

# House Bill 3216

Sponsored by Representative ESQUIVEL (at the request of Alan Brickley)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires persons that facilitate like-kind exchanges to make certain notifications and to provide bonds or other securities in specified amounts.

Prohibits exchange facilitator from taking certain actions.

Sunsets January 2, 2014.

## A BILL FOR AN ACT

1  
2 Relating to exchange facilitators.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. As used in sections 1 to 6 of this 2009 Act:**

5 (1) **"Affiliate" means a person that controls, is controlled by or is under common control**  
6 **with another person, directly or indirectly.**

7 (2) **"Client" means a taxpayer and resident of this state that enters into an agreement**  
8 **with an exchange facilitator for services.**

9 (3) **"Exchange accommodation titleholder" means an exchange accommodation titleholder**  
10 **as described in section 4.02(1) of Internal Revenue Service Revenue Procedure 2000-37.**

11 (4)(a) **"Exchange facilitator" means a person that:**

12 (A) **Is engaged in a business in which, for a fee, the person enters into agreements with**  
13 **clients for the purpose of performing services as:**

14 (i) **A qualified intermediary;**

15 (ii) **An exchange accommodation titleholder;**

16 (iii) **A trustee of a qualified trust; or**

17 (iv) **An escrow holder of a qualified escrow account.**

18 (B) **Maintains an office in this state for the purpose of soliciting or engaging in business**  
19 **of the type described in subparagraph (A) of this paragraph; or**

20 (C) **Represents to the public in advertisements or solicitations in any media that the**  
21 **person is engaged in business of the type described in subparagraph (A) of this paragraph.**

22 (b) **"Exchange facilitator" does not include:**

23 (A) **A taxpayer or a disqualified person, as defined in 26 C.F.R. 1.1031(k)-1(k), that is**  
24 **seeking to qualify for the nonrecognition provisions of 26 U.S.C. 1031.**

25 (B) **A financial institution, as defined in ORS 706.008, that is not facilitating exchanges**  
26 **under 26 U.S.C. 1031 and is:**

27 (i) **Acting as a depository for exchange funds;**

28 (ii) **Acting solely as a trustee of a qualified trust, notwithstanding the provisions of par-**  
29 **agraph (a)(A)(iii) of this subsection; or**

30 (iii) **Acting solely as an escrow holder of a qualified escrow account, notwithstanding the**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 provisions of paragraph (a)(A)(iv) of this subsection.

2 (C) An escrow agent, as defined in ORS 696.505, title insurance company or other person  
3 that is not facilitating exchanges under 26 U.S.C. 1031 and is:

4 (i) Acting solely as a trustee of a qualified trust, notwithstanding the provisions of par-  
5 agraph (a)(A)(iii) of this subsection; or

6 (ii) Acting solely as an escrow holder of a qualified escrow account, notwithstanding the  
7 provisions of paragraph (a)(A)(iv) of this subsection.

8 (D) A person that advertises and teaches seminars or classes or that otherwise makes  
9 presentations for the primary purpose of educating professionals in the field of taxation  
10 about tax-deferred exchanges or training persons to act as exchange facilitators.

11 (E) A qualified intermediary that holds funds from the disposition of property located  
12 outside this state and used in an exchange under 26 U.S.C. 1031, notwithstanding the pro-  
13 visions of paragraph (a)(A)(i) of this subsection.

14 (F) An entity that an exchange accommodation titleholder wholly owns and uses to take  
15 title to property in this state.

16 (5)(a) "Exchange funds" means moneys, property, instruments or other consideration an  
17 exchange facilitator receives from or on behalf of a client in connection with an exchange  
18 conducted under 26 U.S.C. 1031.

19 (b) "Exchange funds" does not include moneys or other consideration the exchange  
20 facilitator receives from a client as compensation for the exchange facilitator's services.

21 (6) "Fee" means compensation of any nature, direct or indirect, monetary or in-kind, that  
22 a person or another person related to the person in the manner described in 26 U.S.C. 267(b)  
23 or 26 U.S.C. 707(b) receives for services related or incidental to the exchange of like-kind  
24 property under 26 U.S.C. 1031.

25 (7) "Financial institution" has the meaning given that term in ORS 706.008.

26 (8) "Person" means an individual, corporation, partnership, limited liability company,  
27 joint venture, association, joint stock company, trust or other legal entity and the agents  
28 and employees of the entity.

29 (9) "Prudent investor standard" means an exercise of judgment and care under circum-  
30 stances then prevailing that investors of prudence, discretion and intelligence exercise in the  
31 management of the investors' own affairs not in regard to speculation but in regard to the  
32 permanent disposition of the investors' funds when considering probable income and the  
33 probable safety of the investors' capital.

34 (10) "Qualified escrow account" has the meaning given that term in 26 C.F.R.  
35 1.1031(k)-1(g)(3)(ii).

36 (11) "Qualified exchange agreement" means a qualified exchange agreement as described  
37 in section 4.02(3) of Internal Revenue Service Revenue Procedure 2000-37.

38 (12) "Qualified intermediary" has the meaning given that term in 26 C.F.R.  
39 1.1031(k)-1(g)(4)(iii).

40 (13) "Qualified trust" has the meaning given that term in 26 C.F.R. 1.1031(k)-1(g)(3)(iii).

41 (14) "Relinquished property" means relinquished property as described in 26 C.F.R.  
42 1.1031(k)-1(a).

43 (15) "Replacement property" means replacement property as described in 26 C.F.R.  
44 1.1031(k)-1(a).

45 **SECTION 2.** (1) When a change in control occurs for an exchange facilitator, the ex-

1 change facilitator within 10 business days after the change in control becomes effective shall  
2 notify the exchange facilitator's clients with relinquished property located in this state or for  
3 which the exchange facilitator holds replacement property under a qualified exchange  
4 agreement.

5 (2) The notice required under subsection (1) of this section must:

6 (a) Be delivered by hand, first-class mail, overnight mail, electronic mail or facsimile;

7 (b) Be posted on any website the exchange facilitator maintains for 90 days after the ef-  
8 fective date of the change in control; and

9 (c) Set forth the name, address, telephone number and other contact information for the  
10 person that assumes control of the exchange facilitator.

11 (3) For purposes of this section, a change in control for an exchange facilitator occurs  
12 if more than 50 percent of the exchange facilitator's assets or ownership interests transfer,  
13 directly or indirectly, to another person.

14 **SECTION 3.** (1) An exchange facilitator shall at all times:

15 (a) Maintain one or more fidelity bonds that are issued by a corporate surety authorized  
16 to do business in this state in an aggregate amount of not less than \$1 million;

17 (b) Deposit with a financial institution in an interest-bearing deposit account or money  
18 market account, the interest of which accrues to the exchange facilitator, moneys, securities  
19 or irrevocable letters of credit issued by corporate sureties authorized to do business in this  
20 state in an aggregate amount of not less than \$1 million;

21 (c) Deposit with a financial institution funds used in an exchange under 26 U.S.C. 1031 in  
22 a qualified escrow account or a qualified trust and provide that withdrawals from the ac-  
23 count or trust require both the exchange facilitator's and the client's written authorization;  
24 or

25 (d) Be listed as a named insured on one or more fidelity bonds that are issued by a cor-  
26 porate surety authorized to do business in this state in an aggregate amount of not less than  
27 \$1 million.

28 (2) An exchange facilitator shall at all times:

29 (a) Maintain errors and omissions insurance issued by an authorized insurer, as defined  
30 in ORS 731.066, in an amount not less than \$250,000;

31 (b) Deposit with a financial institution in an interest-bearing deposit account or money  
32 market account, the interest of which accrues to the exchange facilitator, moneys, securities  
33 or irrevocable letters of credit issued by corporate sureties authorized to do business in this  
34 state in an aggregate amount of not less than \$250,000; or

35 (c) Be listed as a named insured in an errors and omissions insurance policy issued by  
36 an authorized insurer, as defined in ORS 731.066, in an amount of not less than \$250,000.

37 (3) An exchange facilitator may maintain bonds or deposits as provided in subsection (1)  
38 of this section or insurance or deposits as provided in subsection (2) of this section in  
39 amounts in excess of the minimum amounts specified in subsections (1) and (2) of this sec-  
40 tion.

41 **SECTION 4.** (1) An exchange facilitator shall act as a custodian for all exchange funds  
42 and shall invest the exchange funds only in investments that:

43 (a) Meet a prudent investor standard; and

44 (b) Satisfy the investment goals of liquidity and preservation of principal.

45 (2) An exchange facilitator fails to invest exchange funds according to a prudent investor

1 standard if:

2 (a) The exchange facilitator knowingly commingles exchange funds with the exchange  
3 facilitator's operating accounts;

4 (b) Exchange funds are loaned or otherwise transferred to a person or entity, other than  
5 a financial institution, that is an affiliate of or otherwise related to the exchange facilitator,  
6 unless the exchange funds are transferred from an exchange facilitator to an exchange ac-  
7 commodation titleholder in accordance with a qualified exchange agreement; or

8 (c) The exchange facilitator invests exchange funds in a manner that does not provide  
9 sufficient liquidity to meet the contractual obligations the exchange facilitator has with a  
10 client or that does not preserve the principal of the exchange funds.

11 (3) Exchange funds are not subject to execution or attachment in any claim against the  
12 exchange facilitator.

13 (4) An exchange facilitator may not knowingly keep moneys or cause moneys to be kept  
14 in a financial institution under a name that designates the moneys as belonging to a client  
15 unless the moneys belong to the client and the client entrusted the moneys to the exchange  
16 facilitator.

17 **SECTION 5.** An exchange facilitator may not:

18 (1) Make a false statement, material misrepresentation or statement intended to mislead  
19 a client or another person concerning an exchange conducted under 26 U.S.C. 1031, or con-  
20 tinue a course of misrepresentation through advertising or otherwise;

21 (2) Fail to account within a reasonable time for moneys or property in the exchange  
22 facilitator's possession that belongs to another person;

23 (3) Engage in conduct that constitutes fraud or dishonesty or commit a crime involving  
24 fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery or theft;  
25 or

26 (4) Materially fail to fulfill the exchange facilitator's contractual duty to deliver moneys  
27 or property to a client, unless the failure results from circumstances beyond the exchange  
28 facilitator's control.

29 **SECTION 6.** (1) A person that claims to have suffered damage because an exchange  
30 facilitator violated a provision of section 4 or 5 of this 2009 Act has a right of action on the  
31 bonds or deposits described in section 3 of this 2009 Act. An action under this subsection does  
32 not limit the remedies available to the person under this section or under other provisions  
33 of law.

34 (2) An exchange facilitator that violates a provision of section 4 or 5 of this 2009 Act is  
35 subject to an action for damages brought in a circuit court of this state.

36 **SECTION 7.** Sections 1 to 6 of this 2009 Act are repealed on January 2, 2014.  
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