ancestry, civil union status, domestic partnership status, pregnancy or breastfeeding status, gender identity or expression, affectional or sexual orientation, disability, or liability for service in the Armed Forces of the United States.

## **ALTERNATIVES NEED NOT BE EQUALLY EFFECTIVE**

The new regulations make several changes to the state's approach to disparate impact liability, which may apply in connection with a neutral policy that has a disproportionate adverse effect on a prohibited basis. The new regulations remove the phrase "equally effective" in connection with less discriminatory alternatives. Specifically, disparate impact regulations generally prescribe the parties' burdens of proof, first describing what an aggrieved person—a claimant, such as a loan applicant—must show. Upon such a sufficient showing, the

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<sup>1</sup> [https://www.njoag.gov/wp-content/uploads/2025/12/DCR-Disparate-Impact-Discrimination-Rules-13\\_16-12.15.2025.pdf](https://www.njoag.gov/wp-content/uploads/2025/12/DCR-Disparate-Impact-Discrimination-Rules-13_16-12.15.2025.pdf).

<sup>2</sup> <https://www.njoag.gov/ag-platkin-announces-division-on-civil-rights-adopts-landmark-rules-on-disparate-impact-discrimination-under-new-jersey-law/>.

<sup>3</sup> <https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/know-the-law/njlad/>.

burden shifts to the respondent (such as a lender) to show that its challenged practice is necessary to achieve a legitimate, nondiscriminatory interest. The respondent also may be required to show that there is not a less discriminatory way to achieve that interest. Current New Jersey regulations provide that the respondent must show that there is no less-discriminatory, “equally effective” alternative. By removing that phrase, the Division states that a respondent (like a lender) may be liable for disparate impact discrimination “even when a less discriminatory alternative may require somewhat more labor, time, and resources,” or “may be less efficient or more costly, than the challenged practice or policy.”

The Division offers an example that if a claimant shows that making decisions based solely on credit scores results in disparate impact on a protected class, the respondent may not be able to defend itself by claiming that while an individual analysis of other criteria may be less discriminatory, it is more labor-intensive. The Division stated that 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 respect to the challenged practice. As such, the removal of “equally effective” could force lenders and others to adopt alternatives that are less effective at achieving the stated business interest, and increase their exposure to disparate impact litigation and liability.

### **NONPROFIT ADVOCACY GROUPS MAY BRING COMPLAINT**

New Jersey’s new regulations also expand the scope of persons that may challenge a practice based on disparate impact. In addition to the individual aggrieved person and certain regulatory enforcement agencies, the new regulations provide that “any other person or organization authorized by the Division’s Rules of Practice and Procedure . . . or the LAD” may bring a complaint. By adding that language, the Division asserts that it is simply clarifying that nonprofit advocacy organizations may bring a complaint of disparate impact discrimination based on pre-existing authority.

### **TWO-STEP PROCESS FOR HOUSING AND MORTGAGE LENDING CLAIMS**

As mentioned above, the Division’s regulations codify a two-step, burden-shifting process for disparate impact claims in the housing and housing financial assistance areas (as compared to, for example, the employment context). In accordance with state appellate court precedent,<sup>4</sup> once a claimant

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<sup>4</sup> In re Adoption 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 848 A.2d 1 (SUP. Ct. App. Div. Apr. 28, 2004).

shows that there is an adverse impact on a protected class, the respondent 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. Commenters argued that the framework should have three steps, such that if the respondent shows that a challenged policy is necessary to achieve a legitimate interest, the burden then shifts back to the claimant to show that there is a less discriminatory alternative means of achieving that interest. However, the state's regulations continue to shift that burden onto the respondent to prove a negative—that there is no less discriminatory alternative to achieve that interest—asserting that it reflects, in part, the lack of insight claimants may have, particularly into lenders' standards and their increasing reliance on automated decision-making tools.

Commenters challenged the regulation as supporting diversity and “increasing access for underrepresented or underserved members of a protected class,” which commenters argued is contrary to the Supreme Court's opinion related to college admissions.<sup>5</sup> The Division countered that the Court's opinion does not address the application of state anti-discrimination laws like the LAD.

### MEETS OR EXCEEDS HUD'S DISPARATE IMPACT REGULATIONS

In issuing these new disparate impact regulations, the Division asserts that it is maintaining consistency with New Jersey case law, as well as striving to “meet or exceed the floor set by [the Department of Housing and Urban Development (“HUD”)] in enforcing the [Fair Housing Act].” HUD's construct of disparate impact under the Fair Housing Act has changed over the years, including in response to the Supreme Court's 2015 opinion in *Inclusive Communities*.<sup>6</sup> In that case, the Court held that while disparate impact is a viable theory of liability under the Fair Housing Act, adequate safeguards must be implemented to protect against abusive disparate impact litigation. Importantly, the Court held that to prove disparate impact discrimination, one must first identify a policy that causes the disparate impact and must show a robust causality between the challenged policy and the impact.

Effective in October 2020, HUD revised its disparate impact regulations to conform to that opinion, imposing what was considered a high burden of proof on a claimant and providing mortgage lenders (or others facing Fair Housing Act claims) with enhanced defenses. HUD also stated at that time that it

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<sup>5</sup> *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20–1199 (U.S. June 29, 2023).

<sup>6</sup> <https://www.justice.gov/sites/default/files/crt/legacy/2014/12/30/texasdhcainclusivebrief.pdf>.

opposed civil money penalties in administrative proceedings, indicating instead that remedies in disparate impact cases should focus on eliminating or reforming the discriminatory practice. That rule met with strong criticism from consumer advocacy groups, members of Congress, and even some in the industry who felt it was inconsistent with the Supreme Court's parameters.

Then the next year, HUD essentially scrapped that 2020 rulemaking and returned to the prior state of disparate impact. That new rule,<sup>7</sup> which became effective in 2023, provided that disparate impact applies to a practice that actually results, or *predictably will result*, in a disparate impact—asserting that a claimant should not have to wait until the impact manifests itself. Disparate impact also would include, under that HUD rulemaking, a practice that reinforces or perpetuates segregated housing patterns. Additionally, arguably the 2023 rule does not reflect the Supreme Court's safeguards or require the showing of robust causality described above. HUD's rule also does not recognize that a legitimate business interest, which a mortgage lender may assert in its defense, includes practical business considerations like profitability.

More recently, President Donald Trump has instructed federal agencies to eliminate the use of disparate impact to the maximum degree possible. In that vein, HUD has reported that it intends once again to amend its disparate impact standard<sup>8</sup> under the Fair Housing Act.

### **ACTUAL OR PREDICTABLE DISPARATE IMPACT**

Back to New Jersey, the Division appears in its regulations largely to be channeling HUD's 2023 disparate impact standard (which as indicated above dates back to before its 2020 standard) and asserts the authority to offer protections beyond HUD's standard. For instance, New Jersey includes the "predictably results" phrase, providing as follows:

A practice or policy has a disparate impact where it actually *or predictably* results in a disproportionately negative effect on members of a protected class. A practice or policy predictably can have a disparate impact when there is evidence that the practice or policy will have a disparate impact even though the practice or policy has not yet been implemented, if the practice or policy has been approved, announced, or otherwise finalized.

Further, while commenters on New Jersey's new regulations asserted that, like claims against the federal ECOA, the LAD does not expressly provide a

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<sup>7</sup> <https://www.ecfr.gov/current/title-24/subtitle-B/chapter-I/part-100/subpart-G/section-100.500>.

<sup>8</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=2529-AB09>.

cause of action for disparate impact discrimination, the Division asserts that the LAD and court interpretations provide the Division the authority to address disparate impact actions.

### **AUTOMATED DECISION-MAKING TOOLS**

The Division also emphasized that its regulations apply to the use of automated decision-making tools by covered entities in all contexts covered by the LAD and in the same way they have long applied to other forms of discriminatory conduct.<sup>9</sup> The Division states that the LAD prohibits all forms of discrimination, including when automated tools facilitate that conduct. The regulations include an affirmative requirement to take reasonable steps to carefully consider and evaluate the design and testing of automated decision-making tools, and the Division asserts that a respondent may be liable if unlawful discrimination results from reliance on a vendor's product or system. The Division anticipates providing additional guidance on what may constitute reasonable steps when covered entities choose to use automated decision-making tools.

These disparate impact regulations of the Division became effective December 15, 2025.

Accordingly, New Jersey joins certain other states in its broader approach to disparate impact enforcement and litigation than the federal government's, at least for the foreseeable future.

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<sup>9</sup> [https://www.nj.gov/oag/newsreleases25/2025-0108\\_DCR-Guidance-on-Algorithmic-Discrimination.pdf](https://www.nj.gov/oag/newsreleases25/2025-0108_DCR-Guidance-on-Algorithmic-Discrimination.pdf).