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**SECOND SUBSTITUTE HOUSE BILL 1078**

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

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

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

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

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

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

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

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

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

1        NEW SECTION.    **Sec. 8.**    (1) A person who claims to have sustained  
2 damages by reason of an unintentional error or omission of an exchange  
3 facilitator or an exchange facilitator's employee may file a claim on  
4 the errors and omissions insurance policy or approved alternative  
5 described in section 7 of this act to recover the damages.

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

8        NEW SECTION.    **Sec. 9.**    (1) A person who engages in business as an  
9 exchange facilitator shall act as a custodian for all exchange funds,  
10 including money, property, other consideration, or instruments received  
11 by the exchange facilitator from, or on behalf of, the client, except  
12 funds received as the exchange facilitator's compensation.    The  
13 exchange facilitator shall hold the exchange funds in a manner that  
14 provides liquidity and preserves principal, and if invested, shall  
15 invest those exchange funds in investments that meet a prudent investor  
16 standard and satisfy investment goals of liquidity and preservation of  
17 principal.    For purposes of this section, a violation of the prudent  
18 investor standard includes, but is not limited to, a transaction in  
19 which:

20        (a) Exchange funds are knowingly commingled by the exchange  
21 facilitator with the operating accounts of the exchange facilitator;

22        (b) Exchange funds are loaned or otherwise transferred to any  
23 person or entity, other than a financial institution, that is  
24 affiliated with or related to the exchange facilitator, except that  
25 this subsection (1)(b) does not apply to the transfer of funds from an  
26 exchange facilitator to an exchange accommodation titleholder in  
27 accordance with an exchange contract; or

28        (c) Exchange funds are invested in a manner that does not preserve  
29 the principal of the exchange funds, unless loss of principal occurs as  
30 the result of events beyond the prediction or control of the exchange  
31 facilitator.

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

34        NEW SECTION.    **Sec. 10.**    A person who engages in business as an  
35 exchange facilitator must administer each of his, her, or its places of

1 business under the direct management of an officer or an employee who  
2 is either:

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

5 (2) Has passed a test specific to the subject matter of exchange  
6 facilitation.

7 NEW SECTION. **Sec. 11.** A person who engages in business as an  
8 exchange facilitator shall not:

9 (1) Make a false, deceptive, or misleading material representation,  
10 directly or by implication, concerning a like-kind exchange  
11 transaction;

12 (2) Engage in any unfair or deceptive practice toward any person;

13 (3) Obtain property by fraud or misrepresentation;

14 (4) Make a false, deceptive, or misleading material representation,  
15 directly or by implication, in advertising or by any other means,  
16 concerning a like-kind exchange transaction;

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

20 (6) Knowingly commingle funds held for a client in any account that  
21 holds the exchange facilitator's own funds;

22 (7) Knowingly keep, or cause to be kept, any money in any bank,  
23 credit union, or other financial institution under a name designating  
24 the money as belonging to the client of any exchange facilitator,  
25 unless that money belongs to that client and was entrusted to the  
26 exchange facilitator by that client;

27 (8) Fail to fulfill its contractual duties to the client to deliver  
28 property or funds to the taxpayer in a material way unless such a  
29 failure is due to circumstances beyond the control of the exchange  
30 facilitator;

31 (9) Commit, including commission by its owners, officers,  
32 directors, employees, agents, or independent contractors, any crime  
33 involving fraud, misrepresentation, deceit, embezzlement,  
34 misappropriation of funds, robbery, or other theft of property;

35 (10) Fail to make disclosures required by any applicable state or  
36 federal law; or

1 (11) Negligently make any false statement or knowingly and  
2 willfully make any omission of material fact in connection with any  
3 reports filed by an exchange facilitator or in connection with any  
4 investigation conducted by the department of financial institutions.

5 NEW SECTION. **Sec. 12.** For accounts with a value of five hundred  
6 thousand dollars or more, an exchange facilitator must deposit all of  
7 those client funds in a separate interest-bearing trust account for the  
8 particular client or client's matter on which the interest will be paid  
9 to the client.

10 NEW SECTION. **Sec. 13.** A person who engages in business as an  
11 exchange facilitator and who intentionally violates section 11 (1)  
12 through (8) or 12 of this act is guilty of a class B felony under  
13 chapter 9A.20 RCW. A person who engages in business as an exchange  
14 facilitator and who intentionally violates section 11 (10) or (11) of  
15 this act is guilty of a misdemeanor under chapter 9A.20 RCW.

16 NEW SECTION. **Sec. 14.** (1) Exchange facilitators must provide the  
17 director of financial institutions with a report of exchange  
18 facilitator activity by December 31, 2009. The director may by rule  
19 create a format for the report, which must cover the period of January  
20 1, 2009, through December 31, 2009. The report may only include the  
21 following information for exchange facilitation activity in Washington  
22 state:

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

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

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

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

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



1 unless aggregated with information supplied by other exchange  
2 facilitators in such a manner that the individual information of an  
3 exchange facilitator is not identifiable.

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

7 (3) The director must compile the reports from exchange  
8 facilitators and report to the financial institutions and insurance  
9 committee of the house of representatives and the financial  
10 institutions, housing and insurance committee of the senate by January  
11 15, 2010.

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

13 NEW SECTION. **Sec. 15.** A person who violates this chapter is  
14 subject to civil suit in a court of competent jurisdiction.

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

23 NEW SECTION. **Sec. 17.** Sections 1 through 16 of this act  
24 constitute a new chapter in Title 19 RCW.

25 NEW SECTION. **Sec. 18.** If specific funding for the purposes of  
26 this act, referencing this act by bill or chapter number, is not  
27 provided by June 30, 2009, in the omnibus appropriations act, this act  
28 is null and void.

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