

## **Guidelines for Congestion Relief Fee Refunds**

On March 25, 2008, the General Assembly enacted HB 1578 (the "Act"), which provides how refunds are to be made of the NVTA congestion relief fees that were collected by the five Northern Virginia clerks' offices from January until March, when the collection ceased after the Virginia Supreme Court ruled the fees unconstitutional. After discussions with members of the legislature, representatives of the Governor's office, the Bureau of Insurance, and others, and after review of the Act and the other documentation described below, the VLTA concludes that all Settlement Agents must treat this matter with the greatest degree of care and responsibility. As a service to its members, the title and settlement industry in general and the Commonwealth, the VLTA would like to offer these guidelines to assist in accomplishing the refund process.

The following organizations and their representatives participated in the formation of these guidelines:

- Virginia Land Title Association, VLTA Special NVTA Taskforce
- Virginia Bureau of Insurance, Steve Shipman, CISR, Assistant Supervisor
- Virginia - James M. McCauley, Ethics Counsel
- Virginia Clerks of Court Association – Chip Dicks, Legislative council Bar

**In preparation for the proper handling of the refunds, it is strongly recommended that all parties involved read and understand the following:**

1. **CHAPTER 652 [HB1578] Approved March 25, 2008.** An Act to declare certain fees and taxes imposed pursuant to Chapter 896 of the Acts of Assembly of 2007 null and void and to provide for the refund of such fees and taxes to the person or entity that paid such fee or tax.
2. **Letter from the Virginia State Bar.** Alert to CRESPA Settlement Agents Who Closed Transactions Involving Congestion Relief Tax Charged Against Real Estate in Northern Virginia. By James M. McCauley, Ethics Counsel.
3. **Letter from the Virginia Bureau of Insurance.** Letter from Steve Shipman, CISR, Assistant Supervisor, P&C Agent Investigations Section to the Virginia Land Title Association in response to a request for clarification and assistance for Settlement Agents handling Congestion Relief Fee refunds.
4. **Virginia Clerks of Court, GUIDELINES FOR REFUND OF CONGESTION RELIEF FEES.** Authored by Chip Dicks, Legislative Council for the Virginia Court Clerks Association. These guidelines provide recommendations for an accurate accounting and funds transfer from the Court Clerks to the Settlement Agents.

**AS YOU PROCESS THESE REFUNDS, IT IS IMPERATIVE THAT ACCURATE RECORDS ARE KEPT FOR AUDIT PURPOSES.**

## **Congestion Relief Fee Refunds FAQs**

*Below is a Q&A which we hope will provide highlights of the Act and a summary of the more important steps that Settlement Agents need to take to be in compliance with the Act and other applicable state and federal laws governing the activities of Virginia Settlement Agents. Please note that this is only a summary and no summary should be relied on to replace your reading and understanding of the Act and the other documents mentioned above.*

### **1. Q: What is the first thing I should do to get this process started?**

A: After reading the Act and the other documents, obtain from each of the five clerks' offices the list of transactions where the fees were collected. Each of the clerks have posted or will post (they have until May 1 to do so) the lists on the court's website.

Below are links to those websites:

<http://www.fairfaxcounty.gov/COURTS/CIRCUIT/>

<http://www.co.prince-william.va.us/default.aspx?topic=040017000020000355>

<http://www.loudoun.gov/Default.aspx?tabid=798>

<http://landrec.arlingtonva.us/LandRecords.aspx>

<http://www.alexandriava.gov/clerkofcourt/info/default.aspx?id=383>

### **2. Q: Once I have each of the lists, what do I do next?**

A: Review each list and find any transactions you handled. Pull the file and review your disbursements to make sure your figures agree with the figures from the clerk. Resolve any discrepancies with the clerk. Once you have reconciled any discrepancies, arrange to receive the funds from the clerk. For further information regarding the clerks, refer to the clerks guidelines above.

### **3. Q: Should the funds be placed in my real estate trust account or may I put the funds into another account such as a general operating account?**

A: Because the funds came out of your real estate trust account, and would still be considered settlement funds, the refunded monies must go back to your real estate trust account.

McCaughey: Any funds received from the various Clerks of Court pursuant to the Refund Act must be maintained in your CRESPA real estate escrow account from which disbursements to the person(s) entitled to such refund can be made. Under the Refund Act, settlement agents will have ninety (90) days within which to disburse these funds to their affected customers, *but in no event later than August 22, 2008*. All records applicable to the disbursement of these refunds must be properly maintained and made available for review by your licensing authority. Deducting a fee or expenses for making the refund is improper and would seem to directly conflict with the Act. No interest may be kept on these funds as per Virginia Code § 6.1-2.23 (B).

Shipman: *The Bureau takes the position that these fees are settlement funds and must therefore be handled in accordance with CRESPA. However, the specific provisions of Chapter 652 that address the disbursement of refunded fees will necessarily prevail over the general provisions of CRESPA to the extent there is any conflict.*

*For example, CRESPA would require that funds received by settlement agents from the various Clerks of Court be maintained in a separate trust account, and the agents would be prohibited from retaining any interest received on the funds. All records applicable to the disbursement of these funds must also be properly maintained and made available for review by the Bureau of Insurance. However, settlement agents are given 90 days, as opposed to the normal two days allowed under CRESPA, to disburse these funds to consumers.*

**4. Q: May I charge any fee for handling these refunds, deduct my expenses from the refunds, or earn interest on the funds?**

A: No fees or expenses whatsoever may be charged or deducted from the refunded monies. This includes postage, delivery charges, wire fees, or any charge for your time and effort. The funds must be handled in all respects as settlement funds in compliance with CRESPA. Also, you may not earn interest on the funds.

Shipman: *It seems clear that deducting a portion of the refund fee would directly conflict with Chapter 652 as well as § 6.1-2.23 of the Code of Virginia as it would result in the settlement agent converting funds owed to the consumer. And, as noted above, retaining interest on these funds would violate subsection B of § 6.1-2.23.*

**5. Q: Who should get the refunded fee in each case?**

A: The Act provides that “such taxes shall be returned to the persons or entities entitled thereto.” In most cases, you will refer to the HUD-1 Settlement Statement to determine who gets the refund—whoever paid the fee at closing will be entitled to the refund. However, there may be situations where someone else may be entitled to receive the refund. For instance, in short sales, many short payoff lenders have issued closing instructions that the seller may not receive any sale proceeds or refunds, and that all such funds should be paid to the short payoff lender. In such a case, the short sale lender may be the person entitled to the refund. In 1031 exchange transactions, the Qualified Intermediary may be the one entitled to the refund. In any case where the refund is not made to the seller, you may want to notify the seller that the refund has been made to someone else.

Dicks: The settlement agent will then disburse the congestion relief fee refund to the appropriate parties pursuant to the sales contract, HUD-1 settlement statement, property settlement agreement or other legally binding agreement of the parties.

**6. Q: What if I have multiple sellers, such as a sale by several heirs of an estate?**

A: In any case where you have multiple sellers, whether it be heirs or just several co-owners, you may want to contact all of the parties and work out a mutually agreeable method for refunding the money.

**7. Q: How much effort do I have to expend to get the refund to the right person?**

A: The Act provides that the “settlement agent shall exercise due diligence in the return of such taxes.” What is due diligence? Jim McCauley advises that for a definition of the term “due diligence,” look to the “Unclaimed Property Act.”

McCauley: The Unclaimed Property Act requires that the holder of unclaimed funds exercise due diligence to locate the owner when the amount involved is \$100.00 or more. Under the Unclaimed Property Act, due diligence is exercised when the settlement agent sends a first-class mailing to the owner’s last known address. Va. Code § 55-210.12 (e).

**8. Q: What is my deadline to return the money to the right person? Do I have to disburse these funds within two business days as required by The Wet Settlement Act?**

A: The Act requires the clerk to return the funds to the settlement agents within 60 days of March 25, or by May 24 at the latest. The Act requires the settlement agent to return the funds within 90 days of receipt of the funds from the clerk. Because the latest the clerks should return the funds to the settlement agent is May 24, *you should return the funds to the persons entitled within 90 days of receipt of the funds from the clerk.* The Wet Settlement Act two business days requirement does not apply because the Act controls over “any contrary provision of law.”

McCauley: Under the Refund Act, settlement agents will have ninety (90) days within which to disburse these funds to their affected customers, *but in no event later than August 22, 2008.*

**9. Q: What do I do with the funds if I can’t find the right person or otherwise can’t return any funds, even after exercising due diligence?**

A: If you are unable to return any of the fees by September 30, 2008, those fees are deemed to be unclaimed property, and you should remit those funds to State Treasurer on or before November 1, 2008. You must follow the provisions of the Uniform Disposition of Unclaimed Property Act (Section 55-210.1, et seq).

**10. Q: What is my exposure to liability in handling these refunds?**

A: The Act provides that the “settlement agent shall not be liable to the persons or entities entitled to receive such taxes provided the settlement agent complies with this act, and other applicable state and federal laws governing the activities of settlement agents.”