HOUSE BILL 09-1254

Judd, Rice

SENATE SPONSORSHIP
Harvey,

House Committees
Judiciary

Senate Committees
Judiciary

A BILL FOR AN ACT

Concerning additional consumer protections relating to like-kind exchanges facilitated by exchange facilitators.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Regulates as deceptive trade practices certain actions of exchange facilitators who, for a fee, facilitate like-kind exchanges of real property for purposes of deferring applicable federal taxes, including by failing to:

! Timely notify clients of a change in control of the exchange facilitator;

! Maintain adequate insurance or other financial assurance;

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.
Act as a limited fiduciary with regard to clients' exchange funds.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 7 of article 1 of title 6, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

6-1-721. Like-kind exchanges by exchange facilitators - definitions. (1) Legislative declaration. The General Assembly hereby:

(a) finds that, absent enactment of this section, Colorado has no requirements for the protection of taxpayers who engage persons or entities that facilitate like-kind exchanges pursuant to 26 U.S.C. sec. 1031; and

(b) determines that, to protect taxpayers who engage exchange facilitators, exchange facilitators should meet certain requirements and follow certain procedures.

(2) Definitions. As used in this section, unless the context otherwise requires:

(a) "Affiliated with" means that a person directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the other specified person.

(b) "Colorado property" means real property located in Colorado; except that replacement property need not be located in Colorado.

(c) (1) "Exchange facilitator" means a person that holds
A TAXPAYER'S EXCHANGE FUNDS AND THAT:

(A) FOR A FEE, FACILITATES AN EXCHANGE OF LIKE-KIND COLORADO PROPERTY BY ENTERING INTO AN AGREEMENT WITH A TAXPAYER BY WHICH THE EXCHANGE FACILITATOR ACQUIRES FROM THE TAXPAYER THE CONTRACTUAL RIGHTS TO SELL THE TAXPAYER'S RELINQUISHED COLORADO PROPERTY AND TRANSFER A REPLACEMENT PROPERTY TO THE TAXPAYER AS AN EXCHANGE FACILITATOR, AS IS DEFINED IN 26 CFR 1.1031 (k)-1 (g) (4), OR ENTERS INTO AN AGREEMENT WITH A TAXPAYER TO TAKE TITLE TO COLORADO PROPERTY AS AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS THAT TERM IS DEFINED IN FEDERAL INTERNAL REVENUE SERVICE REVENUE PROCEDURE 2000-37, OR ENTERS INTO AN AGREEMENT WITH A TAXPAYER TO ACT AS A QUALIFIED TRUSTEE OR QUALIFIED ESCROW HOLDER, AS THOSE TERMS ARE DEFINED IN 26 CFR 1.1031 (k)-1 (g) (3), EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (c); OR

(B) MAINTAINS AN OFFICE IN THIS STATE FOR THE PURPOSE OF SOLICITING BUSINESS AS AN EXCHANGE FACILITATOR REGARDING COLORADO PROPERTY.

(II) "EXCHANGE FACILITATOR" DOES NOT INCLUDE:

(A) THE TAXPAYER OR DISQUALIFIED PERSON, AS DEFINED UNDER 26 CFR 1.1031 (k)-1 (k), SEEKING TO QUALIFY FOR THE NONRECOGNITION PROVISIONS OF 26 U.S.C. SEC. 1031;

(B) A BANK, SAVINGS BANK, SAVINGS AND LOAN ASSOCIATION, BUILDING AND LOAN ASSOCIATION, OR CREDIT UNION; A BANK OR SAVINGS ASSOCIATION HOLDING COMPANY ORGANIZED UNDER THE LAWS OF ANY STATE, THE DISTRICT OF COLUMBIA, A TERRITORY OR PROTECTORATE OF THE UNITED STATES, OR THE UNITED STATES, SUBJECT TO REGULATION
AND SUPERVISION BY A FEDERAL BANKING AGENCY; AN OPERATING
SUBSIDIARY OF SUCH ENTITIES; OR AN EMPLOYEE OR EXCLUSIVE AGENT OF
ANY OF SUCH ENTITIES, INCLUDING, WITHOUT LIMITATION, A SUBSIDIARY
THAT IS OWNED OR CONTROLLED BY SUCH ENTITIES;

(C) A PERSON WHO ADVERTISES FOR AND TEACHES SEMINARS OR
CLASSES FOR, OR GIVES PRESENTATIONS TO, ATTORNEYS, ACCOUNTANTS,
REAL ESTATE PROFESSIONALS, TAX PROFESSIONALS, OR OTHER
PROFESSIONALS, WHERE THE PRIMARY PURPOSE IS TO TEACH THE
PROFESSIONALS ABOUT TAX-DEFERRED EXCHANGES OR TRAIN THEM TO
ACT AS EXCHANGE FACILITATORS;

(D) AN EXCHANGE FACILITATOR, AS DEFINED IN 26 CFR 1.1031
(k)-1 (g) (4), WHOSE SOLE BUSINESS IN THIS STATE AS AN EXCHANGE
FACILITATOR CONSISTS OF HOLDING EXCHANGE FUNDS FROM THE
DISPOSITION OF RELINQUISHED PROPERTY LOCATED OUTSIDE THIS STATE;
OR

(E) AN ENTITY THAT IS WHOLLY OWNED BY AN EXCHANGE
FACILITATOR OR IS WHOLLY OWNED BY THE OWNER OF AN EXCHANGE
FACILITATOR AND IS USED BY THAT EXCHANGE FACILITATOR TO
FACILITATE EXCHANGES OR TO TAKE TITLE TO COLORADO PROPERTY AS
AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS DEFINED IN FEDERAL
INTERNAL REVENUE SERVICE REVENUE PROCEDURE 2000-37.

(III) FOR PURPOSES OF THIS PARAGRAPH (c), "FEE" MEANS
COMPENSATION OF ANY NATURE, DIRECT OR INDIRECT, MONETARY OR
IN-KIND, THAT IS RECEIVED BY A PERSON OR A RELATED PERSON AS
DEFINED IN 26 U.S.C. SEC. 1031 (f) (3) FOR ANY SERVICES RELATING TO OR
INCIDENTAL TO THE EXCHANGE OF LIKE-KIND PROPERTY UNDER 26 U.S.C.
SEC. 1031.
(d) "LIKE-KIND EXCHANGE" MEANS A SECTION 1031 EXCHANGE THAT IS SUBJECT TO 26 U.S.C. SEC. 1031.

(e) "PUBLICLY TRADED COMPANY" MEANS A CORPORATION WHOSE SECURITIES ARE PUBLICLY TRADED ON A STOCK EXCHANGE THAT IS REGULATED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION. THE TERM "PUBLICLY TRADED COMPANY" ALSO INCLUDES ALL SUBSIDIARIES OF SUCH PUBLICLY TRADED COMPANY.

(f) "SECTION 1031 EXCHANGE" MEANS AN EXCHANGE CONDUCTED PURSUANT TO 26 U.S.C. SEC. 1031 THAT ALLOWS INVESTORS TO DEFER THE TAX ON CAPITAL GAINS.

(g) "TAXPAYER EXCHANGE FUNDS" OR "EXCHANGE FUNDS" MEANS MONEY A TAXPAYER ENTRUSTS TO AN EXCHANGE FACILITATOR.

(3) **Deceptive trade practices.** A PERSON ENGAGES IN A DECEPTIVE TRADE PRACTICE WHEN A PERSON ACTS AS AN EXCHANGE FACILITATOR AND:

(a) (I) EXCEPT AS SPECIFIED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (a), FAILS TO NOTIFY ALL CURRENT CLIENTS OF ANY CHANGE IN CONTROL OF THE EXCHANGE FACILITATOR WITHIN TWO BUSINESS DAYS AFTER THE EFFECTIVE DATE OF THE CHANGE BY:

(A) FACSIMILE, E-MAIL TRANSMISSION, OR FIRST-CLASS MAIL; AND

(B) POSTING SUCH NOTICE ON THE EXCHANGE FACILITATOR'S WEB SITE FOR A PERIOD ENDING NOT SOONER THAN NINETY DAYS AFTER THE CHANGE IN CONTROL.

(II) THE NOTICE REQUIRED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) SHALL SPECIFY THE NAME, ADDRESS, AND OTHER CONTACT INFORMATION OF THE TRANSFEREES.

(III) IF THE EXCHANGE FACILITATOR IS A PUBLICLY TRADED
COMPANY AND REMAINS A PUBLICLY TRADED COMPANY AFTER A CHANGE IN CONTROL, THE EXCHANGE FACILITATOR NEED NOT NOTIFY ITS CLIENT OF THE CHANGE IN CONTROL.

(IV) FOR PURPOSES OF THIS PARAGRAPH (a), "CHANGE IN CONTROL" MEANS ANY TRANSFER WITHIN TWELVE MONTHS OF MORE THAN FIFTY PERCENT OF THE ASSETS OR OWNERSHIP INTERESTS, DIRECTLY OR INDIRECTLY, OF THE EXCHANGE FACILITATOR.

(b) (I) FAILS TO MAINTAIN ADEQUATE FINANCIAL ASSURANCE AND ERRORS AND OMISSIONS INSURANCE OR DEPOSITS. AN EXCHANGE FACILITATOR MAY MAINTAIN BONDS, INSURANCE POLICIES, DEPOSITS, OR IRREVOCABLE LETTERS OF CREDIT IN EXCESS OF THE AMOUNTS REQUIRED BY THIS SUBPARAGRAPH (I). AN EXCHANGE FACILITATOR SHALL AT ALL TIMES:

(A) MAINTAIN A FIDELITY BOND OR BONDS EXECUTED BY AN INSURER AUTHORIZED TO DO BUSINESS IN THIS STATE IN THE AMOUNT OF AT LEAST ONE MILLION DOLLARS AND MAINTAIN A POLICY OF ERRORS AND OMISSIONS INSURANCE, IN AN AMOUNT OF AT LEAST TWO HUNDRED FIFTY THOUSAND DOLLARS, EXECUTED BY AN INSURER AUTHORIZED TO DO BUSINESS IN THIS STATE;

(B) DEPOSIT AN AMOUNT OF CASH OR IRREVOCABLE LETTERS OF CREDIT IN AN AMOUNT OF AT LEAST THE SUM OF THE AMOUNTS SPECIFIED IN SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (I) IN AN INTEREST-BEARING DEPOSIT ACCOUNT OR IN A MONEY MARKET ACCOUNT WITH A FINANCIAL INSTITUTION OF THE EXCHANGE FACILITATOR'S CHOICE, WITH THE INTEREST EARNED ON SUCH ACCOUNT ACCRUING TO THE EXCHANGE FACILITATOR; OR

(C) DEPOSIT ALL EXCHANGE FUNDS IN A QUALIFIED ESCROW OR
QUALIFIED TRUST AS THOSE TERMS ARE DEFINED UNDER 26 CFR
1.1031(k)-1 (g) (3) WITH A FINANCIAL INSTITUTION AND PROVIDE THAT
ANY WITHDRAWALS FROM SUCH QUALIFIED ESCROW OR QUALIFIED TRUST
REQUIRE THE TAXPAYER'S AND THE EXCHANGE FACILITATOR'S WRITTEN
AUTHORIZATION.

(II) A PERSON CLAIMING TO HAVE SUSTAINED DAMAGE BY REASON
OF THE FAILURE OF AN EXCHANGE FACILITATOR TO COMPLY WITH THIS
SECTION MAY FILE A CLAIM TO RECOVER DAMAGES FROM THE BOND OR
DEPOSIT DESCRIBED IN THIS PARAGRAPH (b).

(c) FAILS TO ACT AS A CUSTODIAN FOR ALL EXCHANGE FUNDS,
INCLUDING MONEY, COLORADO PROPERTY, OTHER CONSIDERATION, OR
INSTRUMENTS RECEIVED BY THE EXCHANGE FACILITATOR FROM OR ON
BEHALF OF THE TAXPAYER, EXCEPT FUNDS RECEIVED AS THE EXCHANGE
FACILITATOR'S COMPENSATION. AS USED IN THIS PARAGRAPH (c),
"CUSTODIAN" MEANS A PERSON WHO HAS THE SAME RESPONSIBILITIES AS
A FIDUCIARY UNDER COLORADO LAW TO PROTECT AND PRESERVE ASSETS
AND SHALL NOT MEAN A PERSON WHO HAS THE SAME RESPONSIBILITIES AS
A FIDUCIARY UNDER COLORADO LAW TO INCREASE ASSETS OR TO
ACCOMPlish OTHER FIDUCIARY DUTIES. EXCHANGE FUNDS ARE NOT
SUBJECT TO EXECUTION OR ATTACHMENT ON ANY CLAIM AGAINST AN
EXCHANGE FACILITATOR. AN EXCHANGE FACILITATOR SHALL NOT
KNOWINGLY KEEP OR CAUSE TO BE KEPT ANY MONEY IN A FINANCIAL
INSTITUTION UNDER ANY NAME DESIGNATING THE MONEY AS BELONGING
TO A TAXPAYER UNLESS THE MONEY EQUITABLY BELONGS TO THE
TAXPAYER AND WAS ACTUALLY ENTRUSTED TO THE EXCHANGE
FACILITATOR BY THE TAXPAYER. TAXPAYER EXCHANGE FUNDS IN EXCESS
OF TWO HUNDRED FIFTY THOUSAND DOLLARS SHALL BE INVESTED OR
DEPOSITED IN SUCH MANNER AS TO REQUIRE BOTH THE TAXPAYER'S AND
THE EXCHANGE FACILITATOR'S COMMERCIAL REASONABLE MEANS OF
AUTHORIZATION FOR WITHDRAWAL, INCLUDING: THE TAXPAYER'S
DELIVERY TO THE EXCHANGE FACILITATOR OF THE TAXPAYER'S
AUTHORIZATION TO DISBURSE EXCHANGE FUNDS, AND THE EXCHANGE
FACILITATOR'S DELIVERY TO THE DEPOSITORY OF THE EXCHANGE
FACILITATOR'S AUTHORIZATION TO DISBURSE EXCHANGE FUNDS; OR
DELIVERY TO THE DEPOSITORY OF BOTH THE TAXPAYER'S AND THE
EXCHANGE FACILITATOR'S AUTHORIZATIONS TO DISBURSE EXCHANGE
FUNDS. AN EXCHANGE FACILITATOR SHALL PROVIDE THE TAXPAYER WITH
WRITTEN NOTIFICATION OF THE MANNER IN WHICH THE EXCHANGE FUNDS
WILL BE INVESTED OR DEPOSITED, SHALL INVEST OR DEPOSIT EXCHANGE
FUNDS FOR THE BENEFIT OF THE TAXPAYER IN INVESTMENTS THAT MEET
A STANDARD OF CARE THAT AN ORDINARILY PRUDENT INVESTOR WOULD
USE WHEN DEALING WITH THE PROPERTY OF ANOTHER, AND SHALL SATISFY
INVESTMENT GOALS OF LIQUIDITY AND PRESERVATION OF PRINCIPAL. FOR
PURPOSES OF THIS PARAGRAPH (c), A PRUDENT INVESTOR STANDARD OF
CARE SHALL BE DEEMED TO HAVE BEEN VIOLATED IF:

(I) A TAXPAYER'S EXCHANGE FUNDS ARE COMMINGLED BY THE
EXCHANGE FACILITATOR WITH THE OPERATING ACCOUNTS OF THE
EXCHANGE FACILITATOR OR WITH THE EXCHANGE FUNDS OF ANOTHER
TAXPAYER; EXCEPT THAT AN EXCHANGE FACILITATOR MAY AGGREGATE
EXCHANGE FUNDS. FOR PURPOSES OF THIS SUBPARAGRAPH (I):

(A) "AGGREGATE" MEANS TO COMBINE EXCHANGE FUNDS OF
MULTIPLE TAXPAYERS FOR INVESTMENT PURPOSES TO ACHIEVE COMMON
INVESTMENT GOALS AND EFFICIENCIES. EXCHANGE FUNDS THAT HAVE
BEEN AGGREGATED INTO COMMON INVESTMENTS SHALL BE READILY
IDENTIFIABLE BY THE FINANCIAL INSTITUTION OR OTHER REGULATED
INVESTMENT CUSTODIAN HOLDING THE FUNDS AS TO EACH TAXPAYER FOR
WHOM THEY ARE HELD THROUGH AN ACCOUNTING OR SUBACCOUNTING
SYSTEM.

(B) "COMMINGLE" MEANS TO MIX TOGETHER EXCHANGE FUNDS OF
TAXPAYERS WITH OTHER FUNDS BELONGING TO OR UNDER THE CONTROL
OF THE EXCHANGE FACILITATOR IN SUCH A MANNER THAT A TAXPAYER'S
EXCHANGE FUNDS CANNOT BE DISTINGUISHED FROM OTHER FUNDS
BELONGING TO OR UNDER THE CONTROL OF THE EXCHANGE FACILITATOR.

(II) EXCHANGE FUNDS ARE LOANED OR OTHERWISE TRANSFERRED
TO ANY PERSON OR ENTITY AFFILIATED WITH THE EXCHANGE FACILITATOR;
EXCEPT THAT THIS SUBPARAGRAPH (II) SHALL NOT APPLY TO A TRANSFER
OR LOAN MADE TO A FINANCIAL INSTITUTION THAT IS THE PARENT OF OR
AFFILIATED WITH THE EXCHANGE FACILITATOR OR FROM AN EXCHANGE
FACILITATOR TO AN EXCHANGE ACCOMMODATION TITLEHOLDER, AS
DEFINED IN FEDERAL INTERNAL REVENUE SERVICE REVENUE PROCEDURE
2000-37, AS REQUIRED UNDER THE SECTION 1031 EXCHANGE CONTRACT;
OR

(III) EXCHANGE FUNDS ARE INVESTED IN A MANNER THAT DOES
NOT PROVIDE SUFFICIENT LIQUIDITY TO MEET THE EXCHANGE
FACILITATOR'S CONTRACTUAL OBLIGATIONS TO THE TAXPAYER AND DOES
NOT PRESERVE THE PRINCIPAL OF THE EXCHANGE FUNDS. THE DEPOSIT OF
FUNDS IN A FINANCIAL INSTITUTION EXEMPTED FROM THIS SECTION
PURSUANT TO SUB-SUBPARAGRAPH (B) OF SUBPARAGRAPH (II) OF
PARAGRAPH (c) OF SUBSECTION (2) OF THIS SECTION SHALL BE DEEMED TO
BE SUFFICIENTLY LIQUID TO MEET THE REQUIREMENTS OF THIS
SUBPARAGRAPH (III).
(d) Commits any of the following:

(I) Knowingly makes any material misrepresentation concerning an exchange facilitator's transaction that is intended to mislead another;

(II) Pursues a continued or flagrant course of misrepresentation or makes false statements through advertising or otherwise;

(III) Fails, within a reasonable time, to account for any money or property belonging to others that may be in the possession or under the control of the exchange facilitator;

(IV) Engages in any conduct constituting fraudulent or dishonest dealing;

(V) Is convicted of, or, in the case of an entity, one or more of its owners, officers, directors, or employees who has access to exchange funds is convicted of, any crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or other theft of property; except that commission of such crime by an officer, director, or employee of an exchange facilitator shall not be considered a violation of this subparagraph (V) if the employment or appointment of the officer, director, or employee has been terminated and no clients of the exchange facilitator were harmed or full restitution has been made to all harmed clients;

(VI) Wilfully fails to fulfill an exchange facilitator's contractual duties to the taxpayer to deliver property or funds to the taxpayer unless such failure is due to circumstances beyond the control of the exchange facilitator;
(VII) MATERIALLY VIOLATES THIS SECTION OR AIDS, ABETS, OR KNOWINGLY PERMITS ANY PERSON TO VIOLATE THIS SECTION;

(VIII) Commits an act that does not meet generally accepted standards of practice for ordinarily prudent investors or fails to perform an act necessary to meet generally accepted standards of practice for ordinarily prudent investors;

(IX) Fails to keep appropriate business and transaction records, falsifies such records, or knowingly and wilfully makes incorrect entries of an essential nature on such records; except that an exchange facilitator may dispose of records after a reasonable time pursuant to the exchange facilitator’s document retention and document destruction policy;

(X) IS DISCIPLINED IN ANY WAY BY A NATIONAL CERTIFYING AGENCY OR BY A REGULATORY AGENCY OF ANOTHER JURISDICTION FOR CONDUCT THAT RELATES TO THE PERSON’S EMPLOYMENT AS AN EXCHANGE FACILITATOR; OR

(XI) IS CONVICTED OF OR PLEADS GUILTY OR NOLO CONTENDERE TO A FELONY OR ANY CRIME DEFINED IN TITLE 18, C.R.S., THAT RELATES TO THE PERSON’S EMPLOYMENT AS AN EXCHANGE FACILITATOR. A CERTIFIED COPY OF THE JUDGMENT OF A COURT OF COMPETENT JURISDICTION OF THE CONVICTION OR PLEA SHALL BE PRIMA FACIE EVIDENCE OF THE CONVICTION OR PLEA.

SECTION 2. Applicability. This act shall apply to acts occurring on or after the effective date of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.