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**SUBSTITUTE SENATE BILL 6032**

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**State of Washington                      61st Legislature                      2009 Regular Session**

**By** Senate Financial Institutions, Housing & Insurance (originally sponsored by Senators Berkey and Hobbs)

READ FIRST TIME 02/25/09.

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

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

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

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

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

17           (2) "Client" means the taxpayer with whom the exchange facilitator

1 enters into an agreement as described in subsection (3)(a)(i) of this  
2 section.

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

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

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

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

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

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

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

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

37 (v) A qualified intermediary, as defined under treasury regulation

1 section 1.1031(k)-1(g)(4), who holds exchange funds from the  
2 disposition of relinquished property located outside of this state; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 (3) The requirements under subsection (1)(a) of this section are  
35 satisfied if the person engaging in business as an exchange facilitator  
36 is listed as a named insured on one or more fidelity bonds that have an  
37 aggregate total of at least one million 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. 6.** (1) A person who claims to have sustained  
9 damages by reason of the fraudulent or dishonest acts of an exchange  
10 facilitator or an exchange facilitator's employee may file a claim on  
11 the fidelity bond or approved alternative described in section 5 of  
12 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. 7.** (1) A person who engages in business as an  
16 exchange facilitator shall:

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

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

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

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

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

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

5 NEW SECTION. **Sec. 8.** (1) A person who claims to have sustained  
6 damages by reason of an unintentional error or omission of an exchange  
7 facilitator or an exchange facilitator's employee may file a claim on  
8 the errors and omissions insurance policy or approved alternative  
9 described in section 7 of this act to recover 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 NEW SECTION. **Sec. 9.** (1) A person who engages in business as an  
13 exchange facilitator shall act as a custodian for all exchange funds,  
14 including money, property, other consideration, or instruments received  
15 by the exchange facilitator from, or on behalf of, the client, except  
16 funds received as the exchange facilitator's compensation. The  
17 exchange facilitator shall hold the exchange funds in a manner that  
18 provides liquidity and preserves principal, and if invested, shall  
19 invest those exchange funds in investments that meet a prudent investor  
20 standard and satisfy investment goals of liquidity and preservation of  
21 principal. For purposes of this section, a violation of the prudent  
22 investor standard includes, but is not limited to, a transaction in  
23 which:

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

30 (b) Exchange funds are loaned or otherwise transferred to any  
31 person or entity, other than a financial institution, that is  
32 affiliated with or related to the exchange facilitator, except that  
33 this subsection (1)(b) does not apply to the transfer of funds from an  
34 exchange facilitator to an exchange accommodation titleholder in  
35 accordance with an exchange contract;

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

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

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

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

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

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

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

25 (1) Knowingly or negligently make a false, deceptive, or misleading  
26 material representation, directly or by implication, concerning a like-  
27 kind transaction;

28 (2) Knowingly or negligently make a false, deceptive, or misleading  
29 material representation, directly or by implication, in advertising or  
30 by any other means, concerning a like-kind transaction;

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

32 (4) Obtain property by fraud or misrepresentation;

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

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

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

9 (8) 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;

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

17 (10) Fail to make disclosures required by any applicable state law;  
18 or

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

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

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

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

35 (2) An exchange facilitator must provide the client with written  
36 notification of how the exchange proceeds have been invested or  
37 deposited.



1        NEW SECTION.    **Sec. 13.**    A person who engages in business as an  
2 exchange facilitator and who intentionally violates section 11 (1)  
3 through (7) of this act is guilty of a class B felony under chapter  
4 9A.20 RCW.

5        NEW SECTION.    **Sec. 14.**    A person who engages in business as an  
6 exchange facilitator and who intentionally violates section 11 (10) or  
7 (11) of this act is guilty of a misdemeanor under chapter 9A.20 RCW.

8        NEW SECTION.    **Sec. 15.**    (1) Exchange facilitators must provide the  
9 director of financial institutions with a report of exchange  
10 facilitator activity by December 31, 2009. The director may by rule  
11 create a format for the report, which must cover the period of January  
12 1, 2009, through December 31, 2009. The report may only include the  
13 following information for exchange facilitation activity in Washington  
14 state:

15        (a) The total number of property exchanges facilitated by the  
16 exchange facilitator;

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

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

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

24        Any information provided by an exchange facilitator in this report  
25 that constitutes a trade secret as defined in RCW 19.108.010 is exempt  
26 from the disclosure requirements in chapters 42.17 and 42.56 RCW,  
27 unless aggregated with information supplied by other exchange  
28 facilitators in such a manner that the individual information of an  
29 exchange facilitator is not identifiable.

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

33        (3) The director must compile the reports from exchange  
34 facilitators and report to the financial institutions and insurance  
35 committee of the house of representatives and the financial

1 institutions, housing and insurance committee of the senate by January  
2 15, 2010.

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

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

6 NEW SECTION. **Sec. 17.** The legislature finds that the practices  
7 covered by this chapter are matters vitally affecting the public  
8 interest for the purpose of applying the consumer protection act,  
9 chapter 19.86 RCW. A violation of this chapter is not reasonable in  
10 relation to the development and preservation of business and is an  
11 unfair or deceptive act in trade or commerce and an unfair method of  
12 competition for purposes of applying the consumer protection act,  
13 chapter 19.86 RCW.

14 NEW SECTION. **Sec. 18.** Sections 1 through 17 of this act  
15 constitute a new chapter in Title 19 RCW.

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