

COMMENT LETTER

July 22, 2013

ICI Jointly Submits Letter to Congress Objecting to the Potential Use of Eminent Domain (pdf)

Dear Members of Congress, Numerous communities across the country are considering entering into an agreement with an investment fund called Mortgage Resolution Partners (MRP) that envisions using a municipality's eminent domain power to acquire performing but underwater mortgage loans held by private-label mortgage-backed securities (PLS) and then refinance the loans through programs administered by the Federal Housing Administration (FHA). The associations listed below are writing to strongly oppose this use of eminent domain. Our organizations are sensitive to the plight faced by many homeowners across America, especially those in communities hardest hit by the housing crisis. Since 2007, the mortgage industry has completed more than six million permanent loan modifications, including more than one million loans through the Treasury Department's Home Affordable Modification Program (HAMP). Combined with the more than one million short sales, the total number of permanent, foreclosure-avoiding solutions now stands above 7.2 million. While we support a broad range of programs to assist struggling homeowners and the communities in which they reside, we are firm in our belief that using the power of eminent domain in this manner would harm our nation's housing markets and the very communities it is intended to help. The introduction of this new risk to the housing finance system would freeze the return of private capital to our markets at a time when many in Congress are looking for ways to increase the role of the private sector and decrease the federal government's footprint. This proposal by MRP would run counter to those efforts and would increase the risk exposure of the already-stretched FHA insurance fund. The proposal targets a small percentage of loans that are in private-label securities and then narrows this group further to focus on those who are current on their existing mortgages, have good credit, and likely don't have existing home equity loans or other liens on the property. While the small group of people that satisfy these criteria would initially appear to be helped, they may impair their ability to sell their home to a future owner. Additionally, this help comes at the substantial expense of the entire community and other potential mortgage borrowers across the country and does not satisfy the public use requirement. This proposed use of eminent domain raises very serious legal and constitutional issues. No jurisdiction has ever used eminent domain to acquire underwater mortgages in securitized pools, and such a use would trigger costly legal challenges with uncertain and uneven results across multiple states. We would point out that under the Fifth Amendment of the U.S. Constitution, eminent domain powers can only be exercised when the proposed taking is for a public use or benefit and when just compensation has been provided to the former owner of the property. The MRP proposal does not satisfy

either requirement. Moreover, the mortgage note is typically held by the PLS trustee who is often domiciled outside of the state. A city's eminent domain authority does not extend beyond the city's borders; it certainly doesn't apply outside the state. It is critically important to recognize who invests in private label mortgage-backed securities and who is therefore harmed if these mortgages are taken by eminent domain. More than a third of the approximately \$938 billion currently held in PLS is held in pension plans, annuities and other insurance products, and mutual funds. Thus, the PLS losses are suffered not by large institutions but by every day savers and investors who have these investments in their pension and 401(k) plans, their college savings plans and their individual investment portfolios. Fannie Mae, Freddie Mac and the Federal Home Loan Banks also own hundreds of billions of dollars of PLS. The Federal Housing Finance Agency (FHFA), which is the conservator of Fannie Mae and Freddie Mac and the regulator of Federal Home Loan Banks, has expressly stated that should a community implement this plan "action may be necessary on its part to avoid a risk to safe and sound operations at its regulated entities and to avoid taxpayer expense." In addition to the issues mentioned above, this use of eminent domain will also be immensely destructive to U.S. mortgage markets in general, and to specific communities using eminent domain, in particular. If the sanctity of the contractual relationship between a borrower and a creditor is undermined by eminent domain, both lenders and investors will be reluctant to provide future funding without significant increases in cost to attempt to manage this new risk. The result will be a contraction of credit availability, particularly in communities that use eminent domain. It will be much harder to get a loan, and loans that are granted will likely come with higher interest rates and larger down payments. This, in turn, could actually serve to further depress housing values in municipalities that employ eminent domain in this manner, pushing many borrowers further underwater. The mortgage industry has taken numerous steps to assist homeowners facing financial difficulties and we recognize that many policy makers continue to look for innovative ways to assist borrowers. We do believe, however, that using the power of eminent domain to abrogate a contractual agreement between borrower and creditor would have far greater and lasting negative effects on existing and future homeowners and Main Street investors. We support the approach taken in the housing finance reform "Discussion Draft" released by Chairman Hensarling which would bar both FHA and the GSEs from putting taxpayers behind the refinancing of a mortgage seized by eminent domain. Similarly, we support H.R. 2733, the "Defending American Taxpayers From Abusive Government Takings Act of 2013" introduced by Congressman Campbell. We further urge Congress to send a strong signal to the Department of Housing and Urban Development and the FHA that this unconstitutional and poorly-conceived proposal has no place in our foreclosure mitigation efforts and runs counter to the widely-supported goal of policymakers to return private capital to our housing finance system.

Sincerely, Securities Industry and Financial Markets Association American Bankers Association American Council of Life Insurers American Land Title Association American Securitization Forum Association of Mortgage Investors Housing Policy Council Investment Company Institute Mortgage Bankers Association National Association of Home Builders National Association of Realtors The Financial Services Roundtable