Via Electronic Submission

September 7, 2012

Mr. Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20024

Re: Use of Eminent Domain to Restructure Performing Loans (No: 2012-N-11)

Dear Mr. Pollard:

The Association of Institutional INVESTORS (the "Association"), a trade organization of traditional asset managers who function as fiduciaries to pension plans, university endowments, foundations, 401(K) plans, mutual funds and individual retirees,[1] welcomes the opportunity to provide input on the proposed use of eminent domain to restructure performing loans.[2] Similar to those views expressed by the Federal Housing Finance Agency ("FHFA") in its recent notice in the Federal Register,[3] the Association has grave concerns about the use of eminent domain as proposed in San Bernardino County, California; Chicago, Illinois; and Berkeley, California, among other municipalities. In this regard, we wholeheartedly support the FHFA acting to prevent the application of eminent domain to mortgage loans. Should this proposal materialize, we see significant and adverse consequences for the mortgage market and for homeowners alike. Moreover, we

[1] Collectively, our member firms manage ERISA pension, 401(k), mutual fund, and personal investments on behalf of more than 100 million American workers and retirees. Our clients rely on us to prudently manage participants' retirements, savings, and investments. This reliance is built, in part, upon the fiduciary duty owed to these organizations and individuals. We recognize the significance of this role, and our comments are intended to reflect not just the concerns of the Association, but potentially the concerns of the companies, labor unions, states, municipalities, families, and individuals we ultimately serve.

[2] For simplicity, we refer to the Community Action to Restore Equity (CARES) proposal promulgated by San Francisco-based Mortgage Resolution Partners, which we understand is being considered by San Bernardino County, Chicago, Berkeley and other municipalities.

[3] Federal Housing Finance Agency, Notice; Input Accepted, *Use of Eminent Domain To Restructure Performing Loans*, 77 Fed. Reg. 47652 (Aug. 9, 2012).

believe any such action by the FHFA is consistent with its mandate to support the housing market and protect taxpayers from unnecessary losses.

The Association has several concerns about the proposed use of eminent domain to restructure performing loans. As investors, we worry that the proposal undermines one of the basic characteristics that makes the United States an attractive country in which to invest: the protection and enforcement of property rights. The proposal would call into question this long-held assumption by selectively (and arbitrarily) seizing private loans at arbitrary market valuations from mortgage investors under the pretense of helping the homeowner. We understand that there are cases where eminent domain is used for a legitimate and incontestable public benefit, but we have serious reservations about any proposal that would seize and redistribute private property to the clear benefit of a private group at potentially a significant profit. The losses to investors from such a plan would not be abstract – they would ultimately be realized by the millions of retirees and savers and thousands of institutions for whom we manage assets.

More broadly, we are concerned about the inevitable effects that such a proposal would have on the already tenuous private mortgage market and on the ability to secure financing for those who need it most. If the eminent domain proposal were applied as conceived, underwriters and investors in the private mortgage market (as we are) would demand to be compensated for this new risk - the risk of having private property seized arbitrarily by the government. This would invariably result in significantly higher borrowing costs for those trying to get a mortgage and would perversely limit the access to financing to only those who have substantial resources. Liquidity and access to credit would be unfavorably impacted not only in those municipalities where the eminent domain proposal is applied, but across the private mortgage market. Furthermore, as fiduciaries we may be obligated to advise our clients to avoid investing in the mortgage market altogether due to the uncertainty of having assets seized by local governments. We worry that withdrawing liquidity from this much-needed market would only cause home prices to drop further, imperiling the already weak recovery within the housing market and within the economy as a whole.

Part-and-parcel to our concerns is how the proposal is constructed. The proposal would apply eminent domain to only those *performing* loans, thereby cherry-picking the most attractive loans within the mortgage trusts. By only targeting the performing loans and leaving the other, less attractive loans in the trusts, the ultimate impact would be a decrease in the value of the trust security held by the mortgage investors - the mutual funds and pensioners on whose behalf we manage money. We think this would put downward pressure on the rest of the private mortgage market and thereby exacerbate homeowners' inability to access financing across the United States. Fund directors and/or trustees may be required to sue local municipalities in order to fulfill their fiduciary obligations to their investors if they are paid anything other that the principal amount on a performing loan. Further, even if the scope of the proposal includes non-performing or defaulted underwater

mortgage loans, as was recently suggested by the sponsors of the proposal, we still believe only the most attractive mortgage loans would be chosen and less than "fair market value" (as described below) would be paid, in order to ensure the program is profitable for those sponsoring it. This would therefore still adversely affect the related RMBS trusts.

An additional concern we have about the proposal is the definition of "fair market value" that would apply to the seized loans. The proposal states that it would seize current paying loans for underwater borrowers at "fair market value," but instead of assessing fair market value at 100% of the loan value, the proposal would envision applying a significant and steep discount to the loans (~40-45% for loans with market-to-market loans-to-value between 120%-125%). To get to this discount, the proposal assumes that all eligible loans for the program would eventually default; yet given that these are current paying loans, this is neither a realistic assumption nor justified by data. Why would the proposal apply a value so far away from the value of the loan? Cynically, it is the only way the private entities involved in the scheme can benefit; indeed, using eminent domain in this way is *only* attractive if the "fair market value" is sufficiently low to make the scheme profitable. Again, these losses incurred are not abstract, but would be realized by those entities for which we manage assets.

In addition to being bad public policy, this proposal raises many Constitutional concerns. An exercise of eminent domain under the Constitution may be only for a public purpose and only with payment of "just compensation." There are no public benefits here, and even the ones argued by the proposal's advocates are, at most, incidental, attenuated, and insufficient. Further, the approach to the valuation used under the proposal would be unconstitutional and unjust, given the unrealistic and draconian assumptions that would be used. If the proposal as a whole were to somehow survive challenges to its Constitutionality, the valuations in each eminent domain taking would be contested in court and ultimately decided by a judge and potentially a jury. This litigation, necessary to protect the interests and fulfill the obligations of trustees, would be complicated and protracted, and would create unnecessary uncertainty and weigh heavily on the already beleaguered mortgage market.

We are also concerned that the program intends to target primarily first-lien mortgages and not the holders of second loans. We worry that this would represent an unfair disregard of lien priority and would minimize the alleged benefit to the borrower that the proposal purports to assist.

We support a strong and healthy housing market as we know it is not only good for the economy, but also good for investors. In that regard, we are supportive of many of the government initiatives undertaken that do *not* involve the use of eminent domain but are directly (and exclusively) aimed at providing relief to the homeowner, such as the Home Affordable Modification Program ("HAMP") and its extensions.

In conclusion, we concur with the FHFA's concerns about the adverse consequences that would result from the application of eminent domain to mortgage loans. We believe that should this ill-conceived proposal be allowed to be realized, it would not only be bad for mortgage investors, including retirees and pension plans, it would be negative for homeowners and the broader economy. Accordingly, we strongly support any effort of the agency to prevent such a proposal from materializing. We would be happy to discuss these concerns with you or your staff at your convenience. Please feel free to contact me with any questions you may have at jgidman@loomissayles.com or (617) 748-1748.

On Behalf of the Association of Institutional INVESTORS,

John Gidman
President