

CERTIFICATION OF ENROLLMENT  
**ENGROSSED SUBSTITUTE SENATE BILL 5082**

Chapter 228, Laws of 2013

63rd Legislature  
2013 Regular Session

EXCHANGE FACILITATORS--REQUIREMENTS

EFFECTIVE DATE: 07/28/13

Passed by the Senate April 22, 2013  
YEAS 47 NAYS 0

BRAD OWEN

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**President of the Senate**

Passed by the House April 12, 2013  
YEAS 95 NAYS 0

FRANK CHOPP

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**Speaker of the House of Representatives**

Approved May 14, 2013, 11:18 a.m.

JAY INSLEE

\_\_\_\_\_  
**Governor of the State of Washington**

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5082** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

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**Secretary**

FILED

May 14, 2013

**Secretary of State  
State of Washington**

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**ENGROSSED SUBSTITUTE SENATE BILL 5082**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2013 Regular Session

**State of Washington                      63rd Legislature                      2013 Regular Session**

**By** Senate Financial Institutions, Housing & Insurance (originally sponsored by Senators Benton and Smith)

READ FIRST TIME 01/31/13.

1            AN ACT Relating to exchange facilitator requirements; and amending  
2 RCW 19.310.010, 19.310.040, 19.310.050, 19.310.080, 19.310.100,  
3 19.310.110, and 19.310.120.

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

5            **Sec. 1.** RCW 19.310.010 and 2009 c 70 s 2 are each amended to read  
6 as follows:

7            The definitions in this section apply throughout this chapter  
8 unless the context clearly requires otherwise.

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

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

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

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

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

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

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

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

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

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

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

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

37 (vi) An affiliated entity that is used by the exchange facilitator

1 to facilitate exchanges or to take title to property in this state as  
2 an exchange accommodation titleholder.

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

8 ~~((4))~~ (5) "Financial institution" means a state chartered or  
9 federally chartered bank, credit union, savings and loan association,  
10 savings bank, or trust company ~~((chartered under the laws of this state~~  
11 ~~or the United States))~~ whose accounts are insured by the full faith and  
12 credit of the United States, the federal deposit insurance corporation,  
13 the national credit union share insurance fund, or other similar or  
14 successor programs.

15 ~~((5))~~ (6) "Person" means an individual, corporation, partnership,  
16 limited liability company, joint venture, association, joint stock  
17 company, trust, or any other form of a legal entity, and includes the  
18 agents and employees of that person.

19 ~~((6))~~ (7) "Prudent investor standard" means the standard for  
20 investment as described under RCW 11.100.020.

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

23 (1) A person who engages in business as an exchange facilitator  
24 must:

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

32 (ii) Deposit all exchange funds in a qualified escrow account or  
33 qualified trust, as both terms are defined under treasury regulation  
34 section 1.1031(k)-1(g)(3), with a financial institution. ~~((The~~  
35 ~~qualified escrow account or qualified trust must provide that))~~ If an  
36 exchange facilitator deposits exchange funds in a qualified escrow  
37 account or qualified trust:

1        (A) A withdrawal ((from that escrow account or trust)) of exchange  
2 funds requires the exchange facilitator and the client to independently  
3 authenticate a record, as defined under RCW 62A.9A-102, of the  
4 transaction; and

5        ((+b+)) (B) The client of the exchange facilitator must receive  
6 independently from the depository financial institution, by any  
7 commercially reasonable means, a current statement for verification of  
8 the deposited exchange funds; and

9        (b) Disclose on the company web site and contractual agreement the  
10 following statement in large, bold, or otherwise conspicuous typeface  
11 calculated to draw the eye: "Washington state law, RCW 19.310.040,  
12 requires an exchange facilitator to either maintain a fidelity bond in  
13 an amount of not less than one million dollars that protects clients  
14 against losses caused by criminal acts of the exchange facilitator, or  
15 to hold all client funds in a qualified escrow account or qualified  
16 trust that requires your consent for withdrawals. All exchange funds  
17 must be deposited in a separately identified account using your  
18 taxpayer identification number. You must receive written notification  
19 of how your exchange funds have been deposited. Your exchange  
20 facilitator is required to provide you with written directions of how  
21 to independently verify the deposit of the exchange funds. Exchange  
22 facilitation services are not regulated by any agency of the state of  
23 Washington or of the United States government. It is your  
24 responsibility to determine that your exchange funds will be held in a  
25 safe manner." If recommending other products or services, the exchange  
26 facilitator must disclose to the client that the exchange facilitator  
27 may receive a financial benefit, such as a commission or referral fee,  
28 as a result of such recommendation. The exchange facilitator must not  
29 recommend or suggest to a client the use of services of another  
30 organization or business entity in which the exchange facilitator has  
31 a direct or indirect interest without full disclosure of such interest  
32 at the time of recommendation or suggestion.

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

36        (3) Upon request of a current or prospective client, or the  
37 attorney general under chapter 19.86 RCW, the exchange facilitator must

1 offer evidence proving that the requirements of this section are  
2 satisfied at the time of the request.

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

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

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

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

14 (1) A person who engages in business as an exchange facilitator  
15 shall act as a custodian for all exchange funds, including money,  
16 property, other consideration, or instruments received by the exchange  
17 facilitator from, or on behalf of, the client, except funds received as  
18 the exchange facilitator's compensation. The exchange facilitator  
19 shall hold the exchange funds in a manner that provides liquidity and  
20 preserves both principal and any earned interest, and if invested,  
21 shall invest those exchange funds in investments that meet a prudent  
22 investor standard and satisfy investment goals of liquidity and  
23 preservation of principal and any earned interest. For purposes of  
24 this section, a violation of the prudent investor standard includes,  
25 but is not limited to, a transaction in which:

26 (a) Exchange funds are knowingly commingled by the exchange  
27 facilitator with the operating accounts of the exchange facilitator,  
28 except that the exchange facilitator's fee may be deposited as part of  
29 the exchange transaction into the same account as that containing  
30 exchange funds, in which event the exchange facilitator must promptly  
31 withdraw the fee;

32 (b) Exchange funds are loaned or otherwise transferred to any  
33 person or entity, other than a financial institution, that is  
34 affiliated with or related to the exchange facilitator, except that  
35 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 (c) Exchange funds are invested in a manner that does not provide  
4 sufficient liquidity to meet the exchange facilitator's contractual  
5 obligations to its clients, unless insufficient liquidity occurs as the  
6 result of: (i) Events beyond the prediction or control of the exchange  
7 facilitator including, but not limited to, failure of a financial  
8 institution; or (ii) an investment specifically requested by the  
9 client; or

10 (d) Exchange funds are invested in a manner that does not preserve  
11 the principal of the exchange funds, unless loss of principal occurs as  
12 the result of: (i) Events beyond the prediction or control of the  
13 exchange facilitator; or (ii) an investment specifically requested by  
14 the client.

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

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

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

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

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

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

28 (4) Obtain property by fraud or misrepresentation;

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

32 (6) Commingle funds held for a client in any account that holds the  
33 exchange facilitator's own funds, except as provided in RCW  
34 19.310.080(1)(a);

35 (7) Loan or otherwise transfer exchange funds to any person or  
36 entity, other than a financial institution, that is affiliated with or

1 related to the exchange facilitator, except for the transfer of funds  
2 from an exchange facilitator to an exchange accommodation title holder  
3 in accordance with an exchange contract;

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

9 (9) Fail to fulfill its contractual duties to the client to deliver  
10 property or funds to the taxpayer in a material way unless such a  
11 failure is due to (~~circumstances beyond the control of the exchange~~  
12 ~~facilitator~~): (a) Events beyond the prediction or control of the  
13 exchange facilitator; or (b) an investment specifically requested by  
14 the client;

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

19 (11) Fail to make disclosures required by any applicable state law;  
20 or

21 (12) Make any false statement or omission of material fact in  
22 connection with any reports filed by an exchange facilitator or in  
23 connection with any investigation conducted by the department of  
24 financial institutions.

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

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

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



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

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

6 (1) Failure to fulfill the requirements under RCW 19.310.040  
7 constitutes prima facie evidence that the exchange facilitator intended  
8 to defraud a client who suffered a subsequent loss of the asset  
9 entrusted to the exchange facilitator.

10 (2) A person who engages in business as an exchange facilitator and  
11 who knowingly violates RCW 19.310.100 (1) through (~~(+8+)~~) (9) or fails  
12 to comply with the requirements under RCW 19.310.040 is guilty of a  
13 class B felony under chapter 9A.20 RCW. However, an exchange  
14 facilitator is not guilty of a class B felony for failure to comply  
15 with the requirements under RCW 19.310.040 if: (a) Failure to comply  
16 is due to the cancellation or amendment of the fidelity bond by the  
17 bond issuer; and (b) the exchange facilitator:

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

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

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