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**MECKLENBURG COUNTY BAR ASSOCIATION  
CONSUMER / REAL ESTATE LENDING LAW FORUM**

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It is a pleasure to be with you today to discuss consumer protection in the residential mortgage market. I appreciate the kind invitation from Chris Tucci and Don Lampe to speak to you and hope you will find what I have to say to be of interest to you and your clients. At the outset, let me make clear that my remarks are expressions of personal opinion and not of State policy generally or of the North Carolina Banking Commission in particular.

As I am sure you know, abuses in the retail mortgage market led to the adoption by the North Carolina General Assembly of two pieces of legislation intended to govern that market: the high-cost loan provisions of Chapter 24 of the General Statutes, commonly referred to as the “predatory lending law;” and the Mortgage Lending Act. These statutes and statutes like them adopted by a number of other state and local governments have brought a response from federal banking regulators preempting or threatening to preempt them as they apply to federally chartered financial institutions and their operating subsidiaries. This, in turn, has brought on a significant amount of criticism from officials in virtually every State in the Union and from both Democratic and Republican members of Congress. The issue of federal preemption of state law is turning into one heck of a fight.

As a willing participant in the preemption fight, I have fairly strong and well-defined views about the merits of the two sides. You will be happy to know that I am going to spare you the details today. This act of mercy is based on my wish to discuss with you the need for all of us in law enforcement – including regulators, state attorneys general, consumer advocates and members of the financial services and real estate bars – to work together to protect and improve the home mortgage market. This market is massive, liquid, vital to our economic well-being, and at least marginally troubled.

Instead of emphasizing areas of disagreement among the stakeholders in the home mortgage market, I will start by reviewing the things about which most, if not all, of us agree and proceed to those subtopics where I believe we can agree if we will only try. I hope that this talk will begin a discussion leading toward more general agreement among the stakeholders and welcome your comments, either during or after the talk, to that end.

First, let's review the aspects of the retail mortgage market about which I expect we agree:

- It has been revolutionized over the last two decades by deregulation and advances in information technology.
- It is no longer the preserve of thrift institutions; rather, the number of participants is wide and varied, ranging from entrepreneurial “mom and pops” to the financial arms of General Motors and General Electric.
- Home mortgages are no longer unified instruments that are held to maturity by the originator; rather, they are marketable near-securities that often end up in the hands of enterprises or trusts that had no contact with the borrower at origination.
- Because of the developments mentioned above, the mortgage market is substantially deeper and more liquid than it was twenty years ago. It is no exaggeration to say that the home mortgage market today is an important part of the global capital market.

- The home mortgage market has made credit available to a substantial portion of our citizens, including many people who would not have been able to obtain such credit twenty years ago.

Whatever the remaining shortcomings in relative home ownership among our various demographic groups, there is no doubt that the percentage of all groups who own homes is up across the board and the prospect for improvement of remaining inequities is bright.

In sum, it is an unusual soul indeed who would return the mortgage market to the “good old days” of twenty years ago. The mortgage lending system in the United States is a marvel and has done much good for consumers and for our economy.

So much for the easy stuff. Let’s kick the discussion up a notch in terms of difficulty to matters where most of us agree most of the time:

- Predatory lending activity has increased, along with access to home mortgage credit, particularly

in the subprime market and with regard to potentially vulnerable borrowers such as seniors. While there is a debate among people of good will about the precise meaning of “predatory lending” and the appropriate means to combat it, there is virtually no disagreement about its existence.

- Mortgage fraud has grown in a significant way, with serious adverse consequences for homeowners and secondary market mortgage purchasers. Regrettably, there is no disagreement about the existence of this phenomenon; rather, there is joint concern about how large it is.

The changes in market structure that I have discussed today were not bad in and of themselves; predatory lending and mortgage fraud were and are very bad. The issue for all stakeholders in home mortgage finance is how to combat the undesirable consequences of the revolution in the home mortgage marketplace without undue harm to its liquidity and efficiency. This leads to the third step in our discussion: searching for agreement about how to regulate this important, competitive and rapidly changing market.

The preemption debate currently in progress involves important issues of sovereignty in our federal system and deserves the extensive discussion it is getting. I believe its resolution is more likely to come through negotiation and attempts at cooperation than from confrontation. This is not a universally shared view. Undaunted, let me offer a few ideas as to how state and federal regulators may work toward comity based on a shared understanding of the realities of the marketplace and the prudent exercise of discretion.

The attempt to achieve comity should begin, in my view, with an acknowledgement of certain consequences of the changes in market structure that I have discussed, to wit:

- *The regulatory framework for banking organizations doesn't fit the new market structure very well.* I don't believe anyone would seriously argue that the structure of the home mortgage market today was even remotely in the minds of the draftsmen of the National Bank Act (including the 1983 revisions that conferred unfettered real estate powers on national banks), Home Owners Loan Act, National Credit Union

Act, or our state banking laws. The mortgage subsidiaries of banking organizations today are different in degree and kind from their parent firms; and, I would argue, they are operated as separate entities because of those differences.

- Federal and state regulators have different and complimentary policy concerns with regard to home mortgage lending. Home mortgage lending today is an inherently local activity that is funded globally. Federal regulators and the financial services industry are primarily concerned with efficiency and systemic integrity, addressing the needs and demands of global capital markets. State authorities are primarily concerned with the impact of the marketplace on individuals. While there is a tension between these policy emphases, they are not necessarily in conflict. Market efficiency depends on a fair and honest origination system, which local enforcement helps ensure; local availability of credit is enhanced by access to broad and deep global capital markets.

If you agree with me with regard to these two propositions, I believe it is possible to conceive of federal and state regulatory activities operating in a complimentary way. While the details of this arrangement will require extensive negotiation, a number of possibilities come to mind, including:

- *National standards for loan terms*. Proponents of market efficiency contend, in the preemption debate and in various state legislatures, that state and local predatory lending laws constrict the flow of capital generally and further decrease the availability of capital to the subprime market (or increase its cost) by creating uncertainty and compliance cost for mortgage lenders. I disagree with the first of the two contentions but think the second has some merit. In furtherance of intergovernmental comity, I believe state regulators could consider supporting a national standard on loan terms. A number of my colleagues and I recently and publicly supported extension of the preemption provisions of the Fair Credit Reporting Act because of our belief that

such extension served the public interest, so this is not a stretch. An effective national standard would reduce or obviate the need for state and local laws or would compliment them to such an extent that little or no conflict would remain.

Although it probably goes without saying, I think North Carolina's standards are the appropriate foundation for a national standard.

- Preserve state enforcement powers. The ability of state authorities to enforce applicable standards of conduct in their markets should be preserved. Recent unfortunate events in the mutual fund industry (some of which funds were bank sponsored) highlight the importance of dual jurisdiction.
- Adoption by OCC of complimentary state standards. The Riegle-Neal provisions that are integral to the current preemption dispute expressly allow the OCC to enforce state standards in the four reserved areas of state policy, including consumer protection, where

state law is not preempted. Accordingly, the OCC could elect not to preempt some state laws that are in furtherance of the mutually shared goal of consumer protection. State laws prohibiting false advertising or flipping or requiring counseling for vulnerable borrowers come to mind.

- *Distinguish between individual and corporate liability.* Given the nature of the mortgage market, I believe it is possible and desirable to distinguish between individual bad acts of corporate employees and systemic wrongdoing by corporations. In the case of national banking organizations, I believe it is possible to allow state action with regard to individual liability of employees without violating whatever exclusive power there may be in OCC with regard to the banking organization that employ them.
- *Enhance Information Sharing and Coordination.* OCC has consistently offered to enter into information sharing agreements with state

officials in connection with consumer complaints. We at the state level should get over our concern that this is some sort of nefarious ploy and take up this offer. In bank supervision and, more and more often, in fraud prosecution, my office works effectively with law enforcement officials from the federal government. There is no reason we should not do so with regard to the mortgage market. We may surprise ourselves and learn something from one another.

I acknowledge that the ideas just expressed are preliminary, that the devil is in the details, and that the protagonists in the preemption debate may have no interest in considering any of them. That being said, I persist in the perhaps naïve belief that it is in the public interest for state and federal regulators to work together to rid the home mortgage market of predatory lending and outright fraud. I appreciate the opportunity to discuss these ideas with you and look forward to a continuing and productive conversation on this important topic.

Thank you for your attention.