

**ESSB 5082** - H COMM AMD

By Committee on Business & Financial Services

ADOPTED 04/12/2013

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

3 "Sec. 1. RCW 19.310.010 and 2009 c 70 s 2 are each amended to read  
4 as follows:

5 The definitions in this section apply throughout this chapter  
6 unless the context clearly requires otherwise.

7 (1) A person or entity "affiliated" with a specific person or  
8 entity, means a person or entity who directly, or indirectly through  
9 one or more intermediaries, controls, or is controlled by, or is under  
10 common control with, the person or entity specified.

11 (2) "Client" means the taxpayer with whom the exchange facilitator  
12 enters into an agreement as described in subsection ~~((+3+))~~ (4)(a)(i)  
13 of this section.

14 (3) "Covered dishonest act" means a crime involving fraud,  
15 embezzlement, misappropriation of funds, robbery, or other theft of  
16 property.

17 (4)(a) "Exchange facilitator" means a person who:

18 (i)(A) Facilitates, for a fee, an exchange of like-kind property by  
19 entering into an agreement with a taxpayer by which the exchange  
20 facilitator acquires from the taxpayer the contractual rights to sell  
21 the taxpayer's relinquished property located in this state and transfer  
22 a replacement property to the taxpayer as a qualified intermediary, as  
23 defined under treasury regulation section 1.1031(k)-1(g)(4); (B) enters  
24 into an agreement with a taxpayer to take title to a property in this  
25 state as an exchange accommodation titleholder, as defined in internal  
26 revenue service revenue procedure 2000-37; or (C) enters into an  
27 agreement with a taxpayer to act as a qualified trustee or qualified  
28 escrow holder, as both terms are defined under treasury regulation  
29 section 1.1031(k)-1(g)(3); or

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

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

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

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

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

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

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

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

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

33 ((+4)) (5) "Financial institution" means a state chartered or  
34 federally chartered bank, credit union, savings and loan association,  
35 savings bank, or trust company (~~(chartered under the laws of this state~~  
36 ~~or the United States)) whose accounts are insured by the full faith and  
37 credit of the United States, the federal deposit insurance corporation,~~

1 the national credit union share insurance fund, or other similar or  
2 successor programs.

3 ~~((+5+))~~ (6) "Person" means an individual, corporation, partnership,  
4 limited liability company, joint venture, association, joint stock  
5 company, trust, or any other form of a legal entity, and includes the  
6 agents and employees of that person.

7 ~~((+6+))~~ (7) "Prudent investor standard" means the standard for  
8 investment as described under RCW 11.100.020.

9 **Sec. 2.** RCW 19.310.040 and 2012 c 34 s 2 are each amended to read  
10 as follows:

11 (1) A person who engages in business as an exchange facilitator  
12 must:

13 (a)(i) Maintain a fidelity bond or bonds in an amount of not less  
14 than one million dollars executed by an insurer authorized to do  
15 business in this state for the benefit of a client of the exchange  
16 facilitator that suffers a direct financial loss as a result of the  
17 exchange facilitator's covered dishonest act. Such fidelity bond must  
18 cover the acts of employees of an exchange facilitator and owners of a  
19 nonpublicly traded exchange facilitator; or

20 (ii) Deposit all exchange funds in a qualified escrow account or  
21 qualified trust, as both terms are defined under treasury regulation  
22 section 1.1031(k)-1(g)(3), with a financial institution. ~~((The~~  
23 ~~qualified escrow account or qualified trust must provide that))~~ If an  
24 exchange facilitator deposits exchange funds in a qualified escrow  
25 account or qualified trust:

26 (A) A withdrawal ~~((from that escrow account or trust))~~ of exchange  
27 funds requires the exchange facilitator and the client to independently  
28 authenticate a record, as defined under RCW 62A.9A-102, of the  
29 transaction; and

30 ~~((+b+))~~ (B) The client of the exchange facilitator must receive  
31 independently from the depository financial institution, by any  
32 commercially reasonable means, a current statement for verification of  
33 the deposited exchange funds; and

34 (b) Disclose on the company web site and contractual agreement the  
35 following statement in large, bold, or otherwise conspicuous typeface  
36 calculated to draw the eye: "Washington state law, RCW 19.310.040,  
37 requires an exchange facilitator to either maintain a fidelity bond in

1 an amount of not less than one million dollars that protects clients  
2 against losses caused by criminal acts of the exchange facilitator, or  
3 to hold all client funds in a qualified escrow account or qualified  
4 trust that requires your consent for withdrawals. All exchange funds  
5 must be deposited in a separately identified account using your  
6 taxpayer identification number. You must receive written notification  
7 of how your exchange funds have been deposited. Your exchange  
8 facilitator is required to provide you with written directions of how  
9 to independently verify the deposit of the exchange funds. Exchange  
10 facilitation services are not regulated by any agency of the state of  
11 Washington or of the United States government. It is your  
12 responsibility to determine that your exchange funds will be held in a  
13 safe manner." If recommending other products or services, the exchange  
14 facilitator must disclose to the client that the exchange facilitator  
15 may receive a financial benefit, such as a commission or referral fee,  
16 as a result of such recommendation. The exchange facilitator must not  
17 recommend or suggest to a client the use of services of another  
18 organization or business entity in which the exchange facilitator has  
19 a direct or indirect interest without full disclosure of such interest  
20 at the time of recommendation or suggestion.

21 (2) An exchange facilitator must provide evidence to each client  
22 that the requirements of this section are satisfied before entering  
23 into an exchange agreement.

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

28 **Sec. 3.** RCW 19.310.050 and 2009 c 70 s 6 are each amended to read  
29 as follows:

30 (1) A person who claims to have sustained damages by reason of the  
31 fraudulent act or covered dishonest act(~~(s)~~) of an exchange facilitator  
32 or an exchange facilitator's employee may file a claim on the fidelity  
33 bond (~~(or approved alternative described in RCW 19.310.040 to recover~~  
34 ~~the damages)~~).

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

1       **Sec. 4.** RCW 19.310.080 and 2009 c 70 s 9 are each amended to read  
2 as follows:

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

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

3 **Sec. 5.** RCW 19.310.100 and 2009 c 70 s 11 are each amended to read  
4 as follows:

5 A person who engages in business as an exchange facilitator shall  
6 not, with respect to a like-kind exchange transaction(~~(, knowingly or~~  
7 ~~with criminal negligence))):~~

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

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

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

14 (4) Obtain property by fraud or misrepresentation;

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

18 (6) Commingle funds held for a client in any account that holds the  
19 exchange facilitator's own funds, except as provided in RCW  
20 19.310.080(1)(a);

21 (7) Loan or otherwise transfer exchange funds to any person or  
22 entity, other than a financial institution, that is affiliated with or  
23 related to the exchange facilitator, except for the transfer of funds  
24 from an exchange facilitator to an exchange accommodation title holder  
25 in accordance with an exchange contract;

26 (8) Keep, or cause to be kept, any money in any bank, credit union,  
27 or other financial institution under a name designating the money as  
28 belonging to the client of any exchange facilitator, unless that money  
29 belongs to that client and was entrusted to the exchange facilitator by  
30 that client;

31 (9) Fail to fulfill its contractual duties to the client to deliver  
32 property or funds to the taxpayer in a material way unless such a  
33 failure is due to (~~circumstances beyond the control of the exchange~~  
34 ~~facilitator)): (a) Events beyond the prediction or control of the  
35 exchange facilitator; or (b) an investment specifically requested by  
36 the client;~~

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

5 (11) Fail to make disclosures required by any applicable state law;  
6 or

7 (12) Make any false statement or omission of material fact in  
8 connection with any reports filed by an exchange facilitator or in  
9 connection with any investigation conducted by the department of  
10 financial institutions.

11 **Sec. 6.** RCW 19.310.110 and 2009 c 70 s 12 are each amended to read  
12 as follows:

13 (1) An exchange facilitator must deposit all client funds in(~~(+~~  
14 ~~(a) For accounts with a value of five hundred thousand dollars or~~  
15 ~~more,~~) a separately identified account, as defined in treasury  
16 regulation section 1.468B-6(c)(ii), for the particular client or  
17 client's matter, and the client must receive all the earnings credited  
18 to the separately identified account(~~(+ or~~

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

24 (2) An exchange facilitator must provide the client with written  
25 notification of how the exchange proceeds have been invested or  
26 deposited.

27 **Sec. 7.** RCW 19.310.120 and 2012 c 34 s 4 are each amended to read  
28 as follows:

29 (1) Failure to fulfill the requirements under RCW 19.310.040  
30 constitutes prima facie evidence that the exchange facilitator intended  
31 to defraud a client who suffered a subsequent loss of the asset  
32 entrusted to the exchange facilitator.

33 (2) A person who engages in business as an exchange facilitator and  
34 who knowingly violates RCW 19.310.100 (1) through (~~(+8+))~~ (9) or fails  
35 to comply with the requirements under RCW 19.310.040 is guilty of a  
36 class B felony under chapter 9A.20 RCW. However, an exchange

1 facilitator is not guilty of a class B felony for failure to comply  
2 with the requirements under RCW 19.310.040 if: (a) Failure to comply  
3 is due to the cancellation or amendment of the fidelity bond by the  
4 bond issuer; and (b) the exchange facilitator:

5 (i) Within thirty days, takes all reasonable steps to comply with  
6 the requirements under RCW 19.310.040; and

7 (ii) Deposits any new exchange funds into a qualified escrow  
8 account or qualified trust until a fidelity bond is obtained that meets  
9 the requirements under RCW 19.310.040(1)(a)(i)."

10 Correct the title.

EFFECT: Makes various clarifying and technical changes,  
including, for example:

Clarifying that certain requirements apply to qualified escrow  
accounts and qualified trusts, rather than an exchange facilitator;

Defining "covered dishonest act" in the singular and using the  
defined term elsewhere in the chapter;

Deleting a reference to an approved alternative to a fidelity bond,  
which was deleted in legislation enacted in 2012; and

Describing (rather than cross-referencing) the exception to the  
prohibited practice on failing to deliver funds.

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