
ENGROSSED SUBSTITUTE SENATE BILL 5082

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, 19.310.080, 19.310.100, 19.310.110, and
3 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 acts" means crimes 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 bank, credit union,
9 savings and loan association, savings bank, or trust company chartered
10 under the laws of ~~((this))~~ any state within the United States or of the
11 United States whose accounts are insured by the full faith and credit
12 of the United States, the federal deposit insurance corporation, the
13 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 acts. 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))~~);

36 (b) Provide that a withdrawal ~~((from that escrow account or trust))~~

1 of exchange funds requires the exchange facilitator and the client to
2 independently authenticate a record, as defined under RCW 62A.9A-102,
3 of the transaction;

4 ~~((b))~~ (c) Provide for the client of the exchange facilitator to
5 receive independently from the depository financial institution, by any
6 commercially reasonable means, a current statement for verification of
7 the deposited exchange funds; and

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

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

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

1 **Sec. 3.** 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. 4.** 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)) as provided for under RCW 19.310.080(1) (c) and (d);~~

35 (10) Commit, including commission by its owners, officers,
36 directors, employees, agents, or independent contractors, any crime

1 involving fraud, misrepresentation, deceit, embezzlement,
2 misappropriation of funds, robbery, or other theft of property;

3 (11) Fail to make disclosures required by any applicable state law;
4 or

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

9 **Sec. 5.** RCW 19.310.110 and 2009 c 70 s 12 are each amended to read
10 as follows:

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

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

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

25 **Sec. 6.** RCW 19.310.120 and 2012 c 34 s 4 are each amended to read
26 as follows:

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

31 (2) A person who engages in business as an exchange facilitator and
32 who knowingly violates RCW 19.310.100 (1) through (~~(+8+))~~ (9) or fails
33 to comply with the requirements under RCW 19.310.040 is guilty of a
34 class B felony under chapter 9A.20 RCW. However, an exchange
35 facilitator is not guilty of a class B felony for failure to comply

1 with the requirements under RCW 19.310.040 if: (a) Failure to comply
2 is due to the cancellation or amendment of the fidelity bond by the
3 bond issuer; and (b) the exchange facilitator:

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

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

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