
HOUSE BILL 1078

State of Washington

61st Legislature

2009 Regular Session

By Representatives Kelley, Roach, Kirby, Warnick, Bailey, and Sells

Prefiled 01/07/09. Read first time 01/12/09. Referred to Committee on Financial Institutions & Insurance.

1 AN ACT Relating to exchange facilitators; and adding a new chapter
2 to Title 19 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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

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

2 (i)(A) Facilitates, for a fee, an exchange of like-kind property by
3 entering into an agreement with a taxpayer by which the exchange
4 facilitator acquires from the taxpayer the contractual rights to sell
5 the taxpayer's relinquished property located in this state and transfer
6 a replacement property to the taxpayer as a qualified intermediary, as
7 defined under treasury regulation section 1.1031(k)-1(g)(4); (B) enters
8 into an agreement with a taxpayer to take title to a property in this
9 state as an exchange accommodation titleholder, as defined in internal
10 revenue service revenue procedure 2000-37; or (C) enters into an
11 agreement with a taxpayer to act as a qualified trustee or qualified
12 escrow holder, as both terms are defined under treasury regulation
13 section 1.1031(k)-1(g)(3); or

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

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

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

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

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

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

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

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

4 (c) For the purposes of this subsection, "fee" means compensation
5 of any nature, direct or indirect, monetary or in kind, that is
6 received by a person or related person, as defined in section 267(b) or
7 707(b) of the internal revenue code, for any services relating to or
8 incidental to the exchange of like-kind property.

9 (4) "Financial institution" means a bank, credit union, savings and
10 loan association, savings bank, or trust company chartered under the
11 laws of this state or the United States whose accounts are insured by
12 the full faith and credit of the United States, the federal deposit
13 insurance corporation, the national credit union share insurance fund,
14 or other similar or successor programs.

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

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

21 NEW SECTION. **Sec. 3.** (1) Except as provided under subsection (2)
22 of this section, a person who engages in business as an exchange
23 facilitator shall notify all existing exchange clients whose
24 relinquished property is located in this state, or whose replacement
25 property held under a qualified exchange accommodation agreement is
26 located in this state, of any change in control of the exchange
27 facilitator. Notification must be provided within ten business days of
28 the effective date of the change in control by hand delivery,
29 facsimile, electronic mail, overnight mail, or first-class mail, and
30 must be posted on the exchange facilitator's internet web site for at
31 least ninety days following the change in control. The notification
32 must set forth the name, address, and other contact information of the
33 transferees.

34 (2) If an exchange facilitator is a publicly traded company or
35 wholly owned subsidiary of the publicly traded company and remains a
36 publicly traded company or wholly owned subsidiary of the publicly

1 traded company after a change in control, the publicly traded company
2 or wholly owned subsidiary of the publicly traded company is not
3 required to notify its existing clients of the change in control.

4 (3) For purposes of this section, "change in control" means any
5 transfer of more than fifty percent of the assets or ownership
6 interests, directly or indirectly, of the exchange facilitator.

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

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

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

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

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

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

30 NEW SECTION. **Sec. 5.** A person who claims to have sustained
31 damages by reason of the failure of a person engaging in business as an
32 exchange facilitator to comply with this chapter may file a claim on
33 the bonds, deposits, or letters of credit described in section 4 of
34 this act to recover the damages.

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

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

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

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

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

20 NEW SECTION. **Sec. 7.** (1) A person who engages in business as an
21 exchange facilitator shall act as a custodian for all exchange funds,
22 including money, property, other consideration, or instruments received
23 by the exchange facilitator from, or on behalf of, the client, except
24 funds received as the exchange facilitator's compensation. The
25 exchange facilitator shall hold the exchange funds in a manner that
26 provides liquidity and preserves principal, and if invested, shall
27 invest those exchange funds in investments that meet a prudent investor
28 standard and satisfy investment goals of liquidity and preservation of
29 principal. For purposes of this section, a prudent investor standard
30 is violated if:

31 (a) Exchange funds are knowingly commingled by the exchange
32 facilitator with the operating accounts of the exchange facilitator; or

33 (b) Exchange funds are loaned or otherwise transferred to any
34 person or entity, other than a financial institution, that is
35 affiliated with or related to the exchange facilitator, except that
36 this subsection (1)(b) does not apply to the transfer of funds from an

1 exchange facilitator to an exchange accommodation titleholder in
2 accordance with an exchange contract.

3 (2) Exchange funds are not subject to execution or attachment on
4 any claim against the exchange facilitator. An exchange facilitator
5 shall not knowingly keep, or cause to be kept, any money in any bank,
6 credit union, or other financial institution under a name designating
7 the money as belonging to the client of any exchange facilitator,
8 unless that money belongs to that client and was entrusted to the
9 exchange facilitator by that client.

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

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

16 (2) A certified exchange specialist as certified by the federation
17 of exchange accommodators.

18 NEW SECTION. **Sec. 9.** A person who engages in business as an
19 exchange facilitator shall not:

20 (1) Make a material misrepresentation concerning a like-kind
21 exchange transaction that is intended to mislead;

22 (2) Pursue a continued course of misrepresentation or make false
23 statements through advertising or any other means;

24 (3) Fail, within a reasonable time, to account for any moneys or
25 property belonging to others that may be in the possession of, or under
26 control of, the exchange facilitator;

27 (4) Engage in any conduct that constitutes fraudulent or dishonest
28 dealings;

29 (5) Commit a crime involving fraud, misrepresentation, deceit,
30 embezzlement, misappropriation of funds, robbery, or theft; or

31 (6) Materially fail to fulfill the exchange facilitator's
32 contractual duties to a client to deliver property or funds to the
33 client, unless that failure is due to circumstances beyond the control
34 of the exchange facilitator.

1 NEW SECTION. **Sec. 10.** A person who violates this chapter is
2 subject to civil suit in a court of competent jurisdiction.

3 NEW SECTION. **Sec. 11.** The legislature finds that the practices
4 covered by this chapter are matters vitally affecting the public
5 interest for the purpose of applying the consumer protection act,
6 chapter 19.86 RCW. A violation of this chapter is not reasonable in
7 relation to the development and preservation of business and is an
8 unfair or deceptive act in trade or commerce and an unfair method of
9 competition for purposes of applying the consumer protection act,
10 chapter 19.86 RCW.

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

--- END ---