

2SHB 1078 - H AMD 219

By Representative Kelley

ADOPTED 03/09/2009

1 Strike everything after the enacting clause and insert the
2 following:

3 NEW SECTION. **Sec. 1.** The legislature finds that there are no
4 statutory requirements pertaining to persons who facilitate like-kind
5 exchanges pursuant to section 1031 of the internal revenue code and
6 associated treasury regulations. The purpose of this chapter is to
7 create a statutory framework that provides some consumer protections to
8 those who entrust money or property to persons acting as exchange
9 facilitators.

10 NEW SECTION. **Sec. 2.** The definitions in this section apply
11 throughout this chapter unless the context clearly requires otherwise.

12 (1) A person or entity "affiliated" with a specific person or
13 entity, means a person or entity who directly, or indirectly through
14 one or more intermediaries, controls, or is controlled by, or is under
15 common control with, the person or entity specified.

16 (2) "Client" means the taxpayer with whom the exchange facilitator
17 enters into an agreement as described in subsection (3)(a)(i) of this
18 section.

19 (3)(a) "Exchange facilitator" means a person who:

20 (i)(A) Facilitates, for a fee, an exchange of like-kind property by
21 entering into an agreement with a taxpayer by which the exchange
22 facilitator acquires from the taxpayer the contractual rights to sell
23 the taxpayer's relinquished property located in this state and transfer
24 a replacement property to the taxpayer as a qualified intermediary, as
25 defined under treasury regulation section 1.1031(k)-1(g)(4); (B) enters
26 into an agreement with a taxpayer to take title to a property in this
27 state as an exchange accommodation titleholder, as defined in internal
28 revenue service revenue procedure 2000-37; or (C) enters into an

1 agreement with a taxpayer to act as a qualified trustee or qualified
2 escrow holder, as both terms are defined under treasury regulation
3 section 1.1031(k)-1(g)(3); or

4 (ii) Maintains an office in this state for the purpose of
5 soliciting business as an exchange facilitator.

6 (b) "Exchange facilitator" does not include:

7 (i) A taxpayer or a disqualified person, as defined under treasury
8 regulation section 1.1031(k)-1(k), seeking to qualify for the
9 nonrecognition provisions of section 1031 of the internal revenue code
10 of 1986, as amended;

11 (ii) A financial institution that is (A) acting as a depository for
12 exchange funds and is not facilitating an exchange or (B) acting solely
13 as a qualified escrow holder or qualified trustee, as both terms are
14 defined under treasury regulation section 1.1031(k)-1(g)(3), and is not
15 facilitating an exchange;

16 (iii) A title insurance company, underwritten title company, or
17 escrow company that is acting solely as a qualified escrow holder or
18 qualified trustee, as both terms are defined under treasury regulation
19 section 1.1031(k)-1(g)(3), and is not facilitating an exchange;

20 (iv) A person that advertises for and teaches seminars or classes,
21 or otherwise makes a presentation, to attorneys, accountants, real
22 estate professionals, tax professionals, or other professionals, when
23 the primary purpose is to teach the professionals about tax-deferred
24 exchanges or to train them to act as exchange facilitators;

25 (v) A qualified intermediary, as defined under treasury regulation
26 section 1.1031(k)-1(g)(4), who holds exchange funds from the
27 disposition of relinquished property located outside of this state; or

28 (vi) An affiliated entity that is used by the exchange facilitator
29 to facilitate exchanges or to take title to property in this state as
30 an exchange accommodation titleholder.

31 (c) For the purposes of this subsection, "fee" means compensation
32 of any nature, direct or indirect, monetary or in kind, that is
33 received by a person or related person, as defined in section 267(b) or
34 707(b) of the internal revenue code, for any services relating to or
35 incidental to the exchange of like-kind property.

36 (4) "Financial institution" means a bank, credit union, savings and
37 loan association, savings bank, or trust company chartered under the
38 laws of this state or the United States whose accounts are insured by

1 the full faith and credit of the United States, the federal deposit
2 insurance corporation, the national credit union share insurance fund,
3 or other similar or successor programs.

4 (5) "Person" means an individual, corporation, partnership, limited
5 liability company, joint venture, association, joint stock company,
6 trust, or any other form of a legal entity, and includes the agents and
7 employees of that person.

8 (6) "Prudent investor standard" means the standard for investment
9 as described under RCW 11.100.020.

10 NEW SECTION. **Sec. 3.** An exchange facilitator may not bring a suit
11 or action for the collection of compensation in connection with duties
12 performed as an exchange facilitator unless the exchange facilitator
13 alleges and proves that he or she was fully in compliance with this
14 chapter at the time of the offering to perform or performing an act or
15 service regulated under this chapter.

16 NEW SECTION. **Sec. 4.** (1) Except as provided under subsection (2)
17 of this section, a person who engages in business as an exchange
18 facilitator shall notify all existing exchange clients whose
19 relinquished property is located in this state, or whose replacement
20 property held under a qualified exchange accommodation agreement is
21 located in this state, of any change in control of the exchange
22 facilitator. Notification must be provided within ten business days of
23 the effective date of the change in control by hand delivery,
24 facsimile, electronic mail, overnight mail, or first-class mail, and
25 must be posted on the exchange facilitator's internet web site for at
26 least ninety days following the change in control. The notification
27 must set forth the name, address, and other contact information of the
28 transferees.

29 (2) If an exchange facilitator is a publicly traded company or
30 wholly owned subsidiary of the publicly traded company and remains a
31 publicly traded company or wholly owned subsidiary of the publicly
32 traded company after a change in control, the publicly traded company
33 or wholly owned subsidiary of the publicly traded company is not
34 required to notify its existing clients of the change in control.

35 (3) For purposes of this section, "change in control" means any

1 transfer of more than fifty percent of the assets or ownership
2 interests, directly or indirectly, of the exchange facilitator.

3 NEW SECTION. **Sec. 5.** (1) A person who engages in business as an
4 exchange facilitator shall:

5 (a) Maintain a fidelity bond or bonds in an amount of not less than
6 one million dollars executed by an insurer authorized to do business in
7 this state; or

8 (b) Deposit an amount of cash or securities or irrevocable letters
9 of credit in an amount of not less than one million dollars into an
10 interest-bearing deposit account or a money market account with the
11 financial institution of the exchange facilitator's choice. Interest
12 on that amount accrues to the exchange facilitator; or

13 (c) Deposit all exchange funds in a qualified escrow account or
14 qualified trust, as both terms are defined under treasury regulation
15 section 1.1031(k)-1(g)(3), with a financial institution and provide
16 that a withdrawal from that escrow account or trust requires the
17 exchange facilitator's and the client's written authorization.

18 (2) A person who engages in business as an exchange facilitator may
19 maintain a bond or bonds or deposit an amount of cash or securities or
20 irrevocable letters of credit in excess of the minimum required amounts
21 under this section.

22 (3) The requirements under subsection (1)(a) of this section are
23 satisfied if the person engaging in business as an exchange facilitator
24 is listed as a named insured on one or more fidelity bonds that have an
25 aggregate total of at least one million dollars.

26 (4) An exchange facilitator must provide evidence to each client
27 that the requirements of this section are satisfied before entering
28 into an exchange agreement.

29 (5) Upon request of a current or prospective client, or the
30 attorney general under chapter 19.86 RCW, the exchange facilitator must
31 offer evidence proving that the requirements of this section are
32 satisfied at the time of the request.

33 NEW SECTION. **Sec. 6.** (1) A person who claims to have sustained
34 damages by reason of the fraudulent or dishonest acts of an exchange
35 facilitator or an exchange facilitator's employee may file a claim on

1 the fidelity bond or approved alternative described in section 5 of
2 this act to recover the damages.

3 (2) The remedies provided under this section are cumulative and
4 nonexclusive and do not affect any other remedy available at law.

5 NEW SECTION. **Sec. 7.** (1) A person who engages in business as an
6 exchange facilitator shall:

7 (a) Maintain a policy of errors and omissions insurance in an
8 amount of not less than two hundred fifty thousand dollars executed by
9 an insurer authorized to do business in this state; or

10 (b) Deposit an amount of cash or securities or irrevocable letters
11 of credit in an amount of not less than two hundred fifty thousand
12 dollars into an interest-bearing deposit account or a money market
13 account with the financial institution of the exchange facilitator's
14 choice. Interest on that amount accrues to the exchange facilitator.

15 (2) A person who engages in business as an exchange facilitator may
16 maintain insurance or deposit an amount of cash or securities or
17 irrevocable letters of credit in excess of the minimum required amounts
18 under this section.

19 (3) The requirements under subsection (1)(a) of this section are
20 satisfied if the person engaging in business as an exchange facilitator
21 is listed as a named insured on one or more errors and omissions
22 policies that have an aggregate total of at least two hundred fifty
23 thousand dollars.

24 (4) An exchange facilitator must provide evidence to each client
25 that the requirements of this section are satisfied before entering
26 into an exchange agreement.

27 (5) Upon request of a current or prospective client, or the
28 attorney general under chapter 19.86 RCW, the exchange facilitator must
29 offer evidence proving that the requirements of this section are
30 satisfied at the time of the request.

31 NEW SECTION. **Sec. 8.** (1) A person who claims to have sustained
32 damages by reason of an unintentional error or omission of an exchange
33 facilitator or an exchange facilitator's employee may file a claim on
34 the errors and omissions insurance policy or approved alternative
35 described in section 7 of this act to recover the damages.

1 (2) The remedies provided under this section are cumulative and
2 nonexclusive and do not affect any other remedy available at law.

3 NEW SECTION. **Sec. 9.** (1) A person who engages in business as an
4 exchange facilitator shall act as a custodian for all exchange funds,
5 including money, property, other consideration, or instruments received
6 by the exchange facilitator from, or on behalf of, the client, except
7 funds received as the exchange facilitator's compensation. The
8 exchange facilitator shall hold the exchange funds in a manner that
9 provides liquidity and preserves principal, and if invested, shall
10 invest those exchange funds in investments that meet a prudent investor
11 standard and satisfy investment goals of liquidity and preservation of
12 principal. For purposes of this section, a violation of the prudent
13 investor standard includes, but is not limited to, a transaction in
14 which:

15 (a) Exchange funds are knowingly commingled by the exchange
16 facilitator with the operating accounts of the exchange facilitator,
17 except that the exchange facilitator's fee may be deposited as part of
18 the exchange transaction into the same account as that containing
19 exchange funds, in which event the exchange facilitator must promptly
20 withdraw the fee;

21 (b) Exchange funds are loaned or otherwise transferred to any
22 person or entity, other than a financial institution, that is
23 affiliated with or related to the exchange facilitator, except that
24 this subsection (1)(b) does not apply to the transfer of funds from an
25 exchange facilitator to an exchange accommodation titleholder in
26 accordance with an exchange contract;

27 (c) Exchange funds are invested in a manner that does not provide
28 sufficient liquidity to meet the exchange facilitator's contractual
29 obligations to its clients, unless insufficient liquidity occurs as the
30 result of: (i) Events beyond the prediction or control of the exchange
31 facilitator including, but not limited to, failure of a financial
32 institution; or (ii) an investment specifically requested by the
33 client; or

34 (d) Exchange funds are invested in a manner that does not preserve
35 the principal of the exchange funds, unless loss of principal occurs as
36 the result of: (i) Events beyond the prediction or control of the

1 exchange facilitator; or (ii) an investment specifically requested by
2 the client.

3 (2) Exchange funds are not subject to execution or attachment on
4 any claim against the exchange facilitator.

5 NEW SECTION. **Sec. 10.** A person who engages in business as an
6 exchange facilitator must administer each of his, her, or its places of
7 business under the direct management of an officer or an employee who
8 is either:

9 (1) An attorney or certified public accountant admitted to practice
10 in any state or territory of the United States; or

11 (2) A person who has passed a test specific to the subject matter
12 of exchange facilitation.

13 NEW SECTION. **Sec. 11.** A person who engages in business as an
14 exchange facilitator shall not, with respect to a like-kind exchange
15 transaction, knowingly or with criminal negligence:

16 (1) Make a false, deceptive, or misleading material representation,
17 directly or indirectly, concerning a like-kind transaction;

18 (2) Make a false, deceptive, or misleading material representation,
19 directly or indirectly, in advertising or by any other means,
20 concerning a like-kind transaction;

21 (3) Engage in any unfair or deceptive practice toward any person;

22 (4) Obtain property by fraud or misrepresentation;

23 (5) Fail to account for any moneys or property belonging to others
24 that may be in the possession or under the control of the exchange
25 facilitator;

26 (6) Commingle funds held for a client in any account that holds the
27 exchange facilitator's own funds, except as provided in section 9(1)(a)
28 of this act;

29 (7) Loan or otherwise transfer exchange funds to any person or
30 entity, other than a financial institution, that is affiliated with or
31 related to the exchange facilitator, except for the transfer of funds
32 from an exchange facilitator to an exchange accommodation title holder
33 in accordance with an exchange contract;

34 (8) Keep, or cause to be kept, any money in any bank, credit union,
35 or other financial institution under a name designating the money as

1 belonging to the client of any exchange facilitator, unless that money
2 belongs to that client and was entrusted to the exchange facilitator by
3 that client;

4 (9) Fail to fulfill its contractual duties to the client to deliver
5 property or funds to the taxpayer in a material way unless such a
6 failure is due to circumstances beyond the control of the exchange
7 facilitator;

8 (10) Commit, including commission by its owners, officers,
9 directors, employees, agents, or independent contractors, any crime
10 involving fraud, misrepresentation, deceit, embezzlement,
11 misappropriation of funds, robbery, or other theft of property;

12 (11) Fail to make disclosures required by any applicable state law;
13 or

14 (12) Make any false statement or omission of material fact in
15 connection with any reports filed by an exchange facilitator or in
16 connection with any investigation conducted by the department of
17 financial institutions.

18 NEW SECTION. **Sec. 12.** (1) An exchange facilitator must deposit
19 all client funds in:

20 (a) For accounts with a value of five hundred thousand dollars or
21 more, a separately identified account, as defined in treasury
22 regulation section 1.468B-6(c)(ii), for the particular client or
23 client's matter, and the client must receive all the earnings credited
24 to the separately identified account; or

25 (b) For accounts with a value less than five hundred thousand
26 dollars, (i) a pooled interest-bearing trust account if the client
27 agrees to pooling in writing; or (ii) if the client does not agree to
28 pooling, in a separately identified account, as defined in treasury
29 regulation section 1.468B-6(c)(ii).

30 (2) An exchange facilitator must provide the client with written
31 notification of how the exchange proceeds have been invested or
32 deposited.

33 NEW SECTION. **Sec. 13.** A person who engages in business as an
34 exchange facilitator and who violates section 11 (1) through (8) of
35 this act is guilty of a class B felony under chapter 9A.20 RCW.

1 NEW SECTION. **Sec. 14.** A person who engages in business as an
2 exchange facilitator and who violates section 11 (11) or (12) of this
3 act is guilty of a misdemeanor under chapter 9A.20 RCW.

4 NEW SECTION. **Sec. 15.** (1) Exchange facilitators must provide the
5 director of financial institutions with a report of exchange
6 facilitator activity by December 31, 2009. The director may by rule
7 create a format for the report, which must cover the period of January
8 1, 2009, through December 31, 2009. The report may only include the
9 following information for exchange facilitation activity in Washington
10 state:

11 (a) The total number of property exchanges facilitated by the
12 exchange facilitator;

13 (b) The total dollar volume of property exchanges facilitated by
14 the exchange facilitator;

15 (c) The primary type of business the exchange facilitator engages
16 in if the primary type of business is not exchange facilitation,
17 including a description of any required licenses; and

18 (d) The percentage of the exchange facilitator's business that is
19 exchange facilitation, both by client and by gross income.

20 Any information provided by an exchange facilitator in this report
21 that constitutes a trade secret as defined in RCW 19.108.010 is exempt
22 from the disclosure requirements in chapters 42.17 and 42.56 RCW,
23 unless aggregated with information supplied by other exchange
24 facilitators in such a manner that the individual information of an
25 exchange facilitator is not identifiable.

26 (2) Any information produced or obtained in examining an exchange
27 facilitator under this section is exempt from disclosure as provided in
28 RCW 42.56.270.

29 (3) The director must compile the reports from exchange
30 facilitators and report to the financial institutions and insurance
31 committee of the house of representatives and the financial
32 institutions, housing and insurance committee of the senate by January
33 15, 2010.

34 (4) This section expires June 1, 2010.

35 NEW SECTION. **Sec. 16.** A person who violates this chapter is
36 subject to civil suit in a court of competent jurisdiction.

1 NEW SECTION. **Sec. 17.** The legislature finds that the practices
2 covered by this chapter are matters vitally affecting the public
3 interest for the purpose of applying the consumer protection act,
4 chapter 19.86 RCW. A violation of this chapter is not reasonable in
5 relation to the development and preservation of business and is an
6 unfair or deceptive act in trade or commerce and an unfair method of
7 competition for purposes of applying the consumer protection act,
8 chapter 19.86 RCW.

9 NEW SECTION. **Sec. 18.** This chapter does not affect the
10 application of chapter 21.20 RCW.

11 NEW SECTION. **Sec. 19.** Sections 1 through 18 of this act
12 constitute a new chapter in Title 19 RCW."

13 Correct the title.

EFFECT: The prohibited practices provisions are altered. A facilitator must not, knowingly or with criminal negligence, commit specified prohibited practices related to a like-kind transaction. These prohibited practices include: Making false, deceptive, or misleading material statements; making deceptive or misleading material statements in advertising; engaging in unfair or deceptive acts; commingling of funds, except as allowed; loaning or transferring money to a person or entity affiliated with the facilitator, except as allowed; keeping exchange funds under a client's name; a material failure to fulfill contractual duties to deliver funds or property unless the failure is due to a cause that is beyond the control of the facilitator; a failure to provide required disclosures; negligently making a false statement or willfully omitting a material fact in a report or investigation; and committing certain crimes. It is not a violation of the requirements regarding sufficient liquidity and preservation of principal to make an investment at the specific investment request of the client. Provisions regarding the segregation of funds are modified. All accounts above 500,000 dollars must be placed in a separately identified account and the client must receive the earnings related to that account. Accounts of less than 500,000 dollars may be pooled with other client accounts if the client agrees, in writing, to the pooling. If the client does not agree, the funds must be placed in a separately identified account. An exchange facilitator must provide the client with written notification of how the funds are invested or deposited. This act does not impact the application of chapter 21.20 RCW, the state securities act. The null and void clause is removed. Additional language and grammar changes

are made.

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