

August 17, 2018

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Docket No. FR-6111-A-01

To Whom It May Concern:

The American Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the Department of Housing and Urban Development's ("HUD") advance notice of proposed rulemaking ("ANPR") regarding possible amendments to HUD's 2013 final rule implementing the Fair Housing Act's² disparate impact standard (the "Disparate Impact Rule" or the "Rule"). The questions presented in the ANPR are reprinted in italics, followed by AFSA's short response and longer discussion.

1. Does the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

Response: No. HUD should revise the disparate impact rule's burden-shifting framework to align with Supreme Court precedent.

The Rule sets forth a three-part analysis. AFSA believes each part of the analysis needs revision.

Part 1: Prima Facie Case

While the Disparate Impact Rule correctly states that the initial burden is upon the plaintiff to prove that a practice or policy has a discriminatory effect, the Rule does not comport with Supreme Court precedent because it does not properly require the plaintiff to identify and allege that a *specified* practice or policy is the cause of an alleged disparate impact on a protected class. *Inclusive Communities* makes clear, however, that merely identifying a disparate impact is not sufficient. The plaintiff must also identify a specific policy or practice that caused the alleged disparate impact:

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² 42 U.S.C. 3601 *et seq.* (the "Fair Housing Act" or the "Act").

requirement ensures that “[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). . . .

...

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.³

Part 2: Legally Sufficient Justification

The Disparate Impact Rule’s burden-shifting framework impermissibly contradicts Supreme Court precedent by stating that the “respondent or defendant⁴ has the burden of *proving* that the challenged practice” serves a legitimate nondiscriminatory interest.⁵ In *Inclusive Communities*, the Supreme Court drew on its decision in *Wards Cove Packing Co., v. Antonio*⁶ to articulate the ways in which the disparate impact theory must be limited “to avoid the serious constitutional questions that might arise under the [Fair Housing Act].”⁷ In *Wards Cove*, the Supreme Court clearly stated that if a plaintiff establishes a prima facie case of disparate impact, then the defendant “carries the *burden of producing* evidence of a business justification . . . The *burden of persuasion*, however remains with the disparate-impact plaintiff.”⁸ According to the Court, in a disparate impact case, the ultimate burden of proving unlawful discrimination “remains with the plaintiff at all times.”⁹

In rejecting this important distinction in the preamble to the Disparate Impact Rule, HUD—without explaining why it was not bound by *Wards Cove*—indicated that its “burden-shifting scheme is consistent with the Title VII discriminatory effects standard codified by Congress in 1991.”¹⁰ This argument fails, however, as shown above and because the Title VII standard it references does not apply to the Fair Housing Act. Although Congress amended Title VII after *Wards Cove* to provide for a more plaintiff-friendly burden-shifting standard, it did *not* similarly amend the Fair Housing Act. The *Wards Cove* standard, adopted by *Inclusive Communities*, therefore remains controlling precedent.¹¹

³ *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522 (2015).

⁴ Because the Fair Housing Act provides for both administrative and judicial remedies, the Disparate Impact Rule uses the terms “charging party” and “plaintiff” to refer to persons alleging violations of the Act, and “respondent” and “defendant” to refer to persons defending such allegations. For simplicity, in this comment letter we use the terms “plaintiff” to refer to both plaintiffs and charging parties, and “defendant” to refer to both defendants and respondents.

⁵ 24 C.F.R. § 100.500(c)(2) (*emphasis added*).

⁶ 490 U.S. 642 (1989).

⁷ *Inclusive Communities*, 135 S. Ct. 2507, 2522. The Court in *Inclusive Communities* noted that *Wards Cove* has been superseded by statute, but, as explained below, these statutory changes did not apply to the Fair Housing Act and thus do not affect *Wards Cove*’s applicability to Fair Housing Act claims.

⁸ *Wards Cove*. 490 U.S. 642, 659.

⁹ *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988)).

¹⁰ 78 Fed. Reg. 11460, 11474 (Feb. 15, 2013).

¹¹ *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (the *Wards Cove* standard continues to apply in a disparate impact case involving discrimination claims under statutes comparable to pre-1991 Title VII).

By impermissibly deviating from the *Wards Cove* standard, HUD created a conflict with binding Supreme Court precedent and placed a more demanding burden on entities defending disparate impact claims. This inconsistency creates confusion and uncertainty that could result in defendants having to expend resources on litigating over an issue that could and should be presented correctly in the Rule.

Therefore, the Disparate Impact Rule must be revised to align with the *Wards Cove* decision by stating that a defendant can rebut a plaintiff's disparate impact claim by offering a business justification for the challenged practice, and by clearly stating that the plaintiff at all times bears the burden of persuading the factfinder that a specifically-identified policy or practice has caused the alleged disparate impact upon the protected class.

Part 3: Less Discriminatory Effect

The current version of the Rule states that if a defendant shows that a challenged practice serves a legitimate, nondiscriminatory interest, the plaintiff may still prevail if the defendant's interest could be served by "another practice that has a less discriminatory effect."¹² The Supreme Court, however, clearly requires a stronger showing. In addressing less discriminatory alternatives, the Court in *Wards Cove* stated that "any alternative practices" offered up by a plaintiff "*must be equally effective*" as the practice under challenge, and "factors such as cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally effective as the challenged practice"¹³

In the Rule's preamble, HUD essentially stated that it was rejecting the "equally effective" standard, because it "is even less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the [Fair Housing Act] that are not readily quantifiable."¹⁴ AFSA respectfully disagrees with this view. As explained above, the Supreme Court has clearly stated that *Wards Cove* remains the appropriate standard for disparate impact claims under statutes using language comparable to pre-1991 Title VII, and the Court specifically applied *Wards Cove* to the Fair Housing Act in its *Inclusive Communities* decisions.¹⁵ HUD cannot merely reject Supreme Court standards that it does not like; only Congress has the authority to override Supreme Court mandates,¹⁶ as it did when it amended Title VII (but *not* the Fair Housing Act) in 1991.

2. *Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability?*

Response: No. HUD should revise the disparate impact rule to clarify that only artificial, arbitrary, and unnecessary barriers can result in disparate impact liability.

Courts evaluating disparate impact claims are bound by Supreme Court precedent. The Supreme Court unequivocally stated: "Governmental or private policies are not contrary to the disparate-impact requirement 'unless they are artificial, arbitrary, and unnecessary barriers.'"¹⁷ AFSA believes that HUD should revise the Disparate Impact Rule's second and third steps to clearly align with this standard.

¹² 24 C.F.R. § 100.500(b)(ii) and (c)(3).

¹³ *Wards Cove*, 490 U.S. 642, 661 (*emphasis added*).

¹⁴ 78 Fed. Reg. 11,473. HUD also stated that it does not believe that *Wards Cove* even governs Fair Housing Act claims, but as discussed under Section I, above, this is not correct.

¹⁵ See *Inclusive Communities*, 135 S.Ct.2507, 2523.

¹⁶ See, e.g., *Chevron, USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁷ *Inclusive Communities*, 135 S. Ct. 2507, 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

The current version of the Rule states that once a plaintiff has satisfied the first step of the burden-shifting framework (that a policy or practice has a disparate impact on a protected class), the defendant has the burden of showing that “the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”¹⁸ This is clearly contrary to *Inclusive Communities*’ holding because (1) it inappropriately places the burden or persuasion upon the defendant, and (2) it ignores the actual, less-onerous *Inclusive Communities*’ standard upholding the policy or practice *unless* it creates an “artificial, arbitrary, and unnecessary barrier” that caused an unequal treatment of the protected class. If the defendant makes this showing, the plaintiff still may prevail by “proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”¹⁹

Another problem is the wording in the Federal Register of HUD’s response to a comment about the phrase “legitimate, nondiscriminatory interest” and whether the legitimate interest must be substantial. HUD modified the Rule so that a defendant has the burden to show a “substantial, legitimate, nondiscriminatory interest.” This placed a higher burden upon a defendant. According to HUD, a “substantial” interest is “a core interest of the organization that has a direct relationship to the function of the organization.”²⁰ HUD then required a practice to be “necessary” to achieve a defendant organization’s “core interest.” This enhanced burden is significantly more onerous than the showing required by the Supreme Court. In *Inclusive Communities*, the Court stressed the importance of limiting the application of the disparate impact theory to “avoid serious constitutional questions” and “protect potential defendants against abusive disparate impact claims.”²¹ To this end, the Court asserted that the Fair Housing Act “*imposes a command*” that practices that are not “artificial, arbitrary, and unnecessary” do not violate the disparate impact standard.²²

The *Wards Cove* decision buttresses this critical limitation. In considering a defendant’s proffered justification for a challenged policy (in this case, an employment policy), the Court in *Wards Cove* stated that “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”²³ The Court further stated that although a “mere insubstantial justification” will not suffice, “*there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ . . . for it to pass muster . . .*”²⁴ Like *Inclusive Communities*,²⁵ and unlike the Rule, *Wards Cove* does not require that the a practice be “necessary” to achieve a “core interest” of the defendant; in fact, *Wards Cove* stands for the opposite view.

By imposing a standard that blatantly contradicts Supreme Court precedent, the Disparate Impact Rule will likely result in confusion and potential litigation. To avoid regulatory uncertainty and prevent potential defendants from having to incur the expense and burden of unwarranted litigation, HUD should revise the language in the second and third steps of Disparate Impact Rule to align with the standard mandated by the Supreme Court in *Inclusive Communities* and *Wards Cove*.

¹⁸ 24 C.F.R. § 100.500(c)(2).

¹⁹ *Id.* §11.500(c)(3).

²⁰ 78 Fed. Reg. 11,460, 11,470 (Feb. 13, 2013).

²¹ *Inclusive Communities*, 135 S. Ct. 2507, 2524.

²² *Id.* (quoting *Griggs*, 401 U.S. 424, 431).

²³ *Wards Cove*, 490 U.S. 642, 659.

²⁴ *Id.*

²⁵ See *e.g. Inclusive Communities*, 135 S. Ct. 2507, 2523 (stressing the need for housing authorities and private developers to be able to maintain policies that achieve “valid interests,” which is not the same standard as “indispensable,” “essential,” or “core” interests).

3. Does the Disparate Impact Rule’s definition of “discriminatory effect” in 24 CFR 100.500(a) in conjunction with the burden of proof for stating a *prima facie* case in 24 CFR 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

Response: No. HUD must revise the Disparate Impact Rule to require plaintiffs to identify the specific policy that caused an alleged disparate impact.

The Disparate Impact Rule diverges from Supreme Court precedent and incentivizes unwarranted claims in two key respects. First, as discussed above, the Rule improperly and unfairly allows disparate impact allegations to be based on the outcome of an entire decision-making process rather than a specific policy. In particular, the text of the Rule does not require a plaintiff to identify specific policies or practices that cause an alleged impact, and the preamble expressly states that “the elements of a decision-making process may not be capable of separation for analysis, in which case it may be appropriate to challenge the decision-making process as a whole.”²⁶ This approach directly contradicts *Wards Cove* and *Inclusive Communities* and creates an impossible compliance burden for entities subject to the Rule.

In *Wards Cove*, the Supreme Court stated that a plaintiff seeking to establish a *prima facie* disparate impact case *must* isolate and identify the specific practices that are allegedly responsible for any observed statistical disparity.²⁷ “To hold otherwise would result in [defendants] being potentially liable for ‘the myriad of innocent causes that may lead to statistical imbalances’”²⁸

Likewise, in *Inclusive Communities*, the Court said:

[A] disparate impact claim that relies on a statistical disparity *must fail* if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that ‘[r]acial imbalance . . . does not, without more, establish a *prima facie* case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.²⁹

If plaintiffs could bring disparate impact claims based on statistical disparities that are not attributable to an isolated practice or policy, but rather result from the operation of an overall business process, the only way to avoid disparate impact risk would be to intentionally consider prohibited bases (*i.e.*, employ ‘numerical quotas’) to prevent disparities from arising in the first place. And *Inclusive Communities* expressly cautions that such results are themselves wrongful.³⁰

For this reason, the current version of the Rule creates a difficult dilemma for AFSA’s mortgage lender members. Mortgage lending transactions are complex, and there are a multitude of factors, including the applicant’s credit history, employment history, income, and debt obligations, that influence whether a loan will be approved, and, if so, how much it will cost. If the combination of these myriad factors results in a statistical imbalance, a lender could face liability, even if every factor was legitimate and evenly applied. In such circumstances, the only way

²⁶ 78 Fed. Reg. 11,460, 11,469.

²⁷ *Wards Cove*, 490 U.S. 642, 657 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S.977, 992 (1988) (*emphasis added*)).

²⁸ *Id.*

²⁹ *Inclusive Communities*, 135 S. Ct. 2507, 2523 (quoting *Wards Cove*, 490 U.S. 642, 653).

³⁰ *Inclusive Communities*, 135 S. Ct. 2507, 2523 (“Without adequate safeguards at the *prima facie* stage, disparate-impact liability might cause race to be used and considered in a pervasive way and ‘would almost inexorably lead’ governmental or private entities to use ‘numerical quotas,’ and serious constitutional questions then could arise.”).

a lender could, with certainty, insulate itself from disparate impact risk would be to intentionally consider prohibited bases such as race to cause underwriting outcomes that are consistent across borrower groups. Of course, this would raise disparate treatment concerns itself, and is exactly the outcome the Supreme Court expressed great concern about in *Inclusive Communities*.³¹ *Inclusive Communities* further warned that “expansive” interpretation by courts of disparate impact liability could “inject racial considerations into every housing decision.”³² AFSA is concerned that a Rule that is similarly “expansively” written beyond what the relevant precedent (more narrowly) requires would produce a similar result. For this reason, AFSA requests HUD to revise the Disparate Impact Rule to require a disparate-impact plaintiff to identify the specific policy that caused an alleged disparity.

In addition, the Rule inappropriately interferes with governmental and private entity discretion in decision-making. This is because, in the Rule’s preamble, HUD indicated that policies that “allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act.”³³ This position too contradicts Supreme Court precedent and improperly creates potential disparate impact liability in situations that are more appropriately evaluated using the disparate treatment theory.

In *Wal-Mart v. Dukes*³⁴ (“*Wal-Mart*”), a 2011 employment discrimination case, the Supreme Court indicated that although a policy of discretion *can* form the basis for a Title VII claim, *e.g.*, when it serves as the functional equivalent of intentional discrimination, the existence of discretion should not itself raise the inference of discriminatory conduct.³⁵ According to the Court, a policy of discretion is “just the opposite of a uniform employment practice” and “is also a very common and presumptively reasonable way of doing business.”³⁶

The mortgage lending business operates using a combination of objective and subjective decision-making. As an example, a mortgage lender may generally require loan applicants to have a minimum credit score to qualify for a loan, but also may decide that some applicants with credit scores below the required minimum have other characteristics (*e.g.*, significant savings, low debt-to-income ratio, etc.) that make them an acceptable risk. Using such subjective decision-making in this context makes sense, and, as the Supreme Court explained in *Wal-Mart*, is a “presumptively reasonable way of doing business.”³⁷

4. *Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under Inclusive Communities and other Supreme Court rulings?*

Response: Yes. HUD should revise the Disparate Impact Rule to align with *Inclusive Communities*’ robust causality requirement.

The current version of the Disparate Impact Rule states that a disparate-impact plaintiff must prove that “a challenged practice caused or predictably will cause a discriminatory effect.”³⁸ AFSA believes the Disparate Impact Rule’s standard of “caused or predictably caused” is a lower threshold than that set out by the Court and, therefore, that HUD should amend the Rule so that its wording clearly aligns with the Court’s mandate.

³¹ “Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.” *Id.* at 2524.

³² *Id.*

³³ 78 Fed. Reg. 11,460, 11,468.

³⁴ *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).

³⁵ *Wal-Mart*, 131 S.Ct 2541, 2555 (citing to *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 994 (1988)).

³⁶ *Wal-Mart*, 131 S.Ct. 2541, 2554.

³⁷ *Id.*

³⁸ 24 C.F.R. § 100.500(c)(1).

In *Inclusive Communities*, the Supreme Court held that “a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”³⁹ The Court went on to say that a “robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.”⁴⁰ The Court explained that this “robust causality” requirement ensures that a racial imbalance without more cannot form the basis of a prima facie disparate impact case.⁴¹ The Court also noted that it may be difficult to show causation when multiple factors influence a decision.⁴²

Courts addressing disparate impact claims after the Court decided *Inclusive Communities* have, as they must, followed the Court’s directive. For example, on remand, the U.S. District Court for the Northern District of Texas dismissed the Inclusive Communities Project’s (“ICP”) disparate impact case because, among other matters, it found that ICP failed to establish a robust causal connection between the defendant’s conduct and the statistical disparity underlying the case. Similarly, in 2017, the Ninth Circuit dismissed two disparate impact lawsuits brought by the City of Los Angeles because the City failed to show a robust causal connection between the alleged disparities and a neutral policy. According to the court, under *Inclusive Communities*, to avoid summary judgment, the City needed “to show both a statistical disparity and a policy or policies that caused the disparity,” and that the causal link between the policy and disparity was “robust.” Because the City failed to make this showing, the Ninth Circuit granted summary judgment to the defendants.⁴³

AFSA believes that the Disparate Impact Rule should provide businesses and other entities subject to the Fair Housing Act, as well as potential disparate-impact plaintiffs, with clear guidance on the standards that will apply if a claim is made. If the Rule does not mirror the requirements imposed by the Supreme Court, it is possible and perhaps even likely that plaintiffs will bring claims that will ultimately fail when a court applies the applicable standard. Such a result would impose unnecessary burdens and expenses on both plaintiffs and defendants.

5. *Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant’s discretion or another federal statute requires adherence to state statutes)?*

Response: Yes. HUD should provide non-exclusive examples of policies that do not violate the Disparate Impact Rule.

AFSA believes that HUD should provide a non-exclusive list of policies that qualify as safe harbor defenses to claims under the Disparate Impact Rule. In the preamble to the current version of the Rule, HUD noted that one commenter requested that the Rule “expressly state that “increasing profits, minimizing costs, and increasing market share” are justified, and that another commenter requested that HUD codify examples of tenant screening criteria that would be presumed to be permissible.⁴⁴ HUD declined to adopt these suggestions, reasoning that the Fair Housing Act “covers many different types of entities and practices,” and a determination of what policies should be deemed permissible “is fact-specific and must be determined on a case-by-case basis.”⁴⁵

³⁹ *Inclusive Communities*, 135 S.Ct.2507, 2523. *See also*, *Wards Cove* at 657.

⁴⁰ *Id* at 2511.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *City of Los Angeles v. Wells Fargo & Co, et al.*15-56157 (May 26, 2017) and *City of Los Angeles v. Bank of Am. Corp., et al.*, 15-55897 (May 26, 2017).

⁴⁴ 78 Fed. Reg. 11,471.

⁴⁵ *Id.*

AFSA believes that the Fair Housing Act’s broad scope permits HUD to declare that certain policies or practices are per se (or at least presumptively) permissible. AFSA agrees that in many instances, whether a particular policy or practice creates liability under the Rule will require a thorough, fact-intensive analysis. Although such analyses can be time consuming and expensive, AFSA recognizes that it is critical for institutions to carefully evaluate policies that may disproportionately impact a protected class to ensure that they are adequately justified.

There are some situations, however, in which it would be appropriate and beneficial for HUD to expressly state that a policy is permissible under the Rule. For example, compliance with mandatory legal, regulatory, and agency requirements should not create disparate impact risk, and regulated entities should not have to bear the burden and expense of defending a challenge to such compliance. AFSA believes that HUD should solicit comment regarding policies and practices that commenters believe should be considered permissible and should expressly enumerate the practices that are clearly permissible so that parties subject to the Rule can focus their compliance resources on more nuanced scenarios.

6. *Are there revisions to the Disparate Impact Rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful?*

Response: Yes. HUD should revise the Disparate Impact Rule to provide that punitive damages are not available in disparate impact cases.

In addition to the foregoing, AFSA believes that HUD should clearly state the Disparate Impact Rule does not foresee or authorize punitive damages. Doing so will align the Rule with binding Supreme Court precedent and will provide clarity to interested stakeholders.

No one questions that the remedy for a remediable disparate impact is declaratory or injunctive relief, or that the remedy for a remedial disparate treatment is both declaratory or injunctive relief as well as actual and punitive damages, and civil money penalties. In the preamble to the Rule, HUD noted that a commenter stated that the most appropriate remedy for a disparate impact claim is declaratory or injunctive relief. HUD disagreed, and noted that the Fair Housing Act “specifically provides for the award of damages—both actual and punitive—and penalties.”⁴⁶

AFSA agrees that the Fair Housing Act provides for damages and penalties, and believes that such remedies can be appropriate in certain circumstances, such as when a defendant is found to have *intentionally discriminated* on a prohibited basis. Disparate impact, however, does not involve intentional discrimination; it involves conduct that was never intended to be discriminatory, but turned out so without the actor’s deliberate intent to discriminate. It certainly may be appropriate to require a defendant to change a neutral policy when an alternative could serve the underlying need equally as well. However, it is quite another thing to punish a person for discriminating who never intended to discriminate, and who did not know he was discriminating. Imposing punitive damages or penalties in such cases is overly harsh and probably contrary to a defendant’s due process rights. Such remedies should be reserved for situations involving intentional conduct. This approach is consistent with the Court’s view in *Inclusive Communities*⁴⁷ and is also consistent with the approach Congress envisioned when it amended Title

⁴⁶ 78 Fed. Reg. 11,474 (citing to 42 U.S.C. §3612-14).

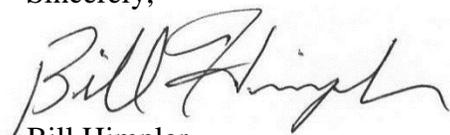
⁴⁷ See *Inclusive Communities*, 135 S.Ct.2507, 2523. “It must be noted further that, even when courts do find liability under a disparate impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate impact cases should concentrate on the elimination of the offending practice that “arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of

VII in 1991. The legislative history of those amendments indicate that the Title VII revisions “do not give victims an unlimited entitlement to damages. Compensatory damages are available only in cases of intentional discrimination.”⁴⁸

* * * *

AFSA appreciates the opportunity to provide comments on the Disparate Impact Rule. We hope you find our recommendations useful. Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association

rac[e].” *Ibid.* If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race neutral means.” See *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 510, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)(plurality opinion).

⁴⁸ 137 Cong. Rec. S15219, S15234 (Oct. 25, 1991).