

CERTIFICATION OF ENROLLMENT
ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1078

61st Legislature
2009 Regular Session

Passed by the House March 9, 2009
Yeas 96 Nays 0

Speaker of the House of Representatives

Passed by the Senate April 2, 2009
Yeas 45 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1078** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1078

Passed Legislature - 2009 Regular Session

State of Washington

61st Legislature

2009 Regular Session

By House General Government Appropriations (originally sponsored by Representatives Kelley, Roach, Kirby, Warnick, Bailey, and Sells)

READ FIRST TIME 03/02/09.

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

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

5 NEW SECTION. **Sec. 1.** The legislature finds that there are no
6 statutory requirements pertaining to persons who facilitate like-kind
7 exchanges pursuant to section 1031 of the internal revenue code and
8 associated treasury regulations. The purpose of this chapter is to
9 create a statutory framework that provides some consumer protections to
10 those who entrust money or property to persons acting as exchange
11 facilitators.

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

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

1 (2) "Client" means the taxpayer with whom the exchange facilitator
2 enters into an agreement as described in subsection (3)(a)(i) of this
3 section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 (3) The requirements under subsection (1)(a) of this section are
36 satisfied if the person engaging in business as an exchange facilitator

1 is listed as a named insured on one or more fidelity bonds that have an
2 aggregate total of at least one million dollars.

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

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

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

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

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

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

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

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

31 (3) The requirements under subsection (1)(a) of this section are
32 satisfied if the person engaging in business as an exchange facilitator
33 is listed as a named insured on one or more errors and omissions
34 policies that have an aggregate total of at least two hundred fifty
35 thousand 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. 8.** (1) A person who claims to have sustained
9 damages by reason of an unintentional error or omission of an exchange
10 facilitator or an exchange facilitator's employee may file a claim on
11 the errors and omissions insurance policy or approved alternative
12 described in section 7 of 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. 9.** (1) A person who engages in business as an
16 exchange facilitator shall act as a custodian for all exchange funds,
17 including money, property, other consideration, or instruments received
18 by the exchange facilitator from, or on behalf of, the client, except
19 funds received as the exchange facilitator's compensation. The
20 exchange facilitator shall hold the exchange funds in a manner that
21 provides liquidity and preserves principal, and if invested, shall
22 invest those exchange funds in investments that meet a prudent investor
23 standard and satisfy investment goals of liquidity and preservation of
24 principal. For purposes of this section, a violation of the prudent
25 investor standard includes, but is not limited to, a transaction in
26 which:

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

33 (b) Exchange funds are loaned or otherwise transferred to any
34 person or entity, other than a financial institution, that is
35 affiliated with or related to the exchange facilitator, except that

1 this subsection (1)(b) does not apply to the transfer of funds from an
2 exchange facilitator to an exchange accommodation titleholder in
3 accordance with an exchange contract;

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

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

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

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

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

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

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

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

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

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

35 (4) Obtain property by fraud or misrepresentation;

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

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

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

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

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

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

25 (11) Fail to make disclosures required by any applicable state law;
26 or

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

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

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

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

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

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

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

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

22 (a) The total number of property exchanges facilitated by the
23 exchange facilitator;

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

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

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

31 Any information provided by an exchange facilitator in this report
32 that constitutes a trade secret as defined in RCW 19.108.010 is exempt
33 from the disclosure requirements in chapters 42.17 and 42.56 RCW,
34 unless aggregated with information supplied by other exchange

1 facilitators in such a manner that the individual information of an
2 exchange facilitator is not identifiable.

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

6 (3) The director must compile the reports from exchange
7 facilitators and report to the financial institutions and insurance
8 committee of the house of representatives and the financial
9 institutions, housing and insurance committee of the senate by January
10 15, 2010.

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

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

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

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

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

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11.100.020

Management of trust assets by fiduciary.

(1) A fiduciary is authorized to acquire and retain every kind of property. In acquiring, investing, reinvesting, exchanging, selling and managing property for the benefit of another, a fiduciary, in determining the prudence of a particular investment, shall give due consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets. In applying such total asset management approach, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, and if the fiduciary has special skills or is named trustee on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.

(2) Except as may be provided to the contrary in the instrument, the following are among the factors that should be considered by a fiduciary in applying this total asset management approach:

- (a) The probable income as well as the probable safety of their capital;
- (b) Marketability of investments;
- (c) General economic conditions;
- (d) Length of the term of the investments;
- (e) Duration of the trust;
- (f) Liquidity needs;
- (g) Requirements of the beneficiary or beneficiaries;
- (h) Other assets of the beneficiary or beneficiaries, including earning capacity; and
- (i) Effect of investments in increasing or diminishing liability for taxes.

(3) Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a fiduciary is authorized to acquire and retain every kind of property, real, personal, or mixed, and every kind of investment specifically including but not by way of limitation, debentures and other corporate obligations, and stocks, preferred or common, which persons of prudence, discretion, and intelligence acquire for their own account.

[1995 c 307 § 2; 1985 c 30 § 65. Prior: 1984 c 149 § 97; 1955 c 33 § 30.24.020; prior: 1947 c 100 § 2; Rem. Supp. 1947 § 3255-10b. Formerly RCW 30.24.020.]