Testimony of Thomas J. Miller

Attorney General of Iowa

Before the House Committee on Financial Services

June 13, 2007

"Improving Federal Consumer Protection in Financial Services"

I. Introduction

CHAIRMAN FRANK AND MEMBERS OF THE COMMITTEE:

Thank you very much for inviting me to testify before you today. The issues you are addressing in today's hearing are vital to American consumers. The most expensive purchases consumers ever make are their homes and vehicles. The majority of consumers finance these purchases and today many consumers finance with federally-chartered lenders. It is essential that government possess and exercise the authority to act against all lenders who engage in deceptive or unfair practices in connection with consumer loans or the other financial products or services offered by lenders.

The Supreme Court has provided guidance in its ruling in *Watters v. Wachovia* concerning whether state agencies may engage in visitation oversight of national banks and their operating subsidiaries. The answer was in the negative. However, the Court left open a number of questions regarding the degree to which national banks and their operating subsidiaries remain subject to state enforcement for violations of state consumer protection laws. Regardless of the ultimate answers to those questions, the need for federal-state cooperation in the context of ensuring national banks and their subsidiaries treat consumers fairly and are held responsible for violations of state and federal consumer protection laws in this consumer driven economy could never be greater.

In your invitation, you asked that we highlight our thoughts on the role the states can continue to play in working with federal regulators to provide additional resources and expertise in monitoring and enforcement in the consumer protection realm. In my view, we have a great opportunity to work together with the OCC, the OTS and other federal agencies to ensure

American consumers have their complaints heard and addressed, and that nationally-regulated financial institutions comply with the consumer protection laws.

I intend on addressing six keys issues in my testimony:

1) Handling consumer complaints;
2) Establishing a joint federal/state task force to address predatory subprime lending practices;
3) Establishing a continuing federal/state working relationship to address all other issues;
4) Being more aggressive about rooting out bad conduct by federally-regulated financial institutions;
5) Holding national banks accountable when they knowingly facilitate consumer fraud; and,
6) Enacting federal predatory lending legislation consistent with other federal laws that authorize enforcement by state officials.

II. The offices of state attorneys general are a tremendous resource for resolving individual consumer complaints; both national banks and consumers would benefit from our assistance

Taking and handling consumer complaints is a primary function of the offices of state attorneys general. Collectively, we have almost 700 full time investigators and attorneys enforcing compliance with state and some federal consumer laws. Conversely, the OCC has 17 times fewer personnel to look into consumer complaints.[1] While the states have been taking complaints and enforcing consumer protection laws for decades, it is only within the past seven years that the OCC has determined it can enforce the deception and unfair practices standards of the FTC Act against national banks.[2]

The states, the District of Columbia, and the territories strongly publicize their complaint-handling services to consumers and make those services available locally. Due, in part, to this

---

[1] Committee on Financial Services, 108th Cong., *Views and Estimates on Matters to Be Set Forth in the Concurrent Rs. On the Budget for Fiscal Year 2005,* at 16 (Comm. Print 2004), available at: http://financialservices.house.gov/media/pdf/FY2005%20Views_Final.pdf.

[2] Julie L. Wiliams and Michael S. Bylsma, "On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks," 58 Bus. Lawyer 1243, 1244 (May, 2003).

publicity, I believe consumers are many times more likely to turn to their state Attorney General for assistance with a consumer complaint than they are any federal agency. I think this is particularly true for federally-chartered financial entities that are regulated by various agencies with which most citizens are unfamiliar. In addition, because of our greater collective resources and experience handling consumer complaints, we believe we can handle consumer complaints more quickly and efficiently than can the OCC and other federal financial regulators.

This increased visibility, efficiency and speed benefits the financial institutions which are the subject of the complaints as much as it benefits consumers. If a complaint can be handled and resolved more quickly and efficiently, it lessens the likelihood of expensive litigation or the necessity of pursuing a foreclosure in the context of mortgage lending.

Policy reasons also support permitting states to handle consumer complaints against federally-chartered institutions. The States' interests are particularly acute when it comes to mortgage lending complaints. The borrowers reside in our neighborhoods and cities. The effects of predatory loans are inherently local, with local and state governments bearing the brunt of the costs when neighborhoods fail. Simply put, the states have a greater need to expedite complaint-handling of mortgage lending complaints – and this benefits lenders as much as it does borrowers.

Other federal agencies which regulate industries where states have been preempted from bringing enforcement action provide a possible model of how the OCC and other financial regulators can work with us to assist consumers. For example, the states are preempted under the FAA Act from pursuing lawsuits against airlines for deceptive advertising, but the FAA has never instructed airlines to refuse to work with us or respond to consumer complaints. Indeed,

the airlines have traditionally worked with us to deal with individual complaints, despite the clear preemption. Without agreeing that the *Watters* decision clearly preempts states from enforcing consumer protection laws against national banks, I would like to see the states develop a similar relationship with the federal agencies that oversee federally-chartered financial institutions. For example, the OCC should encourage national banks to respond to our offices when complaints are filed and work with us to resolve those complaints when it appears the OCC's involvement would be beneficial to resolving the matter. The OCC should not tell banks to ignore our offices or be non-responsive. All parties involved should favor fair and efficient resolution of complaints.

III. The OCC and other federal financial regulators should work with the states to establish a joint federal/state task force to continue pursuing predatory subprime lending practices

Everyone has a strong interest in ensuring that lenders, regardless of their charter, avoid engaging in predatory lending practices. The States' settlements with Household and Ameriquest helped lead the way in the fight against predatory mortgage lending practices. Those cases were pursued through joint efforts by state attorneys general and state banking regulators. The States' attorneys general have developed substantial expertise in identifying and acting against deceptive mortgage lending practices. In today's subprime environment, the states retain substantial authority. With its extraordinary authority, the OCC and the states together can effectively set standards that all lenders will have to follow. Together with the OCC's jurisdiction and authority over national banks, we can do even more to eliminate fraud in connection with mortgage lending.

The offices of the attorneys general have worked effectively for many years with other federal agencies, such as the FTC, in taking action against national companies in areas such as: consumer privacy, telemarketing violations, motor vehicle lease advertising by national lenders, and various other areas. These actions resulted from the establishment of good ongoing working relationships between the staffs of our offices and of the federal agencies involved. These joint working relationships have included sharing information about potential violations and conducting joint investigations and joint prosecutions, or dividing prosecutions with the federal agencies handling some cases and the states others.

This unified approach results in greater deterrence. Indeed, the exponential power of a federal/state task force to chill bad practices cannot be overstated. The need is greatest when it comes to predatory mortgage lending practices. Consumers victimized by predatory lending face financial ruin and even the potential loss of shelter. Regulators need to send a strong, unified message to all mortgage lenders that the practices we discovered at Household and Ameriquest cannot be repeated.

By setting strong standards at the national level as to federally-chartered institutions, we can continue to send a strong message to lenders that borrower abuses, whether in the field of mortgage or other lending, will not be tolerated and will have severe consequences. Indeed, the potential loss of a federal charter would be a substantial deterrent.

The attorneys and investigators in the offices of state attorneys general have developed substantial expertise in dealing with fraudulent lending practices. I believe that we have much to offer to federal regulators and look forward to working with them.

IV. The States and federal regulators should establish a continuing relationship to address issues beyond predatory mortgage lending

The States regularly receive complaints that may involve some level of participation by national banks. Routine conversations between OCC attorneys and leading States' assistant attorneys general would further the OCC's knowledge and understanding about practices which run afoul of state consumer fraud laws. There currently exists no such exchange of information or knowledge between the attorneys general and the OCC.

As discussed above, the states have long worked with the Federal Trade Commission on an ongoing basis in a number of areas. For example, the states and the FTC have regular conference calls to discuss problems with spam e-mails. We routinely share information about a host of other consumer issues. The FTC recognizes the fact that simply because a company does business nationally, this does not mean state attorneys general have no role to play in enforcement. The FTC recognizes that most of the companies our constituents deal with on a daily basis as consumers are parts of national or international corporations and that our state laws and enforcement authority apply to these companies. However, we don't need the OCC to agree with us as to our jurisdiction in order to work with them in information sharing, conducting investigations or otherwise assisting in enforcement actions against national lenders. All we need is a willingness on behalf of the OCC, the OTS, and other federal regulators to work with us.

Federally-chartered financial institutions provide a variety of financial services. The states could assist the federal agencies in identifying cases of deceptive and unfair practices concerning motor vehicle or home improvement lending, credit card advertising and billing,

failure to disclose extra fees and material limitations on gift cards issued by national banks, maintaining privacy of consumers' financial information, and others. These problems have been seen as to federally-chartered financial institutions, but there has been little or no federal action. The states can assist the OCC and the other federal agencies to decrease or solve many of these problems.

We also need to ensure that the federal agencies have the necessary authority to act against deceptive and unfair practices against national banks. We can't have the Supreme Court seemingly remove the states as enforcers of state laws and leave a toothless OCC as the only remaining regulator. We plan to conduct a thorough review of the OCC's authority and to suggest expanding that authority, if necessary.

V. Federal banking regulators need to be more aggressive about rooting out bad conduct by the institutions they regulate

The OCC has brought few enforcement cases against national banks for engaging in deceptive or unfair practices.[3] Conversely, the states have filed hundreds of lawsuits over the decades alleging violations of state UDAP laws against a variety of businesses, including national financial firms. The *Watters* decision makes it imperative that the OCC change course and become much more aggressive about identifying and acting against deceptive practices.

For example, state attorneys general have investigated and settled with several national banks concerning their marketing agreements with companies offering "free trial offers" to consumers for non-banking products. The most recent case was a multistate settlement with

---

[3] From a list currently appearing on the OCC's website, it appears the agency has concluded six enforcement actions against banks for unfair or deceptive practices, with its first being in 2000. See: http://www.occ.treas.gov/Consumer/Unfair.htm

Trilegiant Corporation and Chase Bank. Trilegiant mailed misleading solicitations to consumers with small checks, typically for $2 to $10, that many consumers mistakenly thought were a rebate or some kind of reward. But cashing the checks committed consumers to a 30-day "trial offer" in some kind of membership program or buying club – and then to monthly or annual charges if they didn't cancel. The states' investigation found that Trilegiant had agreements with Chase Bank to gain access to Chase's customers and market the membership programs. Trilegiant used Chase's name in mailings, and Chase reviewed and approved marketing materials. The States acted to stop these practices and protect consumers. It is important to note that the complaints the states received didn't necessarily name the national bank as the complained-against party. It was through the states' investigation that the bank was identified as being involved. The OCC has not acted to deter national banks from engaging in conduct such as this.

The states have also investigated deception in connection with the issuance of Visa and MasterCard gift cards by national banks.[4] The materials accompanying the cards did not adequately disclose non-usage fees and other limits imposed on card holders. Again, the OCC had taken no action against the banks, and consumers suffered for this lack of action.

In addition, national banks have been charging excessive fees to levy on bank accounts to satisfy child support obligations. Iowa law limits this fee to $10. However, the OCC has claimed national banks are exempt, a position with which Iowa strongly disagrees for many reasons. This has allowed national banks to charge fees in excess of $100. For example, in one situation there was $118 in the account when the levy was issued, the national bank charged a

---

[4] The mall gift card referred in the following linked documents was issued by a national bank. http://www.oag.state.ny.us/press/2005/mar/Consent%20Order%20and%20Judgment.pdf

levy fee of $125, which resulted in the child getting nothing and the delinquent parent incurring even more debt. In these situations the child and parent lose while the national banks continue to profit. Not only has the OCC not acted against this practice, it seemingly has endorsed it!

If the OCC arguably remains the "only cop on the beat" as to national banks, it simply must step up to the plate. It must work harder to identify ways in which national banks are mistreating consumers and act to deter that conduct. Reviewing a bank's safety and soundness is no longer enough. With our substantially greater expertise in identifying and remedying deceptive and unfair practices, state attorneys general stand ready to assist the OCC in such an effort.

VI. Federal banking regulators must hold banks accountable when they knowingly facilitate consumer fraud

The OCC should not permit national banks to continue avoiding responsibility when they are used by telemarketing and Internet scam artists to extract money from the bank accounts of senior citizens and other vulnerable consumers. National banks know something is wrong when payment rejection rates are higher than normal. Unfortunately, despite this knowledge, some banks continue to do business with criminals. The OCC needs to make it crystal clear to national banks that they will be audited on the degree to which they ensure they are not made conduits for those who wish to harm consumers.

The *New York Times*, in its front page story of Sunday, May 20, 2007, described how telemarketing scam artists, operating outside the U.S., depend on support from data brokers and banks to complete their crimes against Americans. The data brokers help them at the outset by selling them victim lists. The banks help them complete the scheme by processing "demand

drafts" – unsigned checks, created after the scam artists trick the victims into divulging their bank account numbers. By accepting these demand drafts when there is clear indicia of fraud, banks are helping these criminals drain the life savings of vulnerable consumers in our states and throughout the country.

In the *New York Times* story, it was reported that Wachovia Bank, a national bank, "accepted $142 million of unsigned checks from companies that made unauthorized withdrawals from thousands of accounts. . . . [and] collected millions of dollars in fees from those companies, even as it failed to act on warnings, according to records." That story also noted that Wachovia ignored requests from other banks to stop processing demand drafts on behalf of an individual the other banks reported was defrauding consumers, and ignored a return rate of near 60%.

According to the OCC's website, two of its four primary objectives are:

- To ensure the safety and soundness of the national banking system.
- To ensure fair and equal access to financial services for all Americans.

Given the prevalence of fraud in the use of demand drafts, based on our own experience and as reported in the *Times*, the OCC is falling short of ensuring the "safety" of the banking system and "fair access" to financial services. It is neither "safe" nor "fair" to permit national banks to facilitate the efforts of fraud merchants to extract money from the bank accounts of consumers who are little able to absorb the losses when the banks know or reasonably should know that will likely be the outcome.

State attorneys general and the FTC have been doing their part to fight telemarketing fraud directed into our states from outside U.S. borders by taking action against companies that facilitate the scams. Examples include actions against companies that process electronic

withdrawals through the Automated Clearing House[5] and state-chartered banks that similarly assist these frauds.[6] It is well past time for the OCC to use its extraordinary leverage to force national banks to cease helping criminals steal from vulnerable victims.

VII. Congress should consider passing effective federal predatory lending consistent with other federal laws that enable enforcement by state attorneys general

In recent years Congress has enacted several consumer protection laws that authorize enforcement by state attorneys general as well as by federal authorities, including laws relating to credit repair,[7] credit reporting agencies,[8] telemarketing fraud,[9] children's online privacy,[10] home owner's equity protection,[11] and a variety of others. Joint enforcement in these areas has worked well.

While banks may not have caused the current subprime crisis, setting national standards levels the playing field and helps to ensure fair competition. State attorneys general are anxious to contribute our thoughts on national standards that protect consumers and foster strong competition in mortgage lending. I believe that enabling us to enforce such a law, in addition to federal enforcement, will result in far greater compliance.

---

[5] http://www.state.ia.us/government/ag/latest_news/releases/dec_2005/Teledraft.html; and http://www.state.ia.us/government/ag/latest_news/releases/feb_2005/Electracash.html

[6] http://www.state.ia.us/government/ag/latest_news/releases/july_2005/First_Premier.html

[7] 15 U.S.C. section 1679h

[8] 15 U.S.C. section 1681s

[9] 15 U.S.C. section 6103

[10] 15 U.S.C. section 6504

[11] 15 U.S.C. section 1640(e)

VIII. Conclusion

It pains me to say that the *Watters* decision provides us with an opportunity to start anew, in that I strongly disagree with the policy of preempting states from regulating state-chartered entities that are operating subsidiaries of national banks that conduct business and commit violations of consumer protection laws in the states. However, the reality we face is that the *Watters* decision has raised new challenges for state regulation and enforcement and, therefore, now is the time to call on federal regulators to substantially step up their efforts. They asked for this situation and they can do more. The states will be watching closely. In addition, the states stand willing to assist as best we can to help ensure that our constituents are not harmed by the actions of national banks.

Again, thank you very much for inviting my testimony on this extremely important issue. I and my colleagues around the country look forward to working with this Committee as it considers ways to improve federal consumer protection in financial services.