CITY OF OAKLAND

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October 10, 2000

City Council of the City of Oakland
Community and Economic Development Committee

Re: The legality of proposed City anti-predatory lending policies

Chairperson Brunner and Members of the Committee:

You have asked for a legal opinion from this Office on what policies the City may adopt to fight predatory lending practices in residential mortgage lending in Oakland. This Opinion is being given in conjunction with an accompanying staff report from the City Manager on this subject along with previous staff reports dated June 13 and March 21. This Opinion first discusses the issue of federal and state preemption in the context of mortgage lending, and then analyzes the legality of various anti-predatory lending policies which have been proposed for Oakland by City staff and the Association for Community Organizations for Reform Now ("ACORN"), as well as policies suggested by the HUD/Treasury Task Force on Predatory Lending in their recent report (the "HUD/Treasury Report")[1], the Coalition for Responsible Lending's Model Statute Against Abusive Home Loans (the "Model Statute")[2], the proposed California anti-predatory lending bill, SB 2128 (recently gutted by the legislature)[3], proposed federal legislation (HR 4250/S 2415, the "Predatory Lending Consumer Protection Act of 2000"), and elsewhere.

I. Issue presented

What policies can the City legally pursue to prevent predatory lending practices for residential mortgage loans in Oakland?

[1] Curbing Predatory Home Mortgage Lending, report from the HUD/Treasury Task Force on Predatory Lending (2000)

[2] See their Guide to Model Statute Against Abusive Home Loans ("Guide to the Model Statute") at their web site, www.responsiblelending.org.

[3] In its original form, SB 2128, sponsored by Senator Hilda Solis (introduced February 25, 2000) would have enacted the "Consumer Protection in Home Mortgages Act" with a number of substantive borrower protections. However, the bill was subsequently gutted before being passed by the Senate on June 8, and now only provides for formation of a Predatory Lending Task Force. References to "SB 2128" in this opinion refer to the original bill.

II. Summary conclusions

The following are anti-predatory lending policies that the City could adopt under its home rule powers, since they are probably not preempted by federal or state law:

- Expand City efforts to educate and counsel borrowers on predatory lending practices.
- Require depositories seeking City business under Linked Banking to certify that they do not engage in predatory lending practices or to adopt best practices guidelines.
- Provide under Linked Banking that depositories do not get credit towards community lending goals for loans made under predatory lending practices.
- Prohibit the City/Redevelopment Agency from subordinating its mortgage assistance loans to predatory loans.
- Prohibit the City/Redevelopment Agency from participating in development projects that use predatory lenders.
- Require residential lenders to report information on mortgage lending in Oakland.
- Require lenders to provide additional disclosures, such as a copy of real property appraisals to borrowers at closing.
- Require reporting of good credit practices of borrowers to credit agencies.
- Required borrower counseling on high cost loans.
- Limit loan amounts based on the borrower's ability to repay or on debt relative to home value.
- Limit loan refinancings only to refinancings that benefit the borrower.
- Extend the period for borrowers to rescind loans, or expand recision rights to more loans.
- Prohibit kickbacks in connection with home improvement scams.
- Prohibit or limit prepayment penalties (except for federal savings and loans).
- Prohibit or regulate single-premium credit insurance.
- Extend federal restrictions on ultra-high cost loans to more loans.
- Provide private rights of action to borrowers to sue under federal lending laws.
- Advocate for stronger state and federal anti-predatory lending legislation and regulations.

However, since the State of California is involved in the regulation and licensing of various mortgage lending activities, it is possible that a challenge to any of the above regulatory measures could be brought on the grounds that the legislature intended by implication to preempt local regulation in the field of mortgage lending. The success of any challenge on state preemption grounds would rest on whether the court finds that (1) the legislature intended to occupy the field of mortgage lending practices by implication when it adopted the regulatory scheme, and (2) the regulation of mortgage lending practices is an area of exclusive "statewide concern" and not a "municipal affair." There is no case law on state law preemption in this area. We are not aware of any locality that has attempted to regulate mortgage loan terms or lending practices. In adopting any of these policies, particularly regulatory policies, the City will need to make specific findings, with supporting factual information and materials, on (1) how the particular predatory lending practice harms the health, safety or welfare of Oakland residents and the City in general, and (2) how the proposed policy will ameliorate the harm.

The following are anti-predatory lending policies that the City cannot adopt because they are probably preempted by federal law:

- Limit the interest rate on first lien loans or loans made by chartered institutions.
- Limit points or fees on first lien loans.
- Limit or prohibit negative amortization loans.
- Limit or prohibit loans with balloon payments.
- Prohibit mandatory arbitration clauses in residential loan documents.

III. Analysis

A) Federal law

1) Federal preemption principles

Federal preemption is a doctrine adopted by the United States Supreme Court and rooted in the supremacy clause of the U.S. Constitution which provides that states or local governments may not pass laws inconsistent with federal law. There are three types of federal preemption: (1) "express preemption," where a federal statute expressly prohibits state or local regulation in the field; (2) "conflict preemption," where compliance with both federal law and the local law is physically impossible or where the local law "stands as an obstacle" to the federal law; and (3) "field preemption" or "implied preemption," where the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (Fenning v. Glenfed, Inc. (1995) 40 Cal.App.4th 1285, 1290-91.)

The Supreme Court has long held the position that preemption is disfavored, and it applies a presumption against the invalidation of local law based on a preemption defense. (Cipollone v. Liggett Group, Inc. (1992) 505 US 504, 518.) Indeed, the general standard is to "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act[s] unless that [is] the clear and manifest purpose of Congress." (Id. at 516.) The purpose of Congress is the "'ultimate touchstone'" of preemption analysis. (Id. at 516.) Thus, in the absence of clear federal authority showing that Congress intended to preempt all state or local regulation in a field, local governments are free to impose additional regulations on areas in which federal law already governs. (See Allarcom Pay Television v. General Instrument Corp. (9th Cir. 1995) 69 F3 381, 386 (holding that the existence of federal authority regulating cable operators did not prevent California from going farther in the regulation of cable operators).)

2) Preemption in federal mortgage lending laws

There are a number of federal statutes that address the subject of residential mortgage lending. The intent and purpose of each of each of these federal laws is important to the preemption analysis. Some federal statutes are clearly intended to protect consumers and homebuyers from abusive lending practices. For example the Truth in Lending Act is intended, inter alia, "to protect the consumer against inaccurate and unfair credit billing . . . practices" (15 U.S.C. §1601), while the Real Estate Settlement Practices Act is intended to ensure that consumers are "protected from unnecessarily high settlement charges caused by certain abusive practices . . ." (12 U.S.C. §2601). Logically, it may appear there is no reason why "conflict preemption" should block local law from going farther than federal law in the area of lending regulation for those statutes that are designed to protect consumers.

However, other federal lending statutes have purposes other than the protection of consumers, and can be inimical to the interests of borrowers. For example, the Alternative Mortgage Transactions Parity Act, which preempts state regulation of nontraditional mortgage devices, was intended "to eliminate the discriminatory impact [of disparate regulations on] . . . housing creditors to make . . . alternative mortgage transactions . . ." (12 U.S.C. §3801.) Similarly, a stated purpose of the Depository Institutions Deregulation and Monetary Control Act, which preempted state usury laws, was to enhance the ability of lenders to offer credit; see S. Rep. No. 96-368 (1979), reprinted in 1980 U.S.C.C.A.N. 236 ("mortgage rate ceilings must be removed if savings and loan institutions . . . are to begin to pay market rates of interest on savings deposits"). These statutes can present significant preemption issues for local borrower protection regulations.

The most important statutes that grant protection to borrowers are the Truth in Lending Act, the Home Ownership Equity Protection Act, and the Real Estate Settlement Practices Act. Important statutes that regulate the banking industry with goals other than the protection of borrowers are the Depository Institutions Deregulation and Monetary Control Act and the Alternative Mortgage Transactions Parity Act. The Fair Housing Act, the Fair Credit Reporting Act, the Home Mortgage Disclosure Act, the Home Owners Loan Act, the Community Reinvestment Act, and the Federal Arbitration Act are also implicated by the proposed solutions to predatory lending. Below, we analyze the preemptive effect of each of the relevant federal statutes.

a) The Truth in Lending Act

The Truth in Lending Act ("TILA") (codified at 15 U.S.C. §§1601-1693r)[4] requires that lenders provide certain disclosures to borrowers in connection with mortgage loans. Among other things it requires that the total amount financed, finance charge, annual percentage rate, and other information about the charges to the consumer be disclosed. (15 U.S.C. §1638(a).) TILA contains an express provision on preemption in the context of disclosure:

> [T]his part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency.

[4]Those provisions of the TILA related to substantive restriction on the terms of ultra-high-cost loans, added to TILA through the Home Ownership Equity Protection Act of 1994, are discussed below. Those TILA provisions related to credit reporting are addressed in the discussion of the Fair Credit Reporting Act below.

(15 U.S.C. §1610 (a).) Thus, TILA is clear that the doctrines of express and implied or "field" preemption are inapplicable.[5]

Local disclosure regulations are preempted only to the extent they actually conflict with TILA disclosure requirements. See, e.g., Heastie v. Community Bank of Greater Peoria (N.D. Ill. 1988) 690 F. Supp. 716, 720-22 (stating that state law is preempted "if it requires a creditor to make disclosures or take actions that contradict the requirements of the federal law . . ."). TILA regulations provide that:

> A state law is contradictory [and as such preempted] if it requires the use of the same term to represent a different amount or a different meaning than the federal law, or if it requires the use of a term different from that required in the federal law to describe the same item.

(12 CFR §226.28(a)(1).) Thus a locality may not impose additional disclosure obligations on lenders that do not use the same terms as does the TILA scheme, or refers to the same item as the federal scheme using a different term. The preemption rules on TILA disclosures are concerned with terminology, since the focus of the federal (and presumably the state) disclosure scheme is to inform the consumer, and the use of contradictory terminology would confuse borrowers, frustrating the purpose of TILA. However, if the disclosure requirements in the state and federal schemes are found to be "equivalent" rather than contradictory, the federal rule allows lenders in certain circumstances to disclose using only the equivalent state disclosures. (12 CFR §226.28(b).) Also, local disclosure requirements cannot mandate that disclosures be made that are specifically prohibited by the federal scheme. (Drennan v. Sec. Pacific Nat'l Bank (1981) 28 C3 764, 770-75[6].)

Another substantive right that TILA grants to borrowers is a qualified right of recision. (15 U.S.C. §1635.) With certain exceptions, it allows borrowers of loans that are secured by their residences a right to rescind the transaction up to three days after the paperwork and disclosures required by the other parts of TILA have been delivered to them, or closing, whichever is later (though it cannot in any event be exercised more than three years after the transaction). (15 U.S.C. §§1635(a), 1635(f).) Once this right has been exercised, the lender is

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[5]The court in In re Myers, 175 B.R. 122, 126 (Bankr. D. Mass. 1994), stated that:

> Congress left the door open for states to create their own truth-in-lending acts, so long as the disclosures required were substantially the same as those of TILA. The Federal Reserve Board . . . is given the option to determine whether a particular state's laws require disclosures "substantially the same in meaning as a disclosure required by this subchapter."

Referring to the standard set out in section 1610(a)(2), the court in Myers pointed out that TILA was not intended to preempt the entire field or prohibit states from ever regulating lending again; instead, it was intended as a floor.

[6]In Drennan, the California Supreme Court addressed whether the state could require disclosure of a method of computing prepayment penalties called the "Rule of 78's". While TILA clearly states that the method of computing prepayment penalties must be disclosed, it provides that if that method was the "Rule of 78's" it must not be explained, since it would only serve to confuse the consumer and hide other, more important terms. Though the plaintiff/borrower in Drennan claimed that the federal disclosure rule merely set a minimum standard, the Court held that by stating that the "Rule of 78's" was not to be disclosed, Congress took away the power of states to require disclosure of the "Rule of 78's". See id. at 770-75.

obliged to return the borrower to the position he or she was in before the transaction, and the lender can not charge the borrower anything for the exercise of this right. (15 U.S.C. §1635(b).) The TILA right of recision does not apply to home purchase loans, however. (15 U.S.C. §1635(e)(1).)

Local rules can go further than TILA does in granting a right of recission; they can supplement, but they can not go so far as to "stand as an obstacle" to the functioning of TILA's scheme. The bankruptcy court in In re Myers, 175 B.R. 122, 126 (Bankr. D. Mass. 1994), held that the short statute of limitations in TILA's recision provision did not preempt the longer limitations period in a similar Massachusetts law.

Similarly, TILA appears to allow states and localities to enact measures that augment the remedies and enforcement provisions of TILA. Federal courts in other jurisdictions have noted that "TILA does not contain a civil enforcement provision that requires complete preemption of law, nor is there any other manifestation that Congress intended preemption." (Jackson v. Bank One (M.D. Ala. 1996) 952 F.Supp. 734, 736 (citing Gen. Elec. Capital Auto Lease, Inc. v. Mires (E.D. Mich. 1992) 788 F.Supp. 948, 950 (stating that " . . .it appears that the TILA is often interpreted with reference to state law or concurrent with state law . . .".) At least two state courts in other jurisdictions have addressed whether a state may augment the TILA remedies and enforcement provisions. An Illinois appellate court found that an aggrieved borrower was entitled to recover damages under both TILA and a state law for the same failure to disclose financing terms. (Public Finance Corp. v. Riddle (1980) 403 NE2d 1316, 1320 (noting that there is no reason to hold that federal and state remedies should be exclusive unless Congress so states, which it did not do in TILA). Similarly, a Texas appellate court faced with a case where a lack of disclosure invoked both a TILA and a state remedy found that there was no intent to make either remedy exclusive, and therefore both could be applied. (Cantrell v. First Nat'l Bank of Euless (1977) 560 SW2d 721, 729-31.) The reasoning of both of these cases, while not binding, is persuasive; since there is no reason to find that TILA remedies are exclusive, state or local damages can also be applied to punish or remedy the same failure to disclose.

b) The Home Ownership Equity Protection Act

The Home Ownership Equity Protection Act of 1994 ("HOEPA") amended TILA to affirmatively prohibit some abusive terms for certain "ultra-high-cost" loans. While it accomplishes much of what is needed for the costliest of loans, only a very small percentage of loans are included within HOEPA's protections, since it is triggered for loans at least 10 percentage points above the yield on Treasury securities of comparable maturities or with points and fees at least 8 percent of the loan amount. (15 U.S.C. §1602(aa).) Only about 0.7% of subprime loans qualified for HOEPA's protections. (HUD/Treasury Report at 85.) Also, HOEPA only applies to home equity loans, not purchase money mortgages or home equity lines of credit.

For the very small group of ultra-high-cost loans covered by HOEPA, however, the law provides significant protection, including many on ACORN's wish list of protections. These include: additional disclosures (15 U.S.C. §1639(a)-(b)), limitations on prepayment penalties (15 U.S.C. §1639(c)), a prohibition on higher interest rates after default (15 U.S.C. §1639(d)), limitations on balloon payments (15 U.S.C. §1639(e)), a prohibition on negative amortization (15 U.S.C. §1639(f)), a ban on "asset-based lending" (15 U.S.C. §1639(h))[7], and certain restrictions on home improvement scams, including a ban on direct payments to contractors (15 U.S.C. §1639(i)).

HOEPA does not expressly or impliedly preempt further local regulation of high cost loans. Section 1610(b) of TILA, discussed above, which expressly disclaims any field preemption, applies to HOEPA as well.

c) The Fair Credit Reporting Act. ("FCRA")

The Fair Credit Reporting Act ("FCRA") (codified at 15 U.S.C. §1681 et. seq.) regulates credit reporting. Some subprime lenders fail to report the good credit practices of their customers in order to keep these customers' credit ratings below where they should be. (HUD/Treasury Report at 84.) Since a borrower's prompt payments are not reported by these lenders, their credit is never repaired and they cannot "graduate" to less-expensive prime lending products. So lenders are trapping these lucrative customers in their grip long after the promptly-paying borrowers could have refinanced and left for the prime market if their subprime lenders had only reported good credit as well as bad. To rectify this, the HUD/Treasury Task Force recommends that lenders who regularly report to credit bureaus be required by FCRA to report the full payment history of its borrowers. (HUD/Treasury Report at 84.)

FCRA contains an express provision on preemption that is virtually identical to that in the preceding sections of TILA. See 15 U.S.C. §1681t. This section makes it clear that only conflict preemption is applicable, and only to the extent that local regulation[8] conflicts with the imposition of federal law. In Credit Data of Arizona, Inc. v. Arizona (9th Cir. 1979) 602 F2d 195, 197-98, the court held that an Arizona statute that granted to consumers more protection by forbidding credit reporting agencies from imposing a fee in a situation where the FCRA only limited such agencies to a "reasonable" fee was not preempted. But see Retail Credit Co. v. Dade County, Florida (S.D. Fla. 1975) 393 F. Supp. 577, 581-82, which held a county ordinance preempted since it required disclosure of the source of information in a credit file, something that was specifically exempted from disclosure by Congress under FCRA for policy reasons.

The credit reporting provisions in TILA also have an express provision dealing with preemption that governs the applicability of state law to the issue. See 15 U.S.C. §1666j. It uses language similar to that contained in section 1610(a)(1) to declare that the sections governing credit reporting do not affect state law except if state law is inconsistent, and then only to the extent of the inconsistency. In Texaco, Inc. v. Hughes (D. Md. 1982), 572 F. Supp. 1, 7-9, the court held that the portion of TILA that forbade credit card issuers from prohibiting retailers from offering discounts to consumers who paid in cash did not preempt a Maryland statute that

[7]HOEPA prohibits lenders from engaging in a "pattern or practice" of making high cost mortgages without regard to the borrower's ability to repay. That "pattern or practice" standard has been an obstacle to using HOEPA to fight asset based lending. See HUD/Treasury Report at 77.

[8]Courts interpreting FCRA have found that cities have power coterminous with that of their state to enact regulations concerning credit reporting, so long as they are authorized under state law. See Retail Credit Co. v. Dade County (S.D. Fla. 1975) 393 F. Supp. 577, 579 n.3.

prevented those credit card issuers from imposing credit charges on retailers. The court in that case made it clear that no state law would be preempted if it could be complied with alongside the federal scheme.

d) The Real Estate Settlement Procedures Act

The Real Estate Settlement Practices Act of 1974 ("RESPA") (codified at 12 U.S.C. §2601, et seq.) prohibits certain practices in connection with the settlement of "federally-related" first lien real estate loans.[9] Among other things, RESPA prohibits kickbacks and unearned fees in connection with federally-related mortgage loans, prohibits requiring title insurance with the purchase of mortgage products, limits requiring advance deposits in escrow accounts, and requires that borrowers receive a Uniform Settlement Statement and informational booklet.

Because there is an express provision of RESPA that provides that no local law which is more protective of the consumer than RESPA itself is will be preempted, the substantive parts of RESPA will not have much preemptive effect. (12 U.S.C. § 2616.) Section 2616 states that only conflict preemption is applicable to void local regulations based on preemption with RESPA:

> This chapter [RESPA] does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The [HUD] Secretary is authorized to determine whether such inconsistencies exist. *The Secretary may not determine that any State law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer.*

(12 U.S.C. §2616 [emphasis added].) The part of RESPA that prohibits kickbacks and unearned fees also contains an express provision on preemption: "No provision of State law or regulation that imposes more stringent limitations . . . shall be construed as being inconsistent with this section." (12 U.S.C. §2607(d)(6).) Therefore, both express and implied or "field" preemption are not at all applicable to RESPA, and conflict preemption is only applicable to void state or local laws that give less protection to consumers.

Thus local governments are free to craft solutions which provide further protection to consumers in the loan settlement process. However, in order for a locality to rely on the RESPA preemption provision, it must first show that its regulation regulates the same type of real estate settlement procedure that RESPA does. In <u>Greenwald v. First Federal Savings & Loan Association of Boston</u> (D. Mass. 1978) 446 F. Supp. 620, 624-25, the court found that a Massachusetts statute requiring interest payments to be paid on certain real estate tax deposits

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[9]A "federally related mortgage loan" is broadly defined to include any loan that is (1) secured by a first lien on residential real property and (2) is made by a lender insured by the federal government, made in connection with HUD, is eligible for purchase by "Fannie Mae" or "Freddie Mac", or is made by a "creditor" within the meaning of TILA who makes at least $1 million in loans a year. (12 U.S.C. §2602(1).) The TILA definition of "creditor" includes anyone who "regularly extends . . . consumer credit . . ." and is the person to whom the first payment on the debt is payable. (15 U.S.C. §1602(f).)

could not rely on the RESPA preemption provision; the court reasoned that this regulation, is not regulating settlement procedures since payment of interest to consumers can continue long after closing. If a local regulation does regulate a real estate settlement procedure, the locality must then show that the regulation is more protective of the consumer than is the corresponding provision of RESPA.

e) The Depository Institutions Deregulation and Monetary Control Act

In 1980 Congress expressly preempted most state usury limits by passing the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA").[10] DIDMCA provides that any provisions of state law that limit interest rates or amounts, discount points, finance charges, or other charges do not apply to loans secured by a first lien on residential property. (12 U.S.C. §1735f-7a(a)(1)[11].) DIDMCA's prohibition on rate caps only applies to "federally related mortgage loans," although that scope encompasses most loans made by institutional lenders.[12] (12 U.S.C. §1735f-7a(a)(1)(C).) Note also that that DIDMCA preemption only applies to limits placed on first liens. (About three-fourths of subprime loans are first liens, however, see HUD/Treasury Report at 31.) DIDMCA also did not preempt limits on prepayment charges, late charges, or "other provisions designed to protect borrowers." (12 CFR §590.3(c).) States are free to opt out of the preemption on limits on points or other finance charges. (12 U.S.C. §1735f-7a(b)(4).) It is unclear whether localities may also opt out.

Other related federal statutes preempt state usury laws for federally-chartered savings and loans (12 U.S.C. §1463(g)), state-chartered banks (12 U.S.C. §1831d(a)), credit unions (12 U.S.C. §1785(g)), and federally-insured mortgages (12 U.S.C §1735f-7), regardless of whether the loan is a first lien.

f) The Alternative Mortgage Transactions Parity Act

The Alternative Mortgage Transactions Parity Act ("AMTPA") expressly preempts all state constitutions, laws, and regulations prohibiting or limiting "alternative mortgage transactions" or "AMTs".[13] (12 U.S.C. § 3803(c).) If a court finds that a local regulation prohibits the ability of a "housing creditor" (which is defined very expansively in 12 U.S.C. §3802(2) to include anyone who makes loans) to enter into an AMT, that local rule is expressly preempted. (12 U.S.C. §3803(c).) Any local regulation must then avoid limiting AMTs.[14]

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[10]DIDMCA allowed states to opt out of the usury preemption within a specified period. While sixteen jurisdictions did opt out, California is not among them.

[11] DIDMCA states that its preemption does not extend to loans that do not meet the consumer protections set forth in regulations. (12 U.S.C. §1735f-7a(c).) Those protections include a prohibition on prepayment penalties, among other things. (12 CFR §590.4(d).) Thus, a state or locality could impose a limit on interest rates or fees for those loans that include a prepayment penalty or otherwise do not include the specified protections in 12 CFR §590.4.

[12]A "federally related mortgage loan" has the same definition as that under RESPA, see above.

[13]Unlike, DIDMCA, AMTPA is not limited to first liens.

[14]California law purports to regulate various alternative mortgage devices, such as variable rate mortgages, adjustable rate mortgages, and renegotiable rate mortgages. (Civil Code §§1916.5-1916.9.) However, in an effort to remove differences between the rules for state lending institutions and federal institutions, California law also authorizes the Secretary of Business, Transportation, and Housing to adopt regulations extending any authority conferred by federal law on federally regulated financial institutions to all lenders making loans secured by

What constitutes an "AMT" is not entirely clear. The statute defines an AMT as:

> …a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home . . .
> (A) in which the interest rate or finance charge may be adjusted or renegotiated;
> (B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or
> (C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation . . .

(12 U.S.C. §3802(1).) While the first two types of AMTs are specifically defined, the last is not. Since the plain language of the statute is not dispositive, the legislative history and intent should be considered. The stated purpose of AMTPA was to eliminate the barriers that stood in the way of early-1980s lenders to make effective mortgage loans in an inflationary fiscal environment. (12 U.S.C. § 3801.) AMTPA's passage reflected a Congressional intention that:

> National banks must have adequate flexibility to meet the needs of first time homebuyers and to develop innovative mortgage instruments, such as graduated equity mortgages, reverse annuity mortgages and other types of new mortgage equity instruments. Such flexibility is essential for national banks to respond to the evolving demands of the mortgage market.

(S. Rep. No. 97-536 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054.)

While no Ninth Circuit court has examined what an AMT is, two other federal circuits have addressed the issue. The First Circuit noted in dicta that examples of AMTs include "adjustable interest rate mortgages, which may permit negative amortization, and graduated payment mortgages, which may temporarily lower the mortgage payment to less than the monthly interest due, resulting in planned negative amortization whereby interest is charged on the deferred interest." (Grunbeck v. Dime Savings Bank of New York,(1st Cir. 1996) 74 F3d 331, 342, citing First Gibraltar Bank v. Morales (5th Cir. 1994) 19 F3d 1032, 1037.) The Fifth Circuit in First Gibraltar noted that "[o]ther planned negative amortization provisions include the reverse annuity mortgage and the credit conversion mortgage, both of which charge interest on deferred interest." (First Gibraltar, 19 F3d at 1037.)

At their broadest, both the First Gibraltar and Grunbeck courts stand for the proposition that AMTs include "all manner of mortgage instruments that do not conform to the traditional fully-amortized, fixed-interest-rate mortgage loan." (Grunbeck, 74 F3d at 342, quoting First Gibraltar, 19 F3d at 1037.) Thus, under the approach followed by these courts, local prohibitions

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residential property, and such regulations take precedent over other statutes limiting variable interest rate loans. (Civil Code §1916.12. See also Fin.Code §7504.)

on mortgages that are not traditional fixed-rate, fixed-term, fully-amortizing loans are expressly preempted by AMTPA.[15]

g) The Home Owners Loan Act

The Home Owners Loan Act of 1933 ("HOLA") (codified at 12 U.S.C. §1461, et seq.) provides for broad regulation of the operations of federally-chartered savings and loan associations by the Federal Home Loan Bank Board from the "cradle to corporate grave." (Greenwald v. First Federal Savings and Loan Assoc., 446 F. Supp. 620, 623.) Because such institutions are so comprehensively regulated by the federal government, state or local regulation of federal savings and loan associations could implicate field preemption. HOLA and its implementing regulations have been held to preempt state limits on due-on-sale clauses (Fidelity Federal Savings & Loan Assoc. v. De la Cuesta (1982) 458 US 141, 73 L.Ed.2d 664), state requirements for payment of interest on escrow accounts (Greenwald), and state limits on prepayment penalties (Pacific Trust Co. v. Fidelity Federal Savings & Loan Assoc. (1986) 184 Cal.App.3rd 817; Myers v. Beverly Hills Federal Savings & Loan (1974) 499 F2d 1145), as they apply to such institutions. Thus, any local regulation of lending practices that covers federally-chartered savings and loan associations must consider whether HOLA or its regulations provide for regulation of the practice by the Federal Home Loan Bank Board to the degree that the federal government is deemed to occupy the field.

h) The Federal Arbitration Act

Congress has preempted state and local governments' ability to prohibit mandatory arbitration agreements by enacting the Federal Arbitration Act ("FAA"). (9 U.S.C. §1, et. seq.) While it has been held that the FAA does not expressly or impliedly preempt local law regarding arbitration agreements (Volt Information Sciences v. Board of Trustees (1989) 489 US 468, 476), the statute has nonetheless been interpreted strictly to preempt all attempts by states and localities to restrict arbitration agreements, since such local control would "stand as an obstacle" to the unambiguous federal goal of promoting the enforceability of arbitration agreements. (Hines v. Davidowitz, 312 US at 67.) The Supreme Court has gone so far as to hold that the FAA actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." (Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 US 52, 55, quoting Southland Corp. v. Keating (1984) 465 US 1, 10.)

i) The Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act ("HMDA") (codified at 12 U.S.C. §2801, et seq.) requires covered lending institutions to report information on the home mortgages they make, including loan purpose, loan amount, census tract, the race, ethnicity, gender, and income of the loan applicant, and the loan purchaser (if the loan is sold). (12 U.S.C. §2803.) (The City relies extensively on HMDA reporting in administering its Linked Banking Ordinance.) Like RESPA,

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[15] A Virginia district court has held that AMPTA and its regulations preempt state limits on prepayment penalties. (National Home Equity Mortgage Assoc. v. Face (ED Va. 1999) 64 F.Supp.2d 584.) It was not clear from that court's opinion how a prepayment penalty constitutes a feature of an AMT.

HMDA provides that it does not exempt institutions from complying with state or local laws with respect to public disclosure "except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency" (12 U.S.C. §2805(a).) The statute further provides that the Federal Reserve may not determine that a local law is inconsistent simply because the law requires the maintenance of records with greater detail or provides greater disclosure than HMDA. It is unlikely that any local regulation on loan reporting would be in direct conflict with HMDA.

j) The Fair Housing Act

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The Fair Housing Act ("FHA") (codified at 42 U.S.C. §3601 et. seq.) was enacted in 1968 to combat discrimination in the housing market.[16] The FHA has a specific provision dealing with its effect on state law, which states:

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

(42 U.S.C. §3615.) By expressly leaving room for states and cities to regulate housing discrimination it is clear that neither express nor implied preemption can be read into the FHA. As for conflict preemption, section 3615 of the FHA clearly sets a low standard. It looks at the rights granted by state and federal law -- if both purport to address the same rights, as long as the local action is not itself a discriminatory housing practice,[17] the FHA will have no preemptive

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[16] Many of the worst abuses of predatory lenders are directed at particular demographic groups of people who are unable, for various reasons, to obtain the same level of service and terms of loans from prime lenders that others can. These targeted groups include minorities, women, and the elderly. (HUD/Treasury Report at 72-73.) Because of redlining among prime lenders, competition for even borrowers of stellar credit in many minority neighborhoods is non-existent, leaving subprime lenders often the only option. The effect has been almost devastating loss of equity in minority neighborhoods.

The FHA can be a powerful litigation tool for the City to fight predatory lending against a particular predatory lender in Oakland, to the extent that the elements of a FHA case can be met against the lender. It has been called the most viable vehicle currently available to fight predatory lending. See Frank Lopez, Using the Fair Housing Act to Combat Predatory Lending, 6 Georgetown Journal on Poverty Law & Policy 73, 91 (1999). The FHA has the advantage of having a broad standing threshold, a low standard of proof, strong remedial potential, and a continuing violations doctrine. See id. at 94. In a much-discussed case, the Department of Justice, HUD, and the FTC used the FHA to investigate and prosecute Delta Funding Corporation, a subprime lender who allegedly targeted African-American women more than white borrowers with similar credit histories. See HUD/Treasury Report at 72-73. The courts have consistently held that cities have legal standing to bring an action under the FHA, since housing discrimination practices burden a city by, among other things, reducing property values, increasing crime, eroding the tax base, and diverting city resources from other local services to fighting discriminatory practices. See Gladstone Realtors v. Bellwood, 441 US 91, 60 LEd.2nd 66, 82-84, and City of Chicago v. Matchmaker Real Estate Sales Center (7th Cir. 1993) 982 F2 1086, 1095.

[17] "Discriminatory Housing Practice" is defined in 42 U.S.C. §3602(f) to mean any act unlawful under four other sections of the FHA. See 42 U.S.C. §3604 (discrimination in the sale or rental of housing and other prohibited

effect. (Toledo Fair Housing Center v. Farmers Ins. (N.D. Ohio 1999) 61 F. Supp. 2d 681, 683.) Since local action against predatory lending would be intended, among other things, to fight discrimination in housing lending, it is difficult to imagine a credible claim that a municipal ordinance targeting predatory lending practices is a "discriminatory housing practice."

B) California law

1) State law preemption principles

The California preemption doctrine can also limit the ability of a locality to exercise its regulatory powers. A local legislative enactment is preempted when it "conflicts" with state law. (Cal. Constitution Art. XI, §7.) A local law "conflicts" with state law when it (1) duplicates state law, (2) contradicts state law, (3) enters into a field of regulation that the state has expressly reserved for itself, or (4) enters into a field of regulation in which the state has implicitly excluded all other regulatory authority. (Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, 397; Cohen v. Board of Supervisors (1985) 40 Cal.3rd 277, 290.)

Preemption is implied when (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern, (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local actions, or (3) the subject matter has been partially covered by state law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. (Morehart v. County of Santa Barbara (1994) 7 Cal.App.4th 725, 728.) A local law that merely imposes greater restrictions or requirements than imposed by state law or that overlaps state law is not by itself in conflict with state law, unless the state has undertaken to occupy the field. (In Re Iverson, 199 C 582, 587.) See 45 Cal.Jur 3d §144 at 232-33.[18] The fact that there are numerous state statutes addressing a subject area does not mean that the state has occupied the field; preemption will be implied only if the state legislative scheme reflects a logically-related and patterned approach to the subject matter. (Galvan v. Superior Court (1969) 70 Cal.2d 851, 861; see League of California Cities, California Municipal Law Handbook at §V.A.3.c.(5).) Adoption of a licensing scheme over the subject matter does not necessarily mean the legislature has occupied the field. See, e.g., City of Oakland v. Superior Court (1996) 45 Cal.App.4th 740 (state ABC licensing of alcoholic beverage establishments does not preempt city regulation of nuisances caused by such establishments). Also, courts have found no field preemption if the local law has a separate and independent purpose from the state law (California Municipal Law Handbook at §V.A.3.c.(5); see also City of Oakland, 45 Cal.App. at 765), or if there is a significant local interest (geographic,

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practices), §3605 (discrimination in residential real estate transactions), §3606 (discrimination in the provision of brokerage services), and §3617 (interference, coercion, or intimidation).

[18]In apparent contradiction to this principle, some authority maintains that "a direct conflict will arise if the local ordinance attempts to prohibit what state law permits." (62 Ops. Atty. Gen. 90, 95 (1979).) See Monterey Oil Co. v. Seal Beach (1953) 120 Cal.App.2d 31, 36. This principle would seem to apply only when state law actually expresses an affirmative intent to allow a particular activity, not in all cases where state law is permissive. See Bravo Vending, 16 Cal.App.4th at 397, (preemption when the local law "penalizes conduct which the state expressly authorizes" (emphasis added)), and Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 902 (preemption when the local law "prohibits what the [state] statute commands, or commands what it prohibits").

economic, or otherwise) that differs from one locality to another that may justify local control. (Galvan, 70 Cal.2d at 863-64; see California Municipal Law Handbook at §V.A.3.c.(4)(c).)

Under the home rule provision of the California Constitution, Article XI, Section 5, state law will not preempt a legislative enactment of a charter city -- even if the enactment conflicts with state law -- if the matter is deemed within the charter city's "municipal affairs," as opposed to a matter of "statewide concern." (California Federal Savings & Loan Assoc. v. City of Los Angeles (1991) 54 Cal.3rd 1, 17.) The terms "municipal affairs" and "statewide concern" are not well-defined by the courts. In determining whether a matter is a municipal affair or of statewide concern, courts will balance on a case-by-case basis the competing local and state interests presented by the local and state enactments. (Id.)[19]

Thus, the preemption question for home rule charter cities is a two step inquiry: (1) Does the local enactment actually "conflict" with (i.e., duplicate, contradict, infringe on) state law? (2) If so, is the matter a "municipal affair" or a matter of "statewide concern?"

2) Preemption in California lending laws

The State of California regulates and licenses various aspects of residential mortgage lending.[20] For instance, the California Residential Mortgage Lending Act ("CRMLA") (codified at Financial Code §50000, et seq.) establishes a licensing scheme under the Department of Corporations for federally-approved "mortgage bankers" involved in making federally-related mortgage loans on one to four unit residential properties. (CRMLA exempts banks, savings and loan associations, and credit unions, among others.) While CRMLA mostly addresses the corporate operations of its licensees, CRMLA does include some restrictions on the mortgage lending practices by its licensees that are apparently intended to protect consumers. Among other things, CRMLA prohibits its licensed lenders from: disbursing loan proceeds except directly to the borrower; failing to disburse loan funds as committed; accepting closing fees not disclosed on the settlement statement; failing to execute discharge of paid-off mortgages; intentionally delaying loans to increase interest and fees; engaging in fraudulent underwriting practices; paying appraisers to influence appraisals; misrepresenting or concealing information; or taking "unconscionable advantage" of a property owner in foreclosure. (Fin. Code §50204.) CRMLA also prohibits certain fees prior to loan closing (Fin. Code §50203), and provides that violation of RESPA constitutes violations of CRMLA (Fin. Code §50505).

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[19]California courts are moving away from the traditional categorical approach to the issue, that is, attempting to sort which classes of governmental activities are "municipal affairs" and which are of "statewide concern," to a more flexible and ad hoc "balancing" approach. As the California Supreme Court described the doctrine in a recent case:

> The phrase 'statewide concern' is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature, one that facially discloses a focus on extramunicipal concerns as the starting point for analysis….As applied to state and charter city enactments in actual conflict, 'municipal affairs' and 'statewide concern' represent Janus-like, ultimate legal conclusions rather than factual descriptions. Their inherent ambiguity masks the difficult but inescapable duty of the court to, in the words of one authoritative commentator, 'allocate the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies'.

(California Federal Savings & Loan Assoc., 54 Cal.3rd at 17.)

[20]Some of the subprime lenders identified by the ACORN study are licensed under the CRMLA as mortgage bankers, others are licensed under CFFL (see below) as finance lenders.

The "California Finance Lenders Law" ("CFFL") (codified at Financial Code §22000, et seq.) also regulates and licenses consumer finance lenders, including lenders involved in mortgage lending (except for those governed by CRMLA and real estate brokers, among others). CFFL licensees are also regulated by the Department of Corporations. CFFL includes some borrower protections including disclosures of interest rates (Fin. Code §§22163 and 22164), limits on credit insurance (but only for loans less than $10,000) (Fin. Code §§22314 and 22315), and a limit on appraisal fees to the actual cost of the appraisal (Fin. Code §22317).

State law also regulate various aspects of the operations of commercial banks and state savings and loan associations.[21] Generally, these regulations do not address the lending practices of the regulated institutions from the consumer prospective.

State statutes also regulate other aspects of residential lending,[22] including some borrower disclosure requirements.[23] Article XV, Section 1, of the California Constitution, the state's usury law, also purports to set limits on interest rates. However, lenders licensed under the CRMLA or the CFLL are exempt (Fin. Code §22022 and §50005), as are banks, savings and loans, credit unions, real estate brokers, among others. Also, as noted above, DIDMCA preempts, as a matter of federal law, state limits on interest rates for most first lien real estate loans.

The state also regulates home improvement contractors, see Business & Professions Code §7150, et seq., including some aspects of home improvement lending. For home improvement loans exceeding $5,000, the lender may make payments only to the borrower directly or a check

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[21]Division 1 of the Financial Code regulates commercial banks, while Division 2 regulates state savings and loan associations.

[22]See Civil Code §§2954 and 2954.1, .2, restrictions on impound accounts for single family owner occupied properties; Civil Code §§2954.4, and 2954.5, limits on late fees for single family owner occupied properties; Civil Code §§2954.6- 2954.7 and 2954.12, rights to terminate and disclosure requirements on mortgage insurance; Civil Code §2954.8, interest on impound accounts; Civil Code §§2954.9 and 2954.10, limits on prepayment charges for owner-occupied properties of four units or fewer. Also, Civil Code §1670.5 generally authorizes a court to refuse to enforce an "unconscionable" contract; the CFFL provides that loan that is unconscionable under the Civil Code violates the CFFL. (Fin. Code §22302.)

Sections 10240 through 10248.3 of the Business and Professions Code impose regulations on loans made or negotiated by brokers, including disclosure requirements, limits on credit insurance, notice on balloon payment loans, disclosures of appraisals, limits on late fees and prepayment charges on certain loans, and limits on installment payment amounts on short term loans. Aside from the fact that these regulations apply only to loans made or negotiated by brokers (B&P Code §10248.3), who are not ordinarily involved in the subprime lending industry, most of the limits apply only to first loans less than $30,000 and junior loans less than $20,000. (B&P Code §10245)

[23] State law requires certain good faith borrower disclosures on purchase loans for residential properties of four units or fewer, including disclosures of negative amortization and balloon payments. (Civil Code §§2956-2967.) For home equity loans, the lender must disclose that the loan is secured by the home and that the borrower risks losing his or her home in the event of default. (Civil Code §2970-2971.) However, the above disclosure requirements are not applicable when the borrower is entitled to disclosure under TILA or RESPA. (Civil Code §2958.) Since the scope of TILA and RESPA is very broad, it is not clear if these provisions would apply to very many mortgage loans. This statute also provides that the disclosure requirements do not "limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transaction," which would seem to dilute any preemptive effect. (Civil Code §2964.) State law also provides for certain limitations and disclosures in connection with various alternative mortgages (adjustable rate, variable rate, renegotiated rate) offered by lenders. (Civil Code §§1916.5 - 1916.10.)

payable jointly to the borrower and contractor, or, if the borrower chooses, into an escrow account. (B&P Code §7159.2(b).) The law specifically requires that a home improvement contract is not enforceable if a loan for the work is a precondition to the contract, or the contractor provides or arranges for the loan, until the borrower obtains the loan and the TILA recision period runs. (B&P Code §7163.) The law also defines as an unfair business practice the home solicitations of seniors for home improvement mortgage loans, where the practice is part of a pattern or practice of abuse. (Civil Code §1770(a)(23).) A mortgage broker or lender is also prohibited from using a contractor to negotiate a home improvement mortgage loan. (Civil Code §1770(b).)

Finally, while the state regulates the operations of companies that issue credit insurance (Insur. Code §779.1, et. seq., (loans up to 10 years only)), mortgage insurance (Insur. Code §12420, et. seq.), and mortgage guaranty insurance (Insur. Code §12640.01, et. seq.), these regulations place very few restrictions on such insurance policies from the consumer prospective. The Civil Code also places certain limitations on residential mortgage insurance, including provisions regarding the right of the borrower to cancel the insurance when the loan balance to value ratio decreases to 75%. (Civil Code §§2954.6, 2954.7, and 2954.12.) California law does not prohibit single-premium credit life or disability insurance.[24]

We are not aware of any California statute, including the CRMLA or the CFLL, that expressly preempts local regulation of residential lending practices, either in the context of specific lending practices or across the field of mortgage lending. Nor are we aware of any statutory language that states or implies that regulation of lending practices is a matter of "statewide concern."

Neither do we see any indication that the state legislature intended by implication to preempt local regulation of mortgage lending practices or to occupy the field to the exclusion of local control. While there are many state laws dealing with the subject of residential mortgage lending, it is not apparent from our review of state law that the state has taken a logically-related or patterned approach to regulating residential lending practices as whole. Nor do we see any comprehensive effort at the state level to regulate predatory lending practices specifically. Despite the state's heavy regulation of lending institutions through the Department of Corporations, its regulation of the residential mortgage lending practices of those institutions does not seem to be comprehensive. The purposes of the state regulatory scheme, though in part intended to protect consumers, se,e e.g., CFLL at §22001 (one of six enumerated purposes of the law is to "protect borrowers against unfair practices by some lenders…"), seem to center at least as much on ensuring the sound operations of the regulated lending institutions. Nor do we see any special "paramount state concern" with the field of mortgage lending that would suggest the area could not tolerate further local control, or any indication that the field of mortgage lending is such that "the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality."

Even if implied preemption were found, we see no expression or implication by the state legislature that the field of residential mortgage lending is solely a matter of "statewide concern,"

[24] State law prohibits the purchasing of credit life or disability insurance for broker originated loans of less than $30,000, for first loans, and $20,000, for junior loans. (B&P Code §10241.1.)

versus a "municipal affair." As documented in the ACORN study, Stripping the Wealth, An Analysis of Predatory Lending in Oakland, many of the problems associated with predatory lending are peculiar to Oakland and other urban communities with significant levels of homeownership (and home equity) among its low income and minority residents. Oakland has a unique local concern with the problem, a concern that might not be shared (at least to the same degree) statewide. Also, there is some evidence that predatory lenders tend to target their efforts at a neighborhood level. (See HUD/Treasury Report at 79-80.) All these factors would support the contention that predatory lending practices can be a municipal affair.

However, Council should be aware that the law of state preemption and home rule is evolving, and there is no assurance that a court would not find preemption in this area implied from the state regulatory scheme.[25] To our knowledge there is no case law one way or the other addressing specifically whether local regulation of residential lending practices is preempted by California law or whether regulation of such practices is a matter of statewide concern. Since the mortgage lending industry, including lending in the subprime market, is dominated by institutions with a statewide or national presence who are operating in many localities, a court may be reluctant to allow each locality in California to set its own standards for loan terms and lending practices.

C) Proposed anti-predatory lending policies for Oakland

The proposals put forward by City staff and ACORN to deal with the problem of predatory lending in Oakland fall into three general categories: (1) educational policies, i.e., the City informing and counseling borrowers about predatory lending practices and their rights under the law; (2) proprietary policies, i.e., the City adopting policies not to do business with predatory lenders or parties associated with predatory lenders; and (3) regulatory policies, i.e., the City using its police powers to restrict certain predatory lending practices in Oakland.[26] Each one of these areas implicate different legal concerns as addressed below.[27]

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[25]As courts have explained, there is no precise test for implied state preemption, and so courts must rely on broad principles and apply those principles on a case by case basis to the issue at hand. (Gluck v. Cnty. of Los Angeles (1979) 93 Cal.App.3d 121, 131.)

[26]Some proposals call for the City to seek reforms through advocating state and federal legislation through the City's lobbyists. There are of course no legal restrictions on pursuing legislative changes. This could include advocating for federal regulations over areas, such as interest rates, in which the City is prohibited from regulating. To the extent that the legislative changes would relax some of the preemption rules in federal law, as has been proposed, see 35 Harvard Civil Rights-Civil Liberties Law Review 225, 240, those changes would facilitate greater City involvement in the field. Since one important source of capital for the subprime lending market are pension funds, the City could use its influence in the PERS system to ensure that PERS is not investing in mortgages held by predatory lenders.

The City can, of course, also combat predatory lending by expanding the purchase and rehabilitation mortgage assistance programs it offers to borrowers, such as first-time homebuyers silent second programs, downpayment assistance programs, and homeowner rehabilitation loans.

[27]The HUD/Treasury Report provides a good frame of reference in considering solutions to the predatory lending problem. The Report recommends actions in the following areas: (1) increasing the transparency of mortgage transactions, while mounting new efforts to educate borrowers, can compensate for the information asymmetries that may disadvantage less informed borrowers; (2) strengthening enforcement of existing law and prohibiting certain practices that injure consumers can help to curb the deceptive, fraudulent and abusive practices that lead borrowers into taking these loans; (3) identifying and restricting certain terms and conditions that are associated with many of the more abusive transactions in this market can reduce opportunities for predatory lenders to exploit some

1) Educational policies

Many of the problems associated with predatory lending can be traced to the lack of information many borrowers have about lending in general, the products that are being marketed to them by unscrupulous lenders, brokers, and contractors, and their rights under law. A number of the proposals put forward by staff and ACORN center around increased education and counseling by the City and nonprofit organizations to help borrowers recognize and avoid predatory lending practices, including a public relations campaign against such lenders. There are no legal constraints on the authority of the City to undertake or support these education efforts. (Educational approaches that impose mandatory lender counseling or disclosure obligations are discussed in the context of regulatory policies below.)

2) Proprietary policies

ACORN has proposed that the City (and, presumably, the Redevelopment Agency) stop "doing business" with predatory lenders. This would include not participating in development projects in which predatory lenders participate, or being involved in financial transactions or deposits with such institutions or their parent entities.

A policy of "not doing business" with predatory lenders can take a number of forms. CEDA staff have suggested amending the City's Linked Banking Ordinance (which prohibits the City from using a bank as a depository or for other banking services unless the bank has met its defined community lending goals) to require a certification from banks that neither they nor their subsidiaries or affiliates engage in predatory lending practices.[28] The HUD/Treasury Task Force has proposed that lenders not get CRA credit for the origination or purchase of predatory loans, and that the CRA should possibly penalize lenders for such practices; the City could provide under the Linked Banking Ordinance that a bank not get credit toward meeting its community lending goals for loans they make or purchase that have defined predatory terms. Also, the City could require banks that seek City business to sign a "best practices" agreement with the City committing the bank not to engage in predatory practices. (See 35 Harvard C.R-C.L. L. Rev. 225, 253-54.)

Also, the City could adopt a policy not to subordinate its first-time homebuyer and other mortgage assistance loans (such as loans made under the Mortgage Assistance Program or the Home Maintenance and Improvement Program) to predatory first loans (either when the City loan is originated, or when the first loan is refinanced).

Finally, the City and the Redevelopment Agency could adopt a policy that it will not participate in any development projects (such as giving financial assistance or disposing of City/Agency real property) in which a predatory lender, or a parent company of such lender, also

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borrowers' lack of knowledge; and (4) expanding borrowers' access to the prime market, increasing information about the mortgage market and enforcing private market discipline to curb abusive practices can help to correct for the market failures that allow predatory lending to persist.

[28]The City of Chicago has apparently adopted a similar policy.

participates.[29]

In the past, the City has taken the position that it had greater latitude to take action as a "market participant" than it might have as a regulator under its police powers. Examples in which the City has acted using its market power to influence policy, in addition to the Linked Banking Ordinance, include the Living Wage Ordinance, the Local Construction Employment Program, the Local/Small Local Business Enterprise Contracting Program, and the Redevelopment Agency's prevailing wage policy. Under this rationale, then, the City could refuse to do business with banks that have lending practices that the City deems predatory, including otherwise legal practices such as offering loans with high interest rates or negative amortization, even if the City was preempted from regulating the practice.

However, the U.S. Supreme Court, in the recent case striking down Massachusetts' purchasing policy barring business with Burma, has cast doubt on the extent to which the City can pursue policies through its market power that it was otherwise preempted to pursue through regulation. (Crosby v. National Foreign Trade Council (2000) 530 US _____, 9, fn. 7.) See also Wisconsin Depart. of Industry v. Gould (1986) 475 US 282, 287 (state was preempted under federal labor law from debarring contractors with repeat violations of National Labor Relations Act). However, those cases involved a state's use of its purchasing policies, not investment policies, and implicated different statutory schemes in areas (foreign affairs in the case of Crosby, and labor relations in the case of Gould) in which federal law has generally been accepted by the courts as overriding. It is not clear that a court would apply the same principle to the City's investment or development policies, or extend these holdings to cover the preemptive effects of federal lending laws.

3) Regulatory policies

Oakland is a home rule charter city. The Oakland Charter provides that the City has the right and power to make and enforce all laws and regulations with respect to municipal affairs pursuant to home rule. (Charter Section 106.) Under the home rule provisions of the California Constitution, a charter city which has accepted home rule powers has the power to make and enforce all ordinances and regulations with respect to municipal affairs. (Cal. Constitution, Article XI, Section 5.) The California Constitution also authorizes a city to exercise its "police powers" to make and enforce within its limits all local regulations not in conflict with general laws. (Cal. Constitution, Article XI, Section 7.) A city's "police power" is its right to adopt regulations designed to promote the health, morals, safety, or general welfare of its residents, including the good order, well being, and general prosperity of the community at large. (Amusing Sandwich, Inc. v. City of Palm Springs (1985) 165 Cal.App3rd 1116, 1126.) The police power includes the power to regulate business practices in the city. "A city may, in the exercise of its police powers relative to the health, safety, comfort, morals, and welfare of its inhabitants, enact ordinances regulating even lawful occupations or business enterprises conducted within its limits, if the relation of the business to the public interest is substantial, and

[29]Council should be aware that such a broad policy could significantly restrict the ability of the City/Agency to participate in many projects, since most projects require private bank financing and many of the large banks in California own subsidiaries that engage in subprime lending, some of which have been accused of predatory practices by ACORN and others.

if the regulation is reasonable and not arbitrary or discriminatory, has a relation to the ends for which the police power exists, and is reasonably necessary to the protection of life, health and property." (45 Cal. Jur. 3d §156 at 251.)

Therefore, the City has the basic authority under home rule to adopt anti-predatory lending policies to protect the general prosperity and welfare of Oakland residents, to the extent not preempted by state or federal law. It is critical that any anti-predatory lending ordinance include specific findings as to (1) the harm that each targeted predatory lending practice causes to Oakland residents and the City, and (2) the means by which the particular policy will ameliorate that harm.[30] The finding should include reference to facts and information supporting the finding, including facts and information specific to Oakland. The ACORN Study provides important Oakland-specific information in this area. It may be advisable for the Council or the Community Reinvestment Commission to hold hearings to solicit testimony from borrowers and community advocates on predatory lending experiences in Oakland. Any legislation should include a finding that addressing predatory lending practices is a matter of local interest and a municipal affair with particular urgency for Oakland, given socioeconomic conditions in the City which give rise to predatory lending here.[31]

We should note that we are not aware of any locality that has attempted to regulate mortgage lending practices through its police powers. Nor are we aware of any locality that has attempted to regulate substantive mortgage loan terms. Oakland would be at the forefront if it adopts any of these regulatory measures.

Below we analyze the legality of various regulatory measures proposed to combat predatory lending practices.

a) Requiring lenders to report information on mortgage lending in Oakland

ACORN has proposed requiring lenders to report information on mortgage loans they make in Oakland, including the location of loans, and the average interest rates and fees on loans by census tract and borrower characteristics, as well as foreclosure information. On the federal level, the HUD/Treasury Task Force recommends that HMDA reporting requirements be expanded to include more information on loans made (such as APR, finance charges, and loan-to-value ratios) and to cover more lenders. (HUD/Treasury Report at 73, 102-04.[32])

[30]For instance, it has been well-documented that the practice of "asset-based lending," where a lender makes a loan it knows is unlikely to be repaid given the borrower's income, leads to foreclosures, which in turn leads to displacement, loss of wealth, vacancies, blight, neighborhood instability, and other harms that can prevent a neighborhood from realizing its community development goals. "Foreclosed homes are often a primary source of neighborhood instability in terms of depressed property values and increased crime." HUD/Treasury Report at 51.

[31] The City's "deemed-approved" program regulating alcoholic beverage establishments was upheld against a preemption challenge in part because the court concluded that "[t]he legislative history of the ordinance shows that there are substantial geographic, economic or other distinctions that persuade us of the need for local control." (City of Oakland, 45 Cal.App.4th at 767.)

[32]HMDA excludes nondepository lenders if their assets are $10 million or less and they originate fewer than 100 mortgages in a year, or if less than 10% of their loan originations the past year were for home purchase loans. This 10% rule excludes many of the largest and fastest growing subprime lenders.

We conclude that the City may require lenders to report information on the mortgage loans they make in Oakland, including information not required by HMDA, as long as the City can justify the requirement based on its police powers and the need to collect this information to better monitor and regulate predatory lending practices. HMDA was expressly intended not to preempt localities from requiring lenders to report additional information on lending practices in their jurisdictions. The City may also expand the universe of lenders required to report their lending activities.

b) Requiring additional lender disclosures

The HUD/Treasury Task Force recommends that TILA and RESPA disclosure requirements be reformed and expanded by Congress. (HUD/Treasury Report at 66-69.) ACORN proposes specifically that lenders be required to give borrowers a copy of their appraisal as part of loan settlement.[33] Also, since there is a short statute of limitations and a low ceilings on damages under TILA, the Task Force recommends that penalties for noncompliance be expanded.

We conclude that the City is free to impose requirements for additional disclosures on mortgage loans made in Oakland (unless the terms used in such disclosures are inconsistent with the disclosure terms as defined by TILA and its regulations), since neither TILA nor RESPA prohibit (and, on the contrary, seem to invite) further local regulation in the field of borrower disclosures and settlement practices. We see no evidence that the California legislature intended to preempt local regulations in the field of lender disclosures. While TILA has express private causes of action, the City could also augment the enforcement of the existing disclosure requirements by making increased damages available to aggrieved plaintiffs. As noted above, courts in other jurisdictions have allowed such augmentation.

c) Extending the loan recision period

The City could extend the loan recision period beyond the TILA three-day period. The City could also impose the recision period on home purchase loans (now currently exempt under TILA). Again, since the standard for preemption in TILA is so high, as long as local rules are structured so that they do not actually conflict with the specific and particular disclosures required by federal law, the City will be free to supplement TILA's recision rules.

d) Requiring reporting of good credit

Proposals have been made to require lenders to report to credit bureaus all payment history on mortgages, including positive payment histories. (See, e.g., the HUD/Treasury Report at 84 and HR 4250/S 2415.) This would prevent predatory lenders from locking their customers into high-cost loans by deliberately failing to report the good credit practices of borrowers.

The City could require lenders to report to credit agencies the good credit practices of mortgage borrowers in Oakland. Such a requirement would not be preempted by either TILA or

[33]For small mortgage loans made by brokers, California law requires that the lender furnish a copy of the appraisal to the borrower at closing. (B&P Code §10241.3.)

FCRA. Although the state also regulates credit reporting, see Civil Code §1785.1, et seq., nothing in that law indicates an intent to preempt additional local requirements in the field.

e) Requiring borrower counseling on high cost loans

Many advocates call for more borrower counseling on high cost loans. A number of proposals require lenders to refer prospective borrowers on high cost loans to independent certified home loan counselors.[34] (An alternative approach to required counseling is to encourage voluntary counseling by expanding the counseling services provided by or funded by the City, see above.)

We see nothing in HOEPA or other federal laws that would prevent the City from requiring that borrowers receive, be offered, or be informed of independent home loan counseling on high cost loans.

f) Limiting interest rates

Predatory lending can include charging an exorbitant interest rate that results in monthly payments that are difficult or impossible for the borrower to make. However, federal law under DIDMCA and other statutes expressly preempts the ability of states and localities to limit interest rates on most first liens and on loans made by chartered institutions. Therefore, the City could not limit interest rates on such loans. Nothing would prevent the City from limiting interest rates on junior mortgage loans made by nonchartered institutions, however. We see no indication that California's usury laws intended to preempt more restrictive local regulation in this field.

g) Limiting points or fees

Predatory lending can include charging loan points or fees, often financed, that results in monthly payments that are difficult or impossible for the borrower to make. Once again, federal law under the DIDMCA expressly preempts the ability of states (and localities) to limit points and fees on most first liens. Therefore, the City could not limit points or fees on such loans. Nothing would prevent the City from limiting points or fees on junior mortgage loans, however.

h) Limiting prepayment penalties

High prepayment fees can prevent a subprime borrower from refinancing with a prime lender once their credit status improves. Proposals have been made to prohibit prepayment

[34]Some proposals actually require that borrowers receive counseling at no cost before high costs loans are made, others simply require lenders to give notice that counseling is available. The HUD/Treasury Task Force recommends that lenders be required to give borrowers a list of certified home counselors and recommend pre-transaction counseling for all HOEPA ultra-high cost loans. (HUD/Treasury Report at 62.) ACORN proposes requiring counseling on loans at a lower threshold than HOEPA (essentially the lower HOEPA threshold advocated by the HUD/Treasury Task Force). SB 2128 would have required free independent advice and counseling to borrowers for certain high-cost loans. The North Carolina statute requires borrower counseling for every high cost loan (NC Gen. Stat. §24-1.1 (1999)), as would the Model Statute, see Guide to Model Statute at 8. See also proposed federal legislation, HR 4250/S 2415, which would require lenders to inform borrowers of the availability of counseling.

penalties, to limit the amount of such charges, to limit the period in which they are assessed, or to expand the circumstances allowing prepayment without penalty. (HUD/Treasury Report at 95; Guide to Model Statute at 5 (prohibit charges); HR 4250/S 2415 (limit charges).) Another option is to require creditors to offer a no-prepayment penalty option. (HUD/Treasury Report.)

California law currently does limit prepayment penalties for residential properties of four units or less. Prepayment charges are allowed only on prepayments within five years of mortgage origination. (Civil Code §2954.9(b).) Prepayment charges are not allowed for any prepayments amounting to 20% or less of the loan principal during any given year, and any prepayment charges on prepayments exceeding this amount are limited to six months advance interest. (Id.) Prepayment charges are not allowed when the loan is accelerated upon sale of the property pursuant to a due on sale clause. (Civil Code §2954.10.) There are similar restrictions for loans originated by brokers. (B&P Code §10242.6.)

Even though state law limits prepayment charges, the City is probably not preempted from enacting more restrictive limitations. We see nothing in these statutes that suggests the state legislature intended to occupy the field of prepayment charges to the exclusion of local control, or considers the subject of prepayment charges to be a matter of "statewide concern." (The express federal preemption in DIDMCA of state limits on loan fees does not apply to prepayment charges, as noted above.) However, as noted above, the City is preempted as a matter of federal law from limiting prepayment charges imposed by federally-chartered savings and loan associations.[35]

i) Prohibiting single-premium credit insurance

The HUD/Treasury Report suggests prohibiting the sale of single-premium credit insurance, where the premium is collected upfront at closing, because such insurance is usually a bad deal for consumers and is simply a way for lenders to pack additional costs into loans. (HUD/Treasury Report at 89-91.) See also the North Carolina statute, HR 4250/S 2415, and the Model Statute (see Guide to Model Statute at 5-6), all of which seek to ban upfront single premium credit insurance.

While, as noted above, the state does regulate certain aspects of credit and mortgage insurance, we do not see any indication that the state intended to occupy the field. Therefore, it appears that the City could prohibit or limit the sale of single-premium credit insurance on mortgage loans in Oakland.

j) Prohibiting or limiting negative amortization loans

A number of proposals call for a ban on mortgage loans that feature negative amortization, i.e. loans where scheduled payments are insufficient to cover interest due, thus

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[35]Council should be aware that a Virginia district court has held that AMPTA and its regulations preempt state limits on prepayment penalties for all covered creditors. (National Home Equity Mortgage Assoc. v. Face (ED Va. 1999) 64 F.Supp.2d 584.)

causing the outstanding principal balance to increase over time.[36] However, it is likely that a local prohibition on negative amortization loans will not survive AMTPA preemption analysis. To reiterate, AMPTA expressly prohibits local control of "alternative mortgage transactions" or "AMTs." While there is no Ninth Circuit authority on the definition of an AMT, it is likely that the expansive definition first laid down by the Fifth Circuit in First Gibraltar discussed above would be followed.[37] Therefore, we conclude that the City is expressly preempted by federal law from limiting or prohibiting negative amortization loans.

k) Prohibiting or limiting balloon payment loans

A number of proposals would limit or prohibit balloon payment loans.[38] However, it is likely that a local prohibition or limitation on balloon payment mortgages will not survive AMTPA preemption analysis, although this is less certain than negative amortization. As noted above, case law from other circuits broadly interpret what an AMT is under AMPTA, and almost certainly would encompass balloon payment loans. (Again, note that there is no Ninth Circuit authority on the issue.) Additionally, the class of AMT loans specifically described in §3803(B) of AMPTA (i.e., loans which "implicitly permit rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule") seems to describe the essential feature of a balloon payment loan. We conclude that the City cannot prohibit or limit balloon payments in connection with mortgage loans, since such loans would likely be found to be AMTs within the meaning of the AMTPA, and therefore the City's authority to prohibit them is expressly preempted by federal law.

l) Limiting loans based on ability to repay or home value

In order to combat "asset based" lending, in which a lender makes a loan that it knows is unlikely to be repaid given the borrower's income and non-housing assets, proposals have been made to limit loan amounts so that loan payments do not exceed a certain maximum percentage of borrower income and/or non-housing assets, or so that the loan does not exceed certain maximum loan-to-value ("LTV") ratios[39] A variation of this would be to require borrower

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[36] Both the HUD/Treasury Task Force and ACORN propose that mortgage loans that feature negative amortization be prohibited. (HUD/Treasury Report at 92.) See also the Guide to the Model Statute at 7.

[37] Curiously, the proposed California anti-predatory-lending bill, SB 2128 originally contained a provision that purported to prohibit negative amortization. See SB 2128 at § 2969.3 (version of May 18, 2000). SB 2128 would have applied to only "restricted" loans, which was defined more broadly than a HOEPA loan- - the California version was to be triggered at 6% over Treasury securities, but HOEPA is triggered at 10% over. While it arguably merely supplemented existing federal law for HOEPA loans and to that extent would not be preempted, for loans with rates between 6% and 10% over comparable Treasury securities, this provision of SB 2128 would probably have been found to restrict AMTs within the protection of the AMTPA, and would therefore be preempted.

[38] ACORN proposes that mortgage loans that feature balloon payments be prohibited, at least in the context of high-cost-loans. The HUD/Treasury Task Force proposes limiting the timing of balloon payments to 15 years or longer. (HUD/Treasury Report at 98.) See also the Guide to the Model Statute at 7 and HR 4250/S 2415.

[39] HOEPA already prohibits creditors from engaging in a pattern or practice of making ultra-high cost loans without regard to the borrower's ability to repay. The original version of SB 2128 would have prohibited home loans if, considering the borrower's current and expected income, current debt obligations, and employment, the borrower will be unable to make the loan payments. See SB 2128, proposed Civil Code § 2969.3 (version of May 18, 2000). The North Carolina law prohibits high-cost loans if the borrower's debt-to-income ratio exceeds 50%, as would the

counseling if loans exceed a certain percentage of income or LTV.

We conclude that the City is not preempted by federal or state law from imposing limits on loans based on LTV and/or a borrower's ability to repay. Any such limit would have to be crafted carefully to avoid DIDMCA's preemption of interest rate and fee caps and AMPTA's preemption of limits on alternative mortgage transactions, however.

m) Limiting loan refinancing only to refinancings that benefit the borrower

Various proposals have been advanced to prevent "flipping" of loans, i.e. frequent refinancings of a loan that provide little or no benefit to the borrower, but cost the borrower prepayment fees and additional origination points and fees and may lead to the loss of equity. [40]

The City is not preempted by federal or state law from imposing limits on loan refinancing to prevent "flipping," such as those proposed under SB 1228. Any such limit would have to be crafted carefully to avoid DIDMCA's preemption of interest rate and fee caps and AMPTA's preemption of limits on alternative mortgage transactions, however.

n) Regulating high cost loans

The HUD/Treasury Task Force recommends that the HOEPA threshold for an "ultra-high cost loan" be reduced from the current 10% above Treasury securities, to 6% for first liens and 8% for second liens. (HUD/Treasury Report at 86.) The Task Force also recommends extending HOEPA protections to purchase loans and home equity lines of credit. (Id.)

Nothing would seem to prevent the City, as a matter of local law, from extending HOEPA protections for loans at a lower threshold (except for those HOEPA protections in which other federal laws preempt local control, such as limits on negative amortization), or extend HOEPA protections to purchase loans and home equity lines of credit. HOEPA was clearly intended to set minimum standards, not restrict greater local restrictions. Also, as long as the local regulation is not so inconsistent with the federal scheme regulating ultra-high-cost loans as to invoke the doctrine of "conflict" preemption, the City is free to impose further regulation on ultra-high cost loans consistent with its police power.[41]

Model Statute, see Guide to Model Statute at 8. HR 4250/S 2415 would require a lender on a high cost loan to make a determination that the borrower will be able to make scheduled payments.

Note that some commentators have cautioned that across-the-board limits on LTV ratios could shut some borrowers out of home loans. Some affordable housing programs feature high LTV ratios in order to assist first time homebuyers.

[40] The HUD/Treasury Task Force recommends, for HOEPA ultra-high cost loans, that refinancings within 18 months of loan origination be banned unless the new loan provides a tangible net benefit to the borrower. (HUD/Treasury Report at 74-75.) SB 2128, in its original form, would have more broadly prohibited home loan refinancings if the new loan does not provide a "benefit" to the borrower. See also the Guide to the Model Statute at 6, 8 (prohibit refinancing unless refinancing provides a "tangible net benefit" to the borrower, and prohibit fees on refinancing high cost loan with a new high cost loan.)

[41] It is highly unlikely that an ordinance intended to regulate the exact same ultra-high-cost loans as HOEPA would "stand as an obstacle" to the accomplishment of HOEPA, absent a truly spectacular level of intrusiveness. See Hines v. Davidowitz, 312 US at 66-67. However, it is difficult to see *why* the City would need to regulate ultra-high-cost loans further - HOEPA's problem is not that it is not powerful enough, but that it is not applicable to

o) Limiting or prohibiting mandatory arbitration clauses

The HUD/Treasury Task Force recommends that mandatory arbitration clauses for certain loans be prohibited as a matter of federal law, because arbitration procedures often foreclose many significant legal remedies for wronged lenders, can be more expensive (because they often lack contingent fee procedures) and difficult, and are generally less advantageous for consumers than dispute resolution in the courts. (HUD/Treasury Report at 99.[42]) However, since the FAA has been interpreted strictly, to preempt all attempts by states and localities to restrict arbitration agreements, we conclude that the City is expressly preempted by federal law from prohibiting mandatory arbitration clauses in mortgage loans.

p) Limiting direct loan payments to contractors

ACORN has proposed a prohibition on direct loan payments to contractors, to prevent payment for work improperly performed or not performed at all. However, it appears that state law already prohibits the practice for most home improvement loans. Section 7159.2(b) of the Business & Professions Code provides that, for home improvement loans exceeding $5,000, the lender may make payments only to the borrower directly or by a check payable jointly to the borrower and contractor, or, if the borrower chooses, into an escrow account. There are expanded penalties for violation of this requirement for seniors or disabled, or for violations that are intentional or exhibit a pattern or practice of violations. Also, for those small numbers of ultra-high cost loans, HOEPA bans direct payments to contractors by lenders as well, requiring either checks payable jointly to the borrower and the contractor, or payments through an escrow.

q) Prohibiting kickbacks on junior home equity loans

Since RESPA's prohibition on kickbacks only covers federally-related first lien mortgages, it does not cover situations in which junior liens are made or refinanced in connection with home improvement scams, in which an unscrupulous contractor colludes with a lender to induce a borrower to make unneeded improvements and receives a payment in return. The City could extend RESPA's prohibition on kickbacks to junior liens and non-federally related loans. RESPA expressly does not preempt such greater restrictions.

r) Establishing private rights of action under federal lending laws

Many of the actions being considered to fight predatory lending would allow private rights of action for the violation of existing federal lending law where such causes of action do not now exist. (A "private right of action" is the right of an aggrieved private citizen, not just a regulatory agency, to sue and seek relief for violation of a statute.) For instance, there is currently no private right of action to enforce certain parts of RESPA, though the HUD/Treasury Task Force believes such a private right of action, along with an expansion of enforcement authority to state agencies, would help to expand the enforcement of current federal law.

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enough loans. See HUD/Treasury Report at 84-89. So conflict with the substantive provisions of HOEPA is extraordinarily unlikely.

[42] See also Guide to the Model Statute at 7-8 and HR 4250/S 2415.

(HUD/Treasury Report at 71.) Many of the existing federal laws would provide increased deterrence against predatory lending practices if more fully enforced as written.

In the absence of an express preemption provision in a federal law, a state or its political subdivisions may create private causes of action for that federal law's enforcement, unless such a state cause of action is inconsistent with the federal requirements. (Washington Mutual Bank v. Superior Court (1999) 75 CA4 773, 787.) In Washington Mutual, the court held that RESPA and regulations promulgated thereunder did not preempt California law providing for a private cause of action. The court noted that RESPA contained a provision expressly denying preemption, but it did not rely on that provision. (Id. at 780.) Rather, it relied on the fact that Congress failed to affirmatively preempt state remedies, and so, in this area of concurrent federal and state power, the state action was legitimate.

Therefore, the City may create a private cause of action under the Oakland Municipal Code for the violation of a federal lending law that does not have an express private cause of action or express preemption language, so long as such a private cause of action is not so "inconsistent" with the federal law that it invokes the doctrine of conflict preemption. The City could create a cause of action for damages, specific performance, and attorneys fees for violations of TILA, HOEPA, and RESPA, giving borrowers who are harmed by such violations more opportunities to seek enforcement.

Respectfully submitted,

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