

## Office of the Attorney General

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TO: All Clerks of Circuit Court  
All Land Records Departments

FROM: Stuart Cordish, Courts Unit

SUBJECT: New Legislation – Taxation of IDOTs

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Dear Folks:

Chap. 267 and 268 (S.B. 436 and H.B. 1209) of the 2013 legislative session amend the law dealing with the taxability of indemnity deeds of trusts and mortgages (IDOTs), and also amend the laws affecting supplemental instruments and refinance instruments. The new law applies to instruments of writing that are **recorded on or after July 1, 2013**.

### 1. Taxability Threshold.

The new legislation raises the loan amount that triggers taxability of IDOTs. Effective July 1, 2013, an IDOT is not taxable unless it is given in connection with a guaranty of a loan and the amount of the loan being guaranteed is **at least \$3 million**.

The law also specifically confirms that a "**series of loans** that are part of the same transaction" are to be **treated as a single loan** for purpose of determining whether the \$3 million threshold has been reached. Example: If the loan being guaranteed is for \$4 million, the grantor cannot escape tax by recording two IDOTs for \$2 million each. Similarly, if several loans appear to be part of a related series of loans, the loan amounts will be aggregated. IDOTs should continue to be accompanied by an affidavit, and you may continue to request such supporting documentation as will enable you to determine whether the instrument is subject to the tax.

## 2. Calculation of the Tax on IDOTs .

As before, **taxability is triggered by the amount of the loan**. However, you would **collect the tax based on the amount of debt secured** by the instrument. Example: The underlying loan is for \$3 million, but the IDOT recites that the amount of debt secured by the instrument is only \$2 million. The instrument is taxable, because of the \$3 million loan amount, but the tax is calculated based on the amount of debt secured by the IDOT, i.e., \$2 million. The amount secured should appear on the face of the IDOT and on the affidavit.

Note: If an IDOT is submitted with language added such as: "Amount secured for recording purposes is [some figure less than \$3 million]," you may need to require some clarification (or send it up for review). If it is clear that the lender has consented to a secured amount less than the full loan amount, that figure may be accepted. But, if it appears that the language was added only for the purpose of avoiding the recordation tax, further review may be necessary.

## 3. Supplemental Instruments.

The law clarifies that supplemental instruments include instruments that confirm, correct, modify, or "amend and restate" existing IDOTs, as well as other lien instruments.

Last year, there was some question as to whether supplements to pre-July 1, 2012 IDOTs would be taxed. This year's legislation clarifies that those IDOTs may be supplemented and provides that they are taxable in the same manner as other supplemental instruments, if the amount of the guaranteed loan crosses the \$3 million threshold.

**Supplemental instruments**, including supplements to existing IDOTs, are taxable only on the "**new money**," regardless of whether any tax was paid on the original instrument. There is new money **if and to the extent the face amount of the supplemental instrument, or the amount of debt secured, exceeds the outstanding principal balance of the existing loan.**

As before, supplemental instruments that merely add or substitute property as collateral, modify the loan rate or the maturity date, change the trustees or the lender, or make other changes that do not change the amount of debt secured do not trigger any tax. And as before, a supplement is also taxable if there is any consideration being paid for the execution of the supplement.

Thus, supplements will be taxed in the same manner that principal-residence refinances are currently taxed. That is, they will be taxed based on the **difference between the outstanding principal balance of the existing loan as of the date of the supplemental instrument and the face amount of the new lien instrument.**

Note that the following example would also be taxable: A deed of trust for \$100,000 is recorded and recordation tax is collected on the full amount. The loan is paid down to \$50,000, and the supplement reflects the new debt secured in the amount of \$75,000. The face amount of the new instrument is actually less than the face amount of the original instrument, but there is taxable new money, because the new loan amount exceeds the outstanding principal amount of the original loan.

Our April 5, 2005 advice letter dealing with supplements to commercial and other non-principal-residence mortgages prescribed a different method of calculating the tax, i.e., the "new money" was the difference between the face amount of the old mortgage and the face amount of the new. The provisions of the new legislation supersede that advice.

A supplemental instrument should recite on its face the nature of the change effected. If the amount of the debt secured is being amended, and the information is not provided on the instrument itself, the supplement should be accompanied by an affidavit that, like a refinance affidavit, recites the current outstanding amount of the loan as well as the new amount being secured. And again, if the supplemented is an IDOT securing only a portion of the modified loan, and the IDOT specifically states that it secures that lesser amount, the tax will be collected based on that lesser amount.

#### 4. Refinances.

The refinance exemption was formerly available only to borrowers who were refinancing their principal residences; it was not available on commercial property or residential property that was not a principal residence, such as vacation home or second residence. The **exemption has been changed to remove the principal-residence requirement**. As a result, the **mortgagor can be an entity as well as an individual**, and the **property can be residential or commercial**. An **IDOT can also qualify for the refinance** exemption, and an existing IDOT can be refinanced by a regular deed of trust, if the grantor is the same.

The **method of calculation is now the same** for all refinances. The tax is assessed on the **difference between the current principal balance of the old mortgage or loan (or IDOT) and the face amount of the new mortgage**.

As a result, **all refinances** must be accompanied by a refinance **affidavit**, unless the same information is included in the body or in the acknowledgment of the new mortgage. If an affidavit is used, it must be under oath and signed by the original mortgagor or the agent of the original mortgagor. In either case, it will need to recite that the grantor is the original mortgagor, and will need to provide the current outstanding principal balance of the mortgage, deed of trust or IDOT that is being refinanced. The additional certification required when an agent completes the affidavit remains unchanged.

#### 5. Allocation.

Finally, the bill confirms that the tax on IDOTs may be allocated among counties. The bill actually refers to the section that addresses IDOTs secured by property both within and outside of Maryland, but IDOTS secured by property in more than one county in Maryland are also subject to allocation.

6. Note: Just a reminder that, beginning on October 1, 2013, some residential refinance affidavits will also contain additional information, as required by newly amended Real Prop. §7-112, in the event of a refinancing of the senior mortgage on a residential property where there are one or more junior mortgages that are not being paid off.

Chapter 205 (S.B. 199) calls for a new statement on the refinance affidavit in such a case. It does not affect the collection of recordation tax, but be aware that there will be new verbiage. The statute requires the following language, in bold or capitalized letters:

THIS IS A REFINANCE OF A DEED OF TRUST/ MORTGAGE/ OTHER SECURITY INSTRUMENT RECORDED AMONG THE LAND RECORDS OF ..... COUNTY/CITY IN LIBER NO. .... FOLIO ....., IN THE ORIGINAL PRINCIPAL AMOUNT OF ....., AND WITH THE UNPAID OUTSTANDING PRINCIPAL BALANCE OF ..... THE INTEREST RATE PROVIDED FOR IN THE EVIDENCE OF INDEBTEDNESS SECURED BY THIS REFINANCE MORTGAGE IS LOWER THAN THE APPLICABLE INTEREST RATE PROVIDED FOR IN THE EVIDENCE OF INDEBTEDNESS SECURED BY THE DEED OF TRUST/MORTGAGE/OTHER SECURITY INSTRUMENT BEING REFINANCED.

I'm sure other questions will arise. Please let me know if you need any additional information.

Stuart Cordish