You ask whether, for purposes of the state recordation tax exemption in § 58.1803(D) of the Code of Virginia, the term "same lender" applies to the refinancing of existing debt (1) with a wholly owned subsidiary of the current lender, or (2) with a bank or mortgage company that has been acquired by another bank or mortgage company, but continues to do business in its former corporate name.\(^1\)

In the first instance, you relate that B.F. Saul Mortgage Company, a wholly owned subsidiary of Chevy Chase Bank, processes and closes all mortgages in its name; however, the mortgage notes and any required servicing of the mortgage are assigned to Chevy Chase Bank. Similar relationships include Waterfield Mortgage and Union Federal, Crestar Mortgage and Crestar Bank, and First Virginia Mortgage and First Virginia Bank.

In the second instance, you relate that F & M Bank has acquired Hallmark Bank and Fairfax Bank & Trust. You advise that Hallmark Bank continues to do business as F & M Hallmark Bank, and that Fairfax Bank & Trust continues to do business as Fairfax Bank & Trust.

A 1992 opinion of the Attorney General interprets the term "same lender" in § 58.1803(D) to mean that "the lender providing the refinancing must be the same as the lender now holding the existing debt being refinanced."\(^2\) The opinion notes that "[t]he obvious purpose of § 58.1803(D) is generally to exclude refinancing of existing debts from payment of an additional recordation tax."\(^3\) Application of the state recordation tax exemption in § 58.1803(D) is therefore dependent on the circuit court clerk's determining which financial entity holds the existing debt at the time of the refinancing or modification.

Once identity of the financial entity holding the existing debt has been determined, the answer to your inquiries turns on whether the entity currently holding the debt is the same legal entity providing the refinancing or modification. It appears that the subsidiary mortgage companies and parent banking institutions are structured as separate legal entities. Therefore, when the existing debt is held by the parent institution, refinancing with a subsidiary mortgage company is not a refinancing with the "same lender" within the meaning of § 58.1803(D), and vice versa.
A refinancing or modification of an existing debt with a financial entity that has merged with, or has been acquired by, the entity holding the existing debt would, in my opinion, qualify as a refinancing with the "same lender." Consistent with the 1992 opinion, the holder of the existing debt is necessarily the same as the entity offering the refinancing where it has become one institution due to merger or acquisition.  

Following the reasoning in the 1992 opinion, although debt may have been assigned several times, it is necessary to determine which entity holds "the existing debt being refinanced" for purposes of applying the exemption in § 58.1803(D). If a merger or acquisition has taken place, the banking institutions involved have become a new entity, and it is the new entity that is the holder of the existing debt. A refinancing or modification through the new entity-the merged or enlarged banking institution—constitutes a refinancing of the existing debt with the same lender for purposes of § 58.1803(D).

Ultimately, whether a mortgage company or bank qualifies as the "same lender" for purposes of § 58.1803(D) will depend on the specific facts of each situation. Such a determination is a factual one to be made by the clerk of the circuit court.

Therefore, I am of the opinion that mortgage companies and banks that are structured as separate legal entities do not constitute the "same lender" for purposes of applying the exemption in § 58.1803(D). I am also of the opinion that any banking institution that acquires, or merges or consolidates with, another banking institution is the "same lender" for purposes of refinancing or modifying an existing debt held by the new banking institution.

1Section 58.1803 provides, in part:

"(A) A recordation tax on deeds of trust or mortgages is hereby imposed at a rate of 15¢ on every $100 or portion thereof of the amount of bonds or other obligations secured thereby.

***

"(D) On deeds of trust or mortgages, the purpose of which is to refinance or modify the terms of an existing debt with the same lender, which debt is secured by a deed of trust or mortgage on which the tax imposed hereunder has been paid, the tax shall be paid only on that portion of the amount of the bond or other obligation secured thereby which is in addition to the amount of the existing debt secured by a deed of trust or mortgage on which the tax has been paid. The instrument shall certify the amount of existing debt."


3Id.

4Generally, a bank formed by or surviving a consolidation or merger becomes the owner of the property and contracts of the constituent banks, and succeeds to their rights and powers, and is liable for their obligations. See §§ 6.143, 6.144; see also 9 C.J.S. Banks and Banking § 160 (1996).


You are encouraged to verify with the State Corporation Commission whether a bank merger has been completed in the event there is any doubt.