

PUBLICATION

Maryland Again Changes Rules on Taxation of Indemnity Deeds of Trust - Effective July 1, 2013 [Ober|Kaler]

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May 03, 2013

Minimum Threshold for Taxation of IDOTs Increased from \$1,000,000 to \$3,000,000, and New Exemption Created for Certain Refinancings of Commercial Mortgages

Governor Martin O'Malley signed legislation this week that will again impact the use of Indemnity Deeds of Trust (IDOTs) in Maryland.

Until July of 2012, many real estate secured loans in Maryland involved an IDOT structure. Using an IDOT structure, a loan is made to a borrower and guaranteed by a third party. The third party guarantor secures its guaranteed obligations with a deed of trust on its real property. The guarantor's deed of trust is an IDOT, because it secures the guarantor's *contingent* liability. Pursuant to Maryland law, the contingent nature of IDOT obligations means that recordation tax is not due at the time the IDOT is recorded. Rather, payment of recordation tax is deferred until the contingent obligation becomes a current, direct liability of the guarantor.

On July 1, 2012, legislation took effect that limited the recordation tax deferral for IDOTs to transactions where the IDOT secured a guarantee of repayment of a loan of less than \$1,000,000. This legislation, combined with the aggressive efforts of Maryland counties to collect recordation taxes on the original principal amount of certain IDOTs amended after July 1, 2012, led to an outcry from lenders and guarantors forced to deal with sweeping changes to established Maryland lending practices.

The Maryland General Assembly reconsidered last year's legislation in its most recent session and decided to make certain changes to the relevant statutes. The new legislation does the following and is effective as of July 1, 2013:

- Specifies that recordation tax will not be payable at the time of recordation of any IDOT securing a guaranty of a loan or multiple related loans of less than \$3,000,000. This broadens the surviving IDOT exemption by increasing the threshold under which tax is not payable from \$1,000,000 to \$3,000,000.
- Clarifies that only IDOTs recorded on or after July 1, 2012 are subject to recordation tax on the original loan amount (unless otherwise exempt) and explicitly permits *amendment* of IDOTs filed prior to July 1, 2012, without triggering payment of recordation tax (so long as the principal amount secured is not increased to \$3,000,000 or greater). An amendment that increases the amount of the loan guaranteed to at least \$3,000,000 will be subject to recordation tax on the difference between the amended loan amount and the outstanding principal balance of the guaranteed loan immediately prior to the time of the amendment. Amendments that increase ordinary deeds of trust (non-IDOTs) will be similarly taxed on the difference between the amended loan amount and the outstanding balance immediately prior to amendment, thus generally increasing the amount subject to taxation in loan increases.
- Creates a commercial mortgage refinancing exemption from recordation tax similar to the exemption available for residential mortgage refinancing, expressly including refinancings of IDOTs.

- Confirms that an IDOT recorded in multiple counties is not subject to recordation tax in each county based on the full amount secured.

The changes and clarifications coming on July 1, 2013 will benefit lenders and borrowers in certain transactions involving an IDOT structure. Given these changes and clarifications, lenders and borrowers may want to review the loans in their pipelines for potential impact.

For more information about this topic or assistance with financing issues, please contact one of the authors or any member of the Ober|Kaler Finance Group.