

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

President of the Senate

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

FRANK CHOPP

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

Secretary

FILED

May 14, 2013

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5082

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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