
ENGROSSED SUBSTITUTE SENATE BILL 6032

State of Washington

61st Legislature

2009 Regular Session

By Senate Financial Institutions, Housing & Insurance (originally sponsored by Senators Berkey and Hobbs)

READ FIRST TIME 02/25/09.

1 AN ACT Relating to exchange facilitators; adding a new chapter to
2 Title 19 RCW; prescribing penalties; and providing an expiration date.

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 pertaining to persons who facilitate like-kind
6 exchanges pursuant to section 1031 of the internal revenue code and
7 associated treasury regulations. The purpose of this chapter is to
8 create a statutory framework that provides some consumer protections to
9 those who entrust money or property to persons acting as exchange
10 facilitators.

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

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

17 (2) "Client" means the taxpayer with whom the exchange facilitator

1 enters into an agreement as described in subsection (3)(a)(i) of this
2 section.

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

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

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

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

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

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

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

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

37 (v) A qualified intermediary, as defined under treasury regulation

1 section 1.1031(k)-1(g)(4), who holds exchange funds from the
2 disposition of relinquished property located outside of this state; or

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

6 (c) For the purposes of this subsection, "fee" means compensation
7 of any nature, direct or indirect, monetary or in kind, that is
8 received by a person or related person, as defined in section 267(b) or
9 707(b) of the internal revenue code, for any services relating to or
10 incidental to the exchange of like-kind property.

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

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

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

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

29 NEW SECTION. **Sec. 4.** (1) Except as provided under subsection (2)
30 of this section, a person who engages in business as an exchange
31 facilitator shall notify all existing exchange clients whose
32 relinquished property is located in this state, or whose replacement
33 property held under a qualified exchange accommodation agreement is
34 located in this state, of any change in control of the exchange
35 facilitator. Notification must be provided within ten business days of
36 the effective date of the change in control by hand delivery,

1 facsimile, electronic mail, overnight mail, or first-class mail, and
2 must be posted on the exchange facilitator's internet web site for at
3 least ninety days following the change in control. The notification
4 must set forth the name, address, and other contact information of the
5 transferees.

6 (2) If an exchange facilitator is a publicly traded company or
7 wholly owned subsidiary of the publicly traded company and remains a
8 publicly traded company or wholly owned subsidiary of the publicly
9 traded company after a change in control, the publicly traded company
10 or wholly owned subsidiary of the publicly traded company is not
11 required to notify its existing clients of the change in control.

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

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

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

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

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

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

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

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

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

8 NEW SECTION. **Sec. 6.** (1) A person who claims to have sustained
9 damages by reason of the fraudulent or dishonest acts of an exchange
10 facilitator or an exchange facilitator's employee may file a claim on
11 the fidelity bond or approved alternative described in section 5 of
12 this act to recover the damages.

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

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

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

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

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

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

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

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

5 NEW SECTION. **Sec. 8.** (1) A person who claims to have sustained
6 damages by reason of an unintentional error or omission of an exchange
7 facilitator or an exchange facilitator's employee may file a claim on
8 the errors and omissions insurance policy or approved alternative
9 described in section 7 of this act to recover 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 NEW SECTION. **Sec. 9.** (1) A person who engages in business as an
13 exchange facilitator shall act as a custodian for all exchange funds,
14 including money, property, other consideration, or instruments received
15 by the exchange facilitator from, or on behalf of, the client, except
16 funds received as the exchange facilitator's compensation. The
17 exchange facilitator shall hold the exchange funds in a manner that
18 provides liquidity and preserves principal, and if invested, shall
19 invest those exchange funds in investments that meet a prudent investor
20 standard and satisfy investment goals of liquidity and preservation of
21 principal. For purposes of this section, a violation of the prudent
22 investor standard includes, but is not limited to, a transaction in
23 which:

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

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

1 (c) Exchange funds are invested in a manner that does not provide
2 sufficient liquidity to meet the exchange facilitator's contractual
3 obligations to its clients, unless insufficient liquidity occurs as the
4 result of: (i) Events beyond the prediction or control of the exchange
5 facilitator including, but not limited to, failure of a financial
6 institution; or (ii) an investment specifically requested by the
7 client; or

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

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

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

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

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

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

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

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

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

32 (4) Obtain property by fraud or misrepresentation;

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

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

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

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

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

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

22 (11) Fail to make disclosures required by any applicable state law;
23 or

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

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

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

35 (b) For accounts with a value less than five hundred thousand
36 dollars, (i) a pooled interest-bearing trust account if the client

1 agrees to pooling in writing; or (ii) if the client does not agree to
2 pooling, in a separately identified account, as defined in treasury
3 regulation section 1.468B-6(c)(ii).

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

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

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

13 NEW SECTION. **Sec. 15.** (1) Exchange facilitators must provide the
14 director of financial institutions with a report of exchange
15 facilitator activity by December 31, 2009. The director may by rule
16 create a format for the report, which must cover the period of January
17 1, 2009, through December 31, 2009. The report may only include the
18 following information for exchange facilitation activity in Washington
19 state:

20 (a) The total number of property exchanges facilitated by the
21 exchange facilitator;

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

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

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

29 Any information provided by an exchange facilitator in this report
30 that constitutes a trade secret as defined in RCW 19.108.010 is exempt
31 from the disclosure requirements in chapters 42.17 and 42.56 RCW,
32 unless aggregated with information supplied by other exchange
33 facilitators in such a manner that the individual information of an
34 exchange facilitator is not identifiable.

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

4 (3) The director must compile the reports from exchange
5 facilitators and report to the financial institutions and insurance
6 committee of the house of representatives and the financial
7 institutions, housing and insurance committee of the senate by January
8 15, 2010.

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

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

12 NEW SECTION. **Sec. 17.** The legislature finds that the practices
13 covered by this chapter are matters vitally affecting the public
14 interest for the purpose of applying the consumer protection act,
15 chapter 19.86 RCW. A violation of this chapter is not reasonable in
16 relation to the development and preservation of business and is an
17 unfair or deceptive act in trade or commerce and an unfair method of
18 competition for purposes of applying the consumer protection act,
19 chapter 19.86 RCW.

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

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

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